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Thomas John FARRELL *v.* Olivia FARRELL

03-911 193 S.W.3d 734

Supreme Court of Arkansas
Opinion delivered September 27, 2004*

* BROWN, J., not participating.

Mitchell, Blackstock, Barnes, Wagoner, Ivers & Sneddon, by: *Jack Wagoner, III*, for appellant.

Rose Law Firm, by: *Richard T. Donovon*, for appellee.

TOM GLAZE, Justice. This appeal arises from a divorce decree ending the marriage of Thomas and Olivia Farrell. The couple married in 1983 and have two children. Just prior to their marriage, in 1982, Olivia borrowed $25,000 from her grandparents and purchased stock in the Arkansas Writer's Project, Inc. That $25,000 loan was paid back over the next several years, including the first years of the Farrells' marriage. In time, the name of the Arkansas Writer's Project changed to the ARC Project, Inc. ("ARC"). ARC is a holding company; its subsidiaries are Arkansas Times Limited Partnership ("ATLP"), which publishes the *Arkansas Times*, and Arkansas Business Limited Partnership ("ABLP"), which publishes *Arkansas Business*. By the time of the Farrells' divorce trial, experts for both parties agreed that the stock was worth in excess of $1,000,000.

The primary issue in the divorce proceedings was whether the ARC stock was considered a marital asset or a non-marital asset, and how to divide the stock once that determination had been made. In its divorce decree, the trial court found that the stock was purchased prior to the marriage, but that the stock was paid for after the marriage using marital funds. Further, the court found that Olivia spent a substantial amount of time after the marriage working to increase the value of the stock, although she was not alone in the effort to increase the value. The court noted that Olivia's active efforts directly attributed to the increase in value of the ARC stock, but that it was difficult to determine how much of her efforts added to that value, because other individuals also worked long hours with the business and contributed to the increase of the value of the stock.

Ultimately, the court concluded that the increase in value of the non-marital stock was a marital asset, and that the fair market value of the ARC stock at the date of the marriage was zero, since the stock was paid for subsequent to the marriage using marital assets. However, at the time of trial, the court determined that the stock was valued at $144.18 per share, or $832,639.50. Taking into consideration the factors enumerated in Ark. Code Ann. § 9-12-315(a) (Repl. 2002), the court found that an equitable distribution of the asset would give 21% of the stock to Thomas, and the remaining 79% to Olivia.[1] Thus, Thomas's share of the ARC stock was $174,854.29; Olivia's share was $654,785.21.

With respect to other property issues raised during the divorce trial, the court found that Olivia should be permitted to purchase Thomas's equity in their marital home, which was valued at approximately $343,000; that the parties would have thirty days to sort out the division of personal property; that Olivia should pay Thomas $10,000 for his interest in her company, Lucid Publishing, Inc.; and that Thomas would keep his own custom-furniture business, valued at $61,250. In an amended order, entered on May 29, 2003, in response to Thomas's motion pursuant to Ark. R. Civ. P. 60 to correct an error in the court's calculations, the trial court noted that the parties had not yet divided their personal property or made arrangements for the sale of the home. As such, the court reserved jurisdiction on those issues, ordering Thomas

[1] The court originally awarded 19% of the ARC stock to Thomas, but, in an amended decree, the court noted that the lower percentage was based on a mistake by the court as to the value of Thomas's own business.

and Olivia to either negotiate a settlement within ninety days or present the matter to the court for a final resolution.

On appeal, Thomas argues that the trial court erred in three respects: 1) in concluding that the ARC stock was a non-marital asset; 2) in dividing the marital property unequally; and 3) in applying a minority discount to determine the value of the ARC stock. Olivia has filed a cross-appeal, in which she contends that the trial court erred when it held that the increase in the value of the ARC stock was a marital asset.

However, we cannot reach the issues raised in this case, because the appeal is not properly before this court. Although neither party raised the issue of jurisdiction, it is well settled that it is the duty of this court to determine that it has jurisdiction. *See Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002); *Haase v. Starnes*, 337 Ark. 193, 987 S.W.2d 704 (1999). In this case, the question of jurisdiction arises because our review of the record reveals that there is no final order, as is required by Ark. R. App. P.—Civ. 2(a)(1) (2004), and Ark. R. Civ. P. 54 (2004). Rule 2(a)(1) of the Rules of Appellate Procedures limits this court's appellate review to final orders in order to avoid piecemeal litigation. *Ford*, 347 Ark. at 490, 65 S.W.3d at 435; *see also Larscheid v. Arkansas Dep't of Human Servs.*, 343 Ark. 580, 36 S.W.3d 308 (2001). Rule 54(b) of our Rules of Civil Procedure provides as follows:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, *the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment.* In the event the court so finds, it shall execute [a] certificate, which shall appear immediately after the court's signature on the judgment, and which shall set forth the factual findings upon which the determination to enter the judgment as final is based[.]

(Emphasis added.)

Here, it is apparent from the language of the May 29, 2003, order that the trial court has not yet entered a final, appealable order, because the court's order did not make a final disposition regarding the parties' marital home and personal prop-

erty. An order is not final when it adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties. *Norman v. Norman*, 342 Ark. 493, 30 S.W.3d 83 (2000); *Stockton v. Sentry Ins.*, 332 Ark. 417, 965 S.W.2d 762 (1998). *See also* Ark. R. Civ. P. 54(b). Even though an issue on which a court renders a decision might be an important one, an appeal will be premature if the decision does not, from a practical standpoint, conclude the merits of the case. *Norman*, 342 Ark. at 496, 30 S.W.3d at 85-86; *Koonce v. Mitchell*, 341 Ark. 716, 19 S.W.3d 603 (2000). Rule 54(b) does provide a way to obtain a final order on fewer than all the claims or all the parties; however, where one wishes such a final order, Rule 54(b) requires the party to move the trial court for an express determination, supported by specific factual findings, that there was no just reason for delay, and for express direction for entry of judgment on the matter to be appealed. *Warren v. Kelso*, 339 Ark. 70, 3 S.W.3d 302 (1999). Our court of appeals has specifically held that Rule 54(b) is applicable to property division issues in divorce cases. *See Morton v. Morton*, 61 Ark. App. 161, 965 S.W.2d 809 (1998) (citing *Cook v. Lobianco*, 8 Ark. App. 60, 648 S.W.2d 808 (1983)).

Because the trial court held in abeyance its final decision regarding the division of the parties' home and personal property, the May 29, 2003, order is not a final order. As a result, this court lacks jurisdiction to consider the matter, and we therefore dismiss the appeal and cross-appeal without prejudice.

STATE of Arkansas *v.* Ricky Dale NEWMAN

CR 03-1257 193 S.W.3d 737

Supreme Court of Arkansas
Opinion delivered September 28, 2004

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

Bruce D. Eddy and Julie Brain, Asst. Federal Public Defenders.

PER CURIAM. Appellant Rickey Dale Newman was convicted in the Crawford County Circuit Court of capital murder and sentenced to death. Following his conviction, this court conducted an automatic review of his conviction and sentence, pursuant to Ark. R. App. P.—Crim. 10, finding no reversible error. *See Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

The trial court subsequently held a hearing, pursuant to Ark. R. Crim. P. 37.5(b), to consider the appointment of counsel to represent Newman in postconviction proceedings. Newman testified at that hearing that he did not want counsel to be appointed to represent him, as he wished to waive his right to pursue any postconviction relief. The trial court entered an order finding that Newman was competent to waive his rights under Rule 37.5.

After the State filed a petition seeking to lodge the record from the waiver proceedings, this court remanded the matter to the trial court for the purpose of ordering the Arkansas State Hospital to conduct an evaluation of Newman to determine whether he was competent to proceed with the Rule 37.5 hearing and to waive his rights under that rule. The remand was based, in part, on evidence that Newman was under the influence of the psychotropic drug, Thorazine, at the time of the hearing. Dr. Charles Mallory conducted the evaluation and determined that Newman did not suffer from any mental disease or defect and that he had the capacity to make a knowing, intelligent, and voluntary waiver to decline the appointment of counsel. Mallory also found that Newman was no longer taking any psychotropic medication.

After receiving Dr. Mallory's report, the trial court held a second waiver hearing. Newman again testified, stating that he agreed with Dr. Mallory's conclusion that he was competent to waive his rights to postconviction relief. The trial court again found that Newman was competent and had knowingly and voluntarily waived his rights under Rule 37. The State submitted to this court the transcript of the second hearing, as well as Dr. Mallory's report. This court then granted the State's petition and affirmed the trial court's finding that Newman knowingly, voluntarily, and intelligently waived his rights to postconviction relief. *See State v. Newman*, 357 Ark. 39, 159 S.W.3d 309 (2004) (*per curiam*).

Now pending before this court is a motion to recall our mandate and stay Newman's execution. Therein, counsel appointed by the federal district court to represent Newman allege that Newman's prior waiver of postconviction proceedings was not knowingly, intelligently, or voluntarily made. This assertion is based on their claim that Newman is both mentally ill and mentally retarded. Moreover, they argue that the State may not execute Newman, because to do so would be in violation of the prohibition set forth in *Atkins v. Virginia*, 536 U.S. 304 (2002).

The question of whether Newman is mentally retarded and, thus, may not be executed by the State is being raised for the first time; accordingly, we have ordered a temporary stay of execution so that we can order briefing on certain issues. It is clear to this court that Newman has attempted to discharge his appointed counsel, but the issue of whether Betty Moore may proceed as next friend on behalf of Newman has also been raised. We, therefore, order the parties to brief the following issues:

1. Does Ms. Moore have standing to intervene as next friend for Newman, particularly in light of this court's previous order affirming the trial court's determination that Newman is competent?

2. Assuming, *arguendo*, that Ms. Moore does have standing to proceed, does this court have jurisdiction to consider the newly raised allegation that Newman is mentally retarded?

3. What relief, if any, is available under state law if there is a finding that Newman is mentally retarded?

4. Does *Atkins*, 536 U.S. 304, absolutely prohibit a mentally retarded person, as opposed to an incompetent person, from waiving his postconviction rights?

The clerk of this court shall establish the briefing schedule. Because Ms. Moore is the moving party, she shall proceed first in the preparing and filing of her brief. The temporary stay of execution shall continue until the court renders its opinion in this matter.

David COCKRELL *v.* UNION PLANTERS BANK; and Robert T. Wood and Jennifer Wood

03-1363 194 S.W.3d 178

Supreme Court of Arkansas
Opinion delivered September 30, 2004

Evans & Evans Law Firm, by: *James E. Evans, Jr.*, for appellant.

Mickel Law Firm, P.A., by: *Delbert Mickel*, for appellees.

ROBERT L. BROWN, Justice. Appellant David Cockrell appeals from an order, which dismissed his petition to set aside a statutory foreclosure sale of property. Cockrell contends on

appeal that the circuit court erred in interpreting and construing Ark. Code Ann. §§ 18-50-116(c) and (d)(2) (Repl. 2003), when it ruled that claims and defenses under the statutory foreclosure act must be raised prior to the statutory foreclosure sale or be forever barred. He specifically contends that the statutory foreclosure act cannot be applied to a deed of trust or mortgage, which encumbers property primarily used for agricultural purposes. We affirm the dismissal.

On April 14, 1993, Cockrell was deeded the land in question, which exceeds forty acres and is located in Pea Ridge. On January 21, 2000, Cockrell obtained a residential loan from Union Planters Bank (Union Planters) for $39,600 to construct a log cabin on the land. Cockrell secured the loan by a deed of trust on the property. Cockrell failed to make timely payments on the loan, and on March 5, 2001, Union Planters's substituted trustee informed Cockrell that it intended to accelerate the note for foreclosure. Cockrell paid $4,720.75 for the delinquency amount and to reinstate the loan.

After Cockrell fell behind on his loan payments a second time, Union Planters filed a foreclosure action against him on October 26, 2001. Also on that date, notice was posted at the Benton County Courthouse that Cockrell's property would be sold at auction on December 27, 2001. The sale date was subsequently changed to January 16, 2002.

Appellees Robert and Jennifer Wood (Woods) subsequently purchased the property in question at the auction for $65,000. On January 22, 2002, the trustee's deed granting the property to the Woods was recorded, and the difference between what Cockrell owed to Union Planters and what the Woods paid at the sale, $19,377.77, was mailed to Cockrell by certified mail-return receipt requested. It was later returned to Union Planters marked "unclaimed."

On February 12, 2002, Cockrell filed a petition to set aside the foreclosure sale of the land and obtained from the circuit court a temporary restraining order to exclude the Woods from the property. Also on that day, Cockrell reentered the property and locked the property gate. On February 13, 2002, the Woods gave notice to Cockrell to quit and vacate the premises. On February 27, 2002, the Woods filed a counterclaim in the matter against Cockrell and claimed that they have a valid trustee's deed to the property. They asserted claims of unlawful detainer, forcible entry and detainer, and ejectment based upon Cockrell's refusal to vacate

the premises. On March 6, 2002, the Woods filed an amended counterclaim stating that they were *bona fide* purchasers in good faith and that they had been specifically damaged by Cockrell's actions.

On March 22, 2002, Cockrell filed an amended petition to set aside the foreclosure sale in which he specifically claimed that the non-judicial statutory foreclosure proceedings found in Ark. Code Ann. § 18-50-101 through § 18-50-117 (Repl. 2003), were not the proper procedures for foreclosure on this property and that the sale was void from its inception.[1] On April 2, 2002, the circuit court conducted a hearing at which the parties stipulated to the fact that the procedures followed by Union Planters in the foreclosure were proper. On May 9, 2002, the circuit court entered an order memorializing its findings and conclusions at the April 2, 2002 hearing. In that order, the court found the foreclosure procedures were proper. The court also concluded in its order that Cockrell's petition and amended petition were moot based on his stipulation. It ordered the temporary restraining order set aside and allowed the Woods to reenter the property. The court further ordered Union Planters to deposit the $19,377.77 check into the registry of the court. In its order, the court alluded to the fact that Cockrell wished to file a second amended petition to determine whether the foreclosed property was used primarily for agricultural purposes.

On April 10, 2002, Cockrell filed a second amended petition to set aside the foreclosure sale under Ark. Code Ann. § 18-50-116(c) and claimed that the land was primarily used for agricultural purposes and, as a result, the non-judicial statutory foreclosure procedure could not be pursued.

On April 23, 2003, the Woods moved to dismiss Cockrell's petition on grounds that Cockrell had admitted in court on April 2, 2002, that Union Planters correctly followed the procedures required regarding non-judicial statutory foreclosures and public sales of real property and because the court lifted the temporary restraining order against the Woods. The Woods also urged that Cockrell's second amended petition should be dismissed under Ark. R. Civ. P. 12(b)(6), because Cockrell failed to claim that the

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[1] In his amended petition, Cockrell asserted that the non-judicial statutory foreclosure proceedings in § 18-50-601 were not the proper method of foreclosure. As there is no § 18-50-601, this court assumes Cockrell intended to cite §§ 18-50-101 — 18-50-117 (Repl. 2003).

subject property was used primarily for agricultural purposes prior to the foreclosure sale, as required by § 18-50-116(d)(2)(B).

On August 15, 2002, the circuit court held another hearing at which Union Planters and the Woods jointly argued a motion to dismiss the petition to set aside based upon § 18-50-116(d)(2)(B). The court agreed with the Woods and ruled that Cockrell had not raised the issue of the agricultural-purposes exception prior to the sale of the property under this section, and, thus, was barred from invoking that defense. On August 28, 2002, the court entered its order that dismissed Cockrell's second amended petition and further ordered that the $19,377.77 remain in the court's registry.

Cockrell appealed to the court of appeals, and on June 11, 2003, the court of appeals issued a *per curiam* opinion that dismissed Cockrell's appeal for lack of a final order. *See Cockrell v. Union Planters Bank*, CA02-1363 (Ark. App. June 11, 2003) (*per curiam*). A second order was then entered by the circuit court on September 10, 2003, with a Rule 54(b) certification. A second appeal was assumed by this court due to its being a case of first impression involving an alleged conflict in our state statutes.

Cockrell argues on appeal that the plain language of § 18-50-116(c) mandates that a statutory foreclosure proceeding performed on land primarily used for agricultural purposes is void. He further argues that the plain language of § 18-50-116(d)(2)(B), which bars defenses not raised before the foreclosure sale, means that the statutory foreclosure act does not impair the right of anyone to assert legal and equitable rights in a court of competent jurisdiction so long as "such rights" were asserted before the sale took place. Cockrell asserts that the "rights" contemplated by the General Assembly under § 18-50-116(d) included the right of redemption, equitable redemption, homestead, or any other equitable right rather than the "agricultural purposes" exception specifically provided in § 18-50-116(c). Cockrell states that § 18-50-116(d)(2)(B) is directed at finalizing foreclosure actions and restricting redemption attempts. He adds that Union Planters is not precluded from conducting another sale of the property using a judicial foreclosure proceeding, as specifically noted in Ark. Code Ann. § 18-50-116(a) (Repl. 2003).

■ In reviewing a circuit court's dismissal under Ark. R. Civ. P. 12(b)(6), this court must treat the facts alleged in the complaint as true and view them in a light most favorable to the plaintiff. *See Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002).

In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and all pleadings are to be liberally construed. *See id.*

This court reviews issues of statutory construction *de novo*, as it is for this court to decide what a statute means; thus, we are not bound by the circuit court's determination in that regard. *See Hartford Fire Ins. Co. v. Sauer*, 358 Ark. 89, 186 S.W.3d 229 (2004). The basic rule of statutory construction is to give effect to the intent of the General Assembly. *See id.* In determining the meaning of a statute, the first rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* This court construes the statute so that no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible. *Id.* When 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. *Id.* However, this court will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. *Id.* This court will accept a circuit court's interpretation of the law unless it is shown that the court's interpretation was in error. *See Barclay v. First Paris Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (2001). This court takes pain to reconcile statutory provisions to make them consistent, harmonious, and sensible. *Id.*

We turn then to the statutes in question. As already noted, statutory foreclosures are governed by Ark. Code Ann. §§ 18-50-101 - 18-50-117 (Repl. 2003). Our General Assembly created this statutory scheme by Act 53 of 1987, which states in part that the General Assembly found that "the present laws regarding foreclosures are awkward, requiring appraisals before the sale and giving the homeowner a one year statutory right of redemption that may not be waived." Act 53, § 19 of 1987. The General Assembly added: "this Act would provide an efficient and fair procedure for the liquidation of defaulted mortgage loans to the benefit of both the homeowner and the mortgage lender." *Id.*

The Arkansas Statutory Foreclosure Chapter does contain caveats, which are pertinent to the matter on appeal. First, the statutory foreclosure scheme *shall* not apply to a mortgage or deed of trust "encumbering trust property used primarily for agricultural purposes." Ark. Code Ann. § 18-50-116(c) (Repl. 2003).

Secondly, the statutory foreclosure scheme does not impair the right of anyone to assert "legal and equitable rights" in a court of competent jurisdiction so long as "any such claim or defense [is] asserted prior to the sale;" otherwise, the claim or defense is "forever barred and terminated." Ark. Code Ann. § 18-50-116(d)(2) (Repl. 2003). At issue in this case is the alleged discrepancy between § 18-50-116(c) and § 18-50-116(d)(2).

Cockrell concedes that Union Planters followed the required statutory procedures to foreclose regarding notice to Cockrell and the sale itself. Nevertheless, he asserts that a statutory foreclosure on agricultural land is void *ab initio*. We disagree.

We conclude that an assertion that the land to be foreclosed on is primarily used for agricultural purposes is precisely the kind of claim or defense that must be raised "prior to the sale or be forever barred and terminated." Ark. Code Ann. § 18-50-116(d)(2) (Repl. 2003). This precise language was added as part of Act 983 of 1999, which contained an Emergency Clause that reads in part:

> . . . it is immediately necessary for the fair and efficient administration of this act that, among other things, sales be considered final, and all rights of the grantor or mortgagor, be terminated, immediately upon the conclusion of the public foreclosure auction[.]

Act 983, § 16 of 1999. Here, however, Cockrell did not raise the agricultural-lands defense until well after the auction sale. This, of course, runs directly counter to the express language of Act 983 and the express policy in the Act that statutory foreclosures be fair and efficient and that foreclosure sales result in the termination of all rights of the mortgagor.

Cockrell, of course, maintains that the agricultural exception equates to a jurisdictional requirement that renders statutory foreclosure of agricultural land void from the inception. We disagree that the exception is jurisdictional. Rather, as already stated, it is a defense that must be asserted by the mortgagor prior to the foreclosure sale *in the interest of finality*. Here that was not done. Accordingly, we affirm the dismissal order of the circuit court.

Affirmed.

Thomas Lee PRATT *v.* STATE of Arkansas

CR 03-1407 194 S.W.3d 183

Supreme Court of Arkansas
Opinion delivered September 30, 2004

Dwain Oliver, for appellant

Mike Beebe, Att'y Gen., by: *Valerie L. Kelly,* Ass't Att'y Gen., for appellee.

RAY THORNTON, Justice. Appellant, Thomas Lee Pratt, was convicted of rape and was sentenced to life imprisonment in the Arkansas Department of Correction. This conviction stems from the rape of G.B., who was three years old at the time that the offense occurred.

On November 12, 2002, G.B. told her babysitter, Tricia Margrave, that appellant had raped her. Ms. Margrave contacted G.B.'s parents. Law enforcement officials were also notified. In an interview with the State Police, G.B. once again described appellant's actions. G.B. told an investigator that appellant instructed her to put her hands on his penis. She also told the investigator that appellant put his finger in her vagina.

On the evening of the incident, appellant turned himself into the Hot Springs Police Department. The next day, Will Steed, an officer with the Clark County Sheriff's Department, went to Garland County to transport appellant back to Clark County. Officer Steed informed appellant of his *Miranda* rights, and appellant signed a form acknowledging that he understood his rights. Thereafter, appellant confessed to raping G. B. Specifically, appellant told Officer Steed that while he was masturbating and looking

at pornographic material on the Internet G.B. entered the room. After giving G.B. instructions on masturbation, appellant had G.B. touch his penis. Appellant also told Officer Steed that G.B. "licked his penis" and that in an effort to get G.B. to put her mouth on his penis, he put peanut butter on it. Finally, appellant told Officer Steed that he put his finger inside G.B.'s vagina and rubbed her anus.

On November 18, 2002, a criminal information was filed charging appellant with rape in violation of Ark. Code Ann. § 5-14-103 (Supp. 2001). On August 1, 2003, appellant filed a motion seeking to suppress the statements that he made to law enforcement officials. On the same day, appellant filed motions seeking to determine whether G.B. was competent to testify and seeking to suppress evidence obtained during the State Police's interview with G.B.

On August 4, 2003, a hearing was held on appellant's motions. After hearing the evidence and considering the arguments, the trial court denied appellant's motions to suppress. The trial court also concluded that G. B.'s statements possessed sufficient guarantees of trustworthiness and relying on Rule 804 of the Arkansas Rules of Evidence, found that G.B. did not have to undergo cross-examination.

On August 25, 2003, appellant's jury trial was held in Clark County Circuit Court. At the close of the evidence, appellant's attorney made a general motion for a directed verdict. The trial court denied appellant's motion. The trial court also denied appellant's request for two jury instructions on offenses that appellant considered to be lesser-included offenses of rape. Thereafter, the jury found appellant guilty, and he was sentenced.

It is from this conviction that appellant appeals. On appeal, appellant raises four points for our consideration, and we affirm the trial court on all points.

In his fourth point on appeal, appellant argues that the trial court erred when it denied his request for a directed verdict. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). Although appellant raises this issue as his final point on appeal, double-jeopardy considerations require us to consider a challenge to the sufficiency of the evidence before other points are raised. *Bowen v. State*, 342 Ark. 581, 30 S.W.3d 86 (2000). In *Beavers v. State*, 345 Ark. 291, 46 S.W.3d 532 (2001), we outlined

the standard of review that we follow when the sufficiency of the evidence is challenged. We wrote:

> When a defendant makes a challenge to the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State. Evidence, whether direct or circumstantial, is sufficient to support a conviction if it is forceful enough to compel reasonable minds to reach a conclusion one way or the other. On appeal, this court does not weigh the evidence presented at trial, as that is a matter for the fact-finder; nor do we assess the credibility of the witnesses.

Id. (internal citations omitted).

Rule 33.1 of the Arkansas Rules of Criminal Procedure explains the procedure a criminal defendant must follow when making a proper motion for directed verdict. The Rule provides:

> (a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict *shall state the specific grounds therefor.*
>
> * * *
>
> (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. *A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense.*

Id. (emphasis added).

Rule 33.1 is strictly construed. *Grady v. State*, 350 Ark. 160, 85 S.W.3d 531 (2002). Based on the language in Rule 33.1, we have explained that in order to preserve a challenge to the sufficiency of the evidence, an appellant must make a specific motion for a directed verdict that advises the trial court of the exact element of the crime that the State has failed to prove. *Beavers, supra.* The reason underlying our requirement that specific

grounds be stated and that the absent proof be pinpointed is that it allows the trial court the option of either granting the motion, or, if justice requires, may allow the State to reopen its case and supply the missing proof. *Grady, supra.* Finally, we have held that a general motion that merely asserts that the State has failed to prove its case is inadequate to preserve the issue for appeal. *See id*; *Beavers, supra.*

Mindful of the foregoing principles, we now consider whether the directed-verdict motion made by appellant's attorney preserved for appeal the issue of the sufficiency of the evidence. At the close of the State's case-in-chief, the following colloquy occurred:

> DEFENSE ATTORNEY: Your honor, I'd like to move for a directed verdict at this time, for the record, based upon the fact that no evidence has been presented which should take the case to the jury.
>
> TRIAL COURT: Motion is denied, based upon the evidence presented so far and exhibits introduced.
>
> * * *
>
> DEFENSE ATTORNEY: Your honor, I have no witnesses. Basically, we rest our case and I'd like to again renew my motion.

After reviewing the motions made by appellant's attorney, we conclude that they do not comply with Rule 33.1. Specifically, appellant's motion requesting a directed verdict was a general challenge to the sufficiency of the evidence. In the motion, appellant's attorney failed to identify a specific element of the crime that was not established by the State. Additionally, the motion did not assert a specific flaw in the State's case. Because appellant's motion for directed verdict was general and did not inform the trial court of the specific issues in the State's case that were being challenged, it did not comply with the requirements of Rule 33.1. Because we require a strict interpretation of that rule, we cannot consider appellant's sufficiency argument on appeal.

Appellant next argues that the trial court erred when it denied his motion to suppress statements that he made to law enforcement officials while he was in custody. Appellant argues that his statement should have been suppressed because he did not "expressly" waive his *Miranda* rights.

In our review of a trial court's ruling on the voluntariness of a confession we make an independent determination based upon the totality of the circumstances. *Grillot v. State,* 353 Ark. 294, 107 S.W.3d 136 (2003). A statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. *Standridge v. State,* 357 Ark. 105, 161 S.W.3d 815 (2004). In order to determine whether a waiver of *Miranda* rights is voluntary, we look to see if the confession was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Id.*

To determine whether the trial court erred when it denied appellant's motion to suppress, we must review the facts surrounding appellant's statement. At the suppression hearing, Will Steed, a criminal investigator with the Clark County Sheriff's Department, testified. Mr. Steed transported appellant from Garland County to Clark County on November 13, 2002. Prior to leaving Clark County, Mr. Steed informed appellant of his *Miranda* rights and appellant signed a statement-of-rights form acknowledging that he understood his rights. Mr. Steed further testified that in his opinion appellant understood his *Miranda* rights and chose to waive them. Thereafter, appellant confessed to raping G.B. Appellant's confession was audiotaped and transcribed. At the time the confession was made, Mr. Steed and appellant were alone in the car. Mr. Steed testified that he did not make any threats or promises to appellant in exchange for his confession. Based on the totality of the circumstances, we conclude that appellant waived his *Miranda* rights and voluntarily confessed to the crime. Accordingly, the trial court properly denied appellant's motion to suppress.

Before leaving this issue, we note that in his brief appellant cites *Brewer v. Williams,* 430 U.S. 387 (1977), and argues that in order for a criminal defendant to waive his *Miranda* rights an "affirmative relinquishment" is required. In *Brewer,* the United State Supreme Court held that "in determining the question of waiver as a matter of federal constitutional law . . . it was incumbent upon the State to prove an intentional relinquishment or abandonment of a known right or privilege." *Id.* The Court further noted that "waiver requires not merely comprehension [of

one's rights] but relinquishment." *Id.* Having outlined these principles, the Court evaluated the facts surrounding the confession made by the criminal defendant and concluded that he "effectively asserted his right[s]." *Id.*

Applying the principles discussed in *Brewer* to the case now before us, we conclude that appellant's actions demonstrated an intentional relinquishment of his *Miranda* rights. Specifically, Officer Steed informed appellant of his *Miranda* rights. Appellant signed a form acknowledging that he understood those rights. Thereafter, appellant confessed to raping G.B. Appellant intentionally abandoned his *Miranda* rights. Accordingly, the trial court correctly denied appellant's motion to suppress.

In appellant's next point on appeal, he argues that the trial court erred when it denied his motion to determine the ability of G.B. to testify and when it denied his motion *in limine* to exclude the transcript of the State Police's interview with G.B. Based on the trial court's denial of appellant's motions, hearsay testimony regarding G.B.'s statements was admitted into evidence, and appellant was not permitted to cross-examine G.B. A trial court's rulings on matters pertaining to the admission of evidence is within the judge's discretion and his rulings will not be set aside absent an abuse of discretion. *Jameson v. State*, 333 Ark. 128, 970 S.W.2d 785 (1998). In the case now before us, the trial court's rulings were based on Rule 804 of the Arkansas Rules of Evidence. The Rule in relevant part provides:

> (b) *Hearsay Exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (7) *Child hearsay in criminal cases.* A statement made by a child under the age of ten (10) years concerning any type of sexual offense against that child, where the Confrontation Clause of the Sixth Amendment of the United States is applicable, provided:
>
> (A) The trial court conducts a hearing outside the presence of the jury, and, with the evidentiary presumption that the statement is unreliable and inadmissible, finds that the statement offered possesses sufficient guarantees of trustworthiness that the truthfulness of the child's statement is so clear from the surrounding circumstances

that the test of cross-examination would be of marginal utility. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.

1. The spontaneity of the statement.

2. The lack of time to fabricate.

3. The consistency and repetition of the statement and whether the child has recanted the statement.

4. The mental state of the child.

5. The competency of the child to testify.

6. The child's use of terminology unexpected of a child of similar age.

7. The lack of a motive by the child to fabricate the statement.

8. The lack of bias by the child.

9. Whether it is an embarrassing event the child would not normally relate.

10. The credibility of the person testifying to the statement.

11. Suggestiveness created by leading questions.

12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges.

Id. We have summarized Rule 804(b)(7) as follows:

> Rule 804(b)(7) provides that the hearsay statement of a child who is under ten years of age and unavailable as a witness, is presumed unreliable and inadmissible unless the trial court, after conducting a hearing outside the presence of the jury, finds the statement possesses guaranties of trustworthiness that the truthfulness of the child's statement is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.

Jameson, supra.

In the case now before us, a hearing was held to consider appellant's motions. At the hearing, the State informed the trial court that based on G.B.'s age and her inability to understand oaths it did not intend to call her as a witness. The State further explained that G.B. had "made some statements which we feel like are trustworthy and reliable." Based on this belief, the State requested that the trial court permit hearsay testimony of G.B.'s statements pursuant to Rule 804. In support of its request, the State presented the testimony of Melissa Dickerson, an investigator with the Arkansas State Police. She testified that she interviewed G.B. on November 13, 2002. G.B. was three years old at the time of the interview, and Ms. Dickerson explained that she was a "very active little girl" who had trouble "focusing" and used hand motions rather than words in response to some of Ms. Dickerson's questions. Prior to being interviewed by Ms. Dickerson, G.B. had spoken to her mother, her babysitter, doctors, and a social worker about the rape. Ms. Dickerson testified that G.B. told the "same story" to each individual. Ms. Dickerson further testified that G.B. told her that appellant "put catsup on . . . his booty," which Ms. Dickerson explained was appellant's genital area. Ms. Dickerson also testified that G.B. used hand motions to describe to her that appellant had instructed G.B. to "masturbate" his penis. Ms. Dickerson also stated that G.B. communicated to her that appellant touched G.B.'s "vaginal area" with his finger. Ms. Dickerson testified that she thought that G.B. was "truthful" and that G.B. had been "raped." Additionally, Ms. Dickerson testified that she did not detect any "ill feelings" towards appellant that would have caused a fabricated story.

After considering the testimony and arguments on this issue, the trial court found:

> [T]he Court having heard the testimony and the other evidence that's been introduced and proceeding in the hearing with the evidentiary presumption that the statement is unreliable and inadmissible as a child, finds that the statement . . . does possess sufficient guarantees of trustworthiness . . . the truthfulness of the child's statement is clear from the surrounding circumstances and that she has given the statement to her mom, the doctor, babysitter, and also to Ms. Melissa Dickerson. And the statement given to Ms. Dickerson was . . . spontaneous. With the child being three years old, I don't know if they have the ability to use time to fabricate statements or actions that they relate to people. She's been consistent and hasn't recanted. She used terms of that you wouldn't

> expect a child to talk about putting catsup on the areas of the body where she describes that, or a child that age touching an adult male in the manner that she was demonstrating to Ms. Dickerson. [sic] There's certainly no evidence that there was any adult in the custody or control of the child that would have a grudge against the accused offender or that there was any attempt to coach her into making false charges. I'm going to find the statement . . . falls under the rule for child hearsay in criminal cases, and that the motion to produce the child for cross-examination at the hearing will be denied.

Appellant raises two challenges to the trial court's findings. First, appellant argues that the trial court failed to determine that G.B. was "unavailable" pursuant to Rule 804(b) of the Arkansas Rules of Evidence. In *Smith v. State*, 303 Ark. 524, 798 S.W.2d 94 (1990), we held that the requirement that there be a showing that a child witness was "unavailable" at trial was met when the trial court concluded that "the child witness, being two and one-half years old, was incapable of communicating with the jury, and, hence, tantamount to being unavailable." *Id.* Similarly, in the case now before us, the trial court was presented with evidence that established that G.B., who was only three years old, and who had a difficult time verbalizing responses to questions and remaining "focused" on issues, was incapable of communicating with a jury. Clearly, the trial court concluded that G.B. was an unavailable witness, and we cannot say that it abused its discretion.

Next, appellant argues that the trial court relied on erroneous factual findings when it determined that the statements G.B. related to Ms. Dickerson possessed sufficient guarantees of trustworthiness. Appellant's contention is misplaced. The trial court's findings were based on the evidence presented at the pre-trial hearing and the factors set out in Rule 804(b)(7)(A). Specifically, the evidence established and the trial court found: (1) that G.B.'s statement was spontaneous; (2) that G.B. did not have the ability to use time to fabricate her statement; (3) that G.B.'s statement included terminology that would not typically be used by a child; (4) that the events described in G.B.'s statement were not normally described by a child; (5) that G.B. repeated her statement several times without recanting the events described; and (6) that there was no evidence of a grudge against appellant by any adult with control over G.B. that would have led G.B. to fabricate her statement. Because the trial court properly considered

the factors articulated in Rule 804, and because the evidence and arguments presented at the hearing supported the trial court's findings, we cannot say that the trial court abused its discretion by denying appellant's motions.

In appellant's final point on appeal, he contends that the trial court erred by refusing to instruct the jury on two offenses that he considered to be lesser-included offenses of rape. Specifically, appellant argues that sexual indecency with a child as provided in Ark. Code Ann. § 5-14-110 (Supp. 2001) and sexual assault in the fourth degree as provided in Ark. Code Ann. § 5-14-127 (Supp. 2001) are lesser-included offenses of rape as defined by Ark. Code Ann. 5-14-103.

Before addressing the merits of appellant's contentions, we note that we cannot consider appellant's arguments as they relate to Ark. Code Ann. § 5-14-127 because appellant failed to proffer the requested jury instruction below. *See Watson v. State*, 329 Ark. 511, 951 S.W.2d 304 (1997) (holding that an appellant who seeks reversal based on the failure to instruct the jury as requested by the appellant must present a record showing a proffer of the requested instruction). However, because appellant proffered a jury instruction regarding Ark. Code Ann. § 5-14-110, his argument relating to that offense was properly preserved.

We now consider whether the trial court erred by refusing to instruct the jury on the offense of sexual indecency with a child during appellant's trial. We have repeatedly stated that it is reversible error to refuse to instruct on a lesser-included offense when there is the slightest evidence to support the instruction. *Gaines v. State*, 354 Ark. 89, 118 S.W.3d 102 (2003). However, we have made it clear that we will affirm a trial court's decision not to give an instruction on a lesser-included offense if there is no rational basis for giving the instruction. *Id.*

In the case now before us, appellant was charged with violating Ark. Code Ann. § 5-14-103. Specifically, the criminal information alleged that appellant "unlawfully and feloniously. . . engaged in deviate sexual activity with another person who is less than fourteen years of age." At the time the offense occurred, Ark. Code Ann. § 5-14-103 provided:

> (a)(1) A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person:

(A) By forcible compulsion; or

* * *

(C)(I) Who is less than fourteen (14) years of age.

Id. Appellant argues that sexual indecency with a child is a lesser-included offense of rape. A person commits sexual indecency with a child if:

> (1) Being eighteen (18) years old or older, the person solicits another person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age to engage in sexual intercourse, deviate sexual activity, or sexual contact; or
>
> (2)(A) With the purpose to arouse or gratify the sexual desires of himself or herself or those of any other person, the person purposefully exposes his or her sex organs to another person who is less than fifteen (15) years of age.

Ark. Code Ann. § 5-14-110.

Mindful of the foregoing statutory provisions, we now determine whether sexual indecency with a child is a lesser-included offense of rape. The determination of when an offense is included in another offense depends on whether it meets one of the three tests set out in Ark. Code Ann. § 5-1-110(b) (Repl. 1997). *Owens v. State*, 354 Ark. 644, 128 S.W.3d 445 (2003). That statute provides:

> (b) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
>
> (1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or
>
> (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or
>
> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

Id.

Pursuant to the test articulated in Ark. Code Ann. § 5-1-110(b)(1), sexual indecency with a child is not a lesser-included offense of rape because it requires additional elements which are not required to prove rape. Specifically, to establish sexual indecency with a child the State must prove: (1) that the defendant is at least eighteen years of age; (2) that the defendant solicited the victim; and (3) that the victim was less than fifteen years of age. These elements are not required to establish rape. Therefore, sexual indecency with a child is not a lesser-included offense of rape pursuant to Ark. Code Ann. § 5-1-110(b)(1).

Additionally, sexual indecency with a child is not a lesser-included offense of rape pursuant to the test set out in Ark. Code Ann. § 5-1-110 (b)(2) because to commit the crime of sexual indecency with a child is not an attempt to commit rape.

Finally, sexual indecency with a child is not a lesser-included offense of rape pursuant to the requirements of Ark. Code Ann. § 5-1-110 (b)(3) because the injury or risk of injury is the same for both offenses. Specifically, subjecting the victim to deviate sexual activity is the injury or risk of injury for both offenses. Because sexual indecency with a child is not a lesser-included offense of rape, the trial court did not err in refusing to instruct the jury on that offense.

4-3(h) Review

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

Affirmed.

Teresa DAVIS *v.* Corliss M. WILLIAMSON

03-682 194 S.W.3d 197

Supreme Court of Arkansas
Opinion delivered September 30, 2004

Ann C. Donovan, for appellant.

Quattlebaum, Grooms, Tull & Burrow PLLC, by: *John E. Tull*, *E.B. Chiles IV*, and *Brandon B. Cate*, for appellee.

JIM HANNAH, Justice. Teresa Ann Davis appeals a decision of the Washington County Circuit Court denying her motion for attorney's fees. We find no abuse of discretion and affirm. We have jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(a)(7) (2004), a subsequent appeal following an appeal decided in the Supreme Court. *Davis v. Williamson*, 353 Ark. 225, 114 S.W.3d 216 (2003).

Facts

On July 31, 1996, a joint petition to establish paternity was filed. The petition sought a finding and order of paternity as well as an order on custody and child support. Paternity was not contested, and on April 27, 1998, an order establishing Williamson as the father of Chasen Williamson was entered. In the April 27, 1998, order, Davis was granted custody, and the issue of attorney's fees, as well as a number of other issues, were expressly reserved for

later hearings. A final order on all issues except attorney's fees was entered September 11, 2002. This order resolved current support, arrearage, witness fees, and visitation. Davis attempted to appeal the September 11, 2002, decision, but failed to perfect her appeal. Her motion for rule on the clerk was denied. *See Davis, supra.* While Davis obtained custody in this paternity action, she failed to obtain the amount of child support, arrearage and other relief she sought.

A motion for interim attorney's fees was filed August 16, 2001, and denied by an order entered December 18, 2001. Davis again filed a motion for attorney's fees at the close of the case September 25, 2002, seeking $118,943.00 in attorney's fees, which was denied in the order entered November 20, 2002.

Davis appeals only the November 20, 2002, order. In the November 20, 2002, order, the circuit court noted that fees could be granted under Ark. Code Ann. § 9-10-109 (Repl. 2002), but that fees are granted at the discretion of the circuit court. The circuit court also noted that although Davis argued that disparity in income should require a grant of fees, that reason alone is not a basis for an award of attorney's fees. The circuit court then evaluated Ann Donovan's legal services, Davis's counsel. The circuit court stated that beyond complex financial issues, this case "presented straight forward legal issues."

Davis appeals the denial of the motion for attorney's fees, arguing that throughout the course of the paternity case resulting in the September 11, 2002, order, the circuit court exhibited bias against Davis, and that this bias in the paternity case constitutes proof that the circuit court's decision to rule against Davis on the motion for attorney's fees was also the result of bias. Davis argues that "Taken as a whole the court appeared to be an adversary of the appellant and her Orders concluding this case reflect that."

Interim Attorney's Fees

In the single heading of her twenty-five page argument, Davis asserts that the circuit court abused its discretion in failing to grant her August 16, 2001, Motion for Interim Attorney's Fees and in failing to grant an award of attorney's fees at the conclusion of the case. However, in her motion for attorney's fees at the conclusion of the case Davis seeks attorney's fees from the beginning of the case onward and states that total fees and costs sought for the case amount to $118,943.00. Therefore, this motion again seeks the fees Davis alleges the circuit court failed to grant

earlier in denying the motion for interim fees, making denial of the motion for interim fees moot. We do not address moot issues. *See, e.g., Benton v. Bradley*, 344 Ark. 24, 37 S.W.3d 640 (2001). To the extent that Davis may assert denial of the motion for interim fees shows bias of the circuit court, that issue is addressed in the following sections of this opinion.

Attorney's Fees in Paternity Actions

Davis argues that the circuit court abused its discretion in denying her motion for attorney's fees because acts by the circuit court prior to filing the motion for attorney's fees show bias and because the circuit court erred in determining that there was a lack of documentation for services, inflated billings, and a lack of expertise. Davis more specifically argues that statements, decisions, and actions taken by the circuit court prior to Davis filing the motion for attorney's fees are relevant to show an abuse of discretion in later denying her motion for attorney's fees. Davis points out in excess of twenty examples of alleged bias from the trial and hearings resulting in the September 11, 2002, order settling custody, support, and other issues relating to the paternity suit.

The parties cite *Green v. Bell*, 308 Ark. 473, 826 S.W.2d 226 (1992), a paternity case, on the issue of attorney's fees. We find the following relevant language in *Green*:

> Finally, appellant urges that the award of an attorney's fee of $40,000 was an abuse of the court's discretion. He recognizes that the court has broad discretion to award attorney's fees, *Wilson v. Wilson,* 294 Ark. 194, 741 S.W.2d 640 (1987), but maintains that the award is excessive. We stated our rule in *Lytle v. Lytle,* 266 Ark. 124, 583 S.W.2d 1 (1979).

Green, 308 Ark. at 480. There is no discussion in *Green, supra,* of the right to attorney's fees in paternity cases, making the case only marginally helpful in showing that attorney's fees may be granted.

[redacted] With regard to attorney's fees, this court recently stated, "Arkansas follows the American Rule that attorney's fees are not chargeable as costs in litigation unless permitted by statute." *Cotten v. Fooks*, 346 Ark.130, 55 S.W.3d 290 (2001). Statutory authority for attorney's fees in paternity actions is found in Ark. Code Ann. § 9-10-109 (Repl. 2002) and by Ark. Code Ann. § 9-27-342 (Supp. 2003). *See Beavers v. Vaughn*, 41 Ark. App. 96, 849 S.W.2d 6 (1993).

Arkansas Code Annotated Section 9-27-342(d) (Repl. 1998) provides:

> (d) Upon an adjudication by the court that the putative father is the father of the juvenile, the court shall follow the same guidelines, procedures, and requirements as established by the laws of this state applicable to child support orders and judgments entered upon divorce. The court may award court costs and attorney's fees.

Arkansas Code Annotated Section 9-10-109(a) (Supp. 2001) provides in pertinent part:

> subsequent to a finding by the court that the putative father in a paternity action is the father of the child, the court shall follow the same guidelines, procedures, and requirements as set forth in the laws of this state applicable to child support orders and judgments entered by the chancery court as if it were a case involving a child born of a marriage in awarding custody, visitation, setting amounts of support, costs, and attorney's fees . . . .

Ark. Code Ann. § 9-10-109 (Supp. 2001). Thus, procedure applicable to child support orders entered upon divorce applies to a motion on attorney's fees in a paternity action. The decision to award attorney's fees and the amount of an award are discretionary determinations that will be reversed only if the appellant can demonstrate an abuse of discretion. *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993).

Alleged Bias of the Circuit Court

Davis asserts that evidence of alleged bias of the circuit court in deciding child support, arrearage, and other issues, is relevant to show bias later in the decision on attorney's fees. We are told at the beginning of Davis's brief that "appellant submits that she will demonstrate the biased mind-set of the court in the case in chief, which also shows the likelihood there would have been success on the merits." Later we are told, "Taken as a whole the court appeared to be an adversary of the appellant and her Orders concluding this case reflect that." Davis thus argues that a showing of bias in the case prior to filing a motion for attorney's fees is relevant to show bias and an abuse of discretion in the decision on the fees. Davis argues that the alleged bias in the "case in chief" is relevant to show an abuse of discretion.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

would be without the evidence. Ark. R. Evid. 401; *Barnes v. Everett*, 351 Ark. 479, 95 S.W.3d 740 (2003).

We have considered every allegation of bias argued by Davis and include by way of example several of Davis's assertions.

1. Statement by the circuit court about $5000 per month as support

Davis states, "The trial court demonstrated bias and abused her discretion in this matter when she commented that no one child needs more than $5000 in child support." In the abstract, we are cited to page 1448 of the record where we find: "At that time, the Court did make an announcement to the parties, or the parties' counsel, at least that the Court could see no reason why a child of this age would need more than $5000 for living expenses." However, in this same discussion two pages later the circuit court stated:

> What I told counsel in chambers was that based upon the reading of both the trial briefs, the testimony of the expert witness so far, that I didn't feel that I was going to be giving the petitioner in this case fifteen percent of Mr. Williamson's income. And I stated that I had not heard all the evidence and I want to hear all the evidence and I might change my mind after I heard all the evidence that was presented in this court . . . I have not formulated an opinion . . . I have not heard all the evidence and I'm certainly open to hearing all the evidence.

Davis argues, in essence, that the circuit court prejudged the issue of the proper amount of child support before the evidence was presented and that this constitutes an abuse of discretion in denying attorney's fees. The record clearly shows that the circuit court had not prejudged the amount of child support, but rather stated, "I have not formulated an opinion. . . ."

2. Continuous Social Commentary by the Circuit Court

Davis accuses the circuit court of continuously making "social commentary." Davis provides no cite to the abstract, or any cite whatever, to allow this court to even consider the assertions. However, we note the following comments by the circuit court in the September 11, 2002, final order on custody and support:

> Ms. Davis testified that she used her savings to move to Fayetteville this summer. Ms. Davis has not handled "the money given to her

> in an exemplary manner" as argued by counsel, nor has Ms. Davis had to be "thrifty" and was just "getting by"on $5000 per month as argued.

It is apparent that the circuit court was concerned about the use of money in caring for Chasen, and there is nothing presented by Davis to show bias, or indeed imply anything beyond concern for the use of funds.

Ms. Davis, however, further argues:

> The court in questioning even comments that it might be okay for Mr. Williamson to spend $1000.00 on shoes but it certainly was not alright for Ms. Davis to purchase a $3000 TV on her salary. The court is dictating the social and financial climate Chasen Williamson is to grow up in.

Davis refers this court to page 189 of the abstract in support of this claim where we find the following questioning of witness Cheryl Shuffield by the circuit court:

> Q. My other question is did you do any sort of analysis here? You have Mr. Williamson who makes a lot of money and you know, he spends maybe a $1,000 on a pair of shoes and that might sound bad.
>
> A. Uh-huh.
>
> Q. But when you look at how much those shoes are versus how much money he's making, it's a little different.
>
> A. Sure.
>
> Q. Where you have Ms. Davis who makes less but she goes out and spends $2000 on a TV when she was not even making, well, she was making $35,000 at that point, I just wondered if there's some analysis that has been done to compare the two sorts. We're talking a lot about standard of living and that would be helpful, but you haven't done that analysis?
>
> A. No, Your Honor, I haven't.

Contrary to Davis's argument, this is hardly a comment by the circuit court that it is "okay" for Williamson to pay $1000 for a pair of shoes but improper for Davis to spend $2000 on a television. It is obviously

a question by the circuit court in an attempt to determine what analysis had been undertaken on the issue of standard of living.

3. Keeping the court file in the Circuit Court Judge's Office

Davis apparently asserts that the circuit court was manipulating the record to favor Williamson. The record provides:

> MR. WATSON: Judge, would the Court consider the possibility of awarding some interim attorney's fees or attorney's fees pending the outcome of the case. I think, actually there's a motion pending for those attorney's fees. I don't know that the Court has actually ruled on that.
>
> THE COURT: I haven't seen it and the file's incomplete because I've had the file for a couple of months now and probably the clerk's office is really mad at me, so I've not seen it. But Mr. Tull, do you have anything to add?

There is nothing in the above quote to show a motive to keep documents and pleadings out of the file so it can be manipulated in Williamson's favor. This court finds no merit to Davis's claim of bias in the "case in chief." Furthermore, we are not convinced that the evidence of alleged bias in the "case in chief" was relevant to the question of whether the circuit court abused its discretion in denying the motion for attorney's fees.

Alleged Abuse of Discretion in Deciding the Motion

Davis does, however, argue an abuse of discretion in deciding issues presented by the motion on attorney's fees. She argues that the circuit court abused its discretion in failing to recognize that this case presented difficult financial issues and was a complex case involving "the Statute of Limitations, unconstitutionality of the administrative order, equitable defenses of laches, waiver, equitable estoppel, and a contested hearing on child custody." The circuit court concluded to the contrary, that aside from the financial matters, this case presented "straight forward issues." Davis also notes that several "extraordinary motions" were filed in this case making costs and fees justifiably higher.

Davis argues that the circuit court failed to properly consider disparity in income in denying attorney's fees. However, disparity in income is discussed in the order. The circuit

court found that while disparity in income is a factor to be considered, it was not determinative in this case. Davis additionally argues that the circuit court erred in finding that counsel failed to provide "total submission of bills." According to Davis, it is "evident" that certain activities are included in the billings, such as presumed follow-up activities based on the activity actually listed. The circuit court found that the billings were inadequate and that some billings were inflated. Examples of deficiencies were given in the order. Davis next argues that the hourly fees she and those she hired charged are reasonable. The circuit court denied the fees in total. Hourly fees are not discussed in the order.

Davis also argues:

> The court erred in her attorney fee Order in the following respects: The issue of attorney's fees was reserved from the hearing held in 1997, not from 2001 forward. In as much as the court had been unable to schedule the continuation of this hearing until 2001, the parties agreed that Mr. Williamson would pay a partial temporary attorney fee of $5000 in the year 2000. The only other award was $3000 out of a $23,552.50 expert witness fee.

No proof of any agreement on fees is offered. Davis also states, "At the time this decision was rendered Ms. Davis was unemployed and a student; she had been employed and was earning $31,123, which is misstated in the Order." The order states that Davis' employment status is based on the "most recent financial affidavit" of Davis on earnings at the time of the issue of child support. Davis offers no proof of this not being so. Davis next argues that a great deal of time was spent in preparation for trial and that the circuit court could not know how long letters were or how long it took to review matters and do research. Davis argues that she need not provide actual billing of hours. She cites this court to *Deaton v. Deaton*, 11 Ark. App. 165, 668 S.W.2d 49 (1984) for this proposition. The relevant language from the case is:

> The second point raised by the appellant is that the chancellor erred in awarding additional attorney's fees. He bases this argument on the fact that the appellee did not provide any documentation as to the time spent on the case by her attorney. Attorney's fees are a matter for the discretion of the trial court, and, absent an abuse of discretion, we will not reverse his decision in that regard. In the case at bar, the chancellor had the opportunity to observe the parties

> and, as the chancellor noted, the appellant was extremely uncooperative in adhering to any of the court's orders. We find no abuse of discretion on the part of the chancellor. Further, this issue was not raised before the trial court nor was any documentation requested.

Deaton, 11 Ark. App. at 166. *Deaton* states it is not an abuse of discretion to grant fees in the absence of documentation where the judge has observed the work and documentation was not requested. Davis provided documentation, but the circuit court found it was inadequate and exhibited problems in inflated billings and otherwise. The circuit court was of the opinion that counsel's billings were unreliable, that too much time was spent on a number of types of items, and that counsel exhibited a lack of expertise. The circuit court evaluated counsel's legal services in the order on attorney's fees, noting the following examples:

1. Poor record keeping on billings as noted by Davis's own expert;
2. Inflated billings, $750 for review of an order, $350 for review of a letter;
3. Failure to bring copies of exhibits to trial for opposing counsel;
4. Raising the issue in open court of the nature of Davis and Williamson's sexual relationship after paternity had already been established;
5. Failure to understand what a proffer was;
6. Further inflated times on billings;
7. Lack of proper documentation;
8. Request for reimbursement of improper items as part of fees;
9. Lack of dates when work was done;
10. Vague billings, such as for "research;"
11. Unreadable entries in billings; and
12. $450 for a single photo.

The circuit court looked to *Paulson v. Paulson*, 8 Ark. App. 306, 652 S.W.2d 46 (1983) for the factors to be considered in determining the amount, if any, to be awarded in

attorney's fees. We first note that the factors in *Paulson* are very similar to the factors set out in *Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990), with one exception. In the context of domestic relations cases, the financial abilities of the parties are also considered. Disparity in incomes is a relevant factor for the circuit court to consider, but standing alone it will not justify an award of attorney's fees. *Scroggins v. Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990). The relevant *Chrisco* factors are:

1. Experience and ability of the attorney;
2. The time and labor required to perform the legal service properly;
3. The amount involved in the case and the result obtained;
4. The novelty and the difficulty of the issues involved;
5. The fee customarily charged in the locality for similar legal services;
6. The time limitations imposed on the client or by the circumstances; and
7. That the acceptance of the particular employment will preclude other employment by the lawyer.

Chrisco, 304 Ark. at 229. While the decision to award attorney's fees and the amount awarded are reviewed under an abuse of discretion standard, factual findings of fact by a circuit court on the existence of the *Chrisco* factors is reviewed under a clearly erroneous standard of review. *See, e.g., Phi Kappa Tau Housing Corp. v. Wengert*, 350 Ark. 335, 86 S.W.3d 856 (2002). When reviewing findings of fact by a circuit court, this court uses a clearly erroneous standard. *Butt v. The Evans Law Firm*, 351 Ark. 566, 98 S.W.3d 1 (2003). The only factor that was not considered by the trial court was the preclusion of other employment by the lawyer. No argument about loss of other employment was made in this case. The finding of the circuit court on the factors was not clearly erroneous.

This court has considered all assertions of abuse of discretion in denying the motion for attorney's fees. The circuit court considered the proper factors in deciding Davis's attorney's fee motion. Davis fails to show an abuse of discretion by the circuit court.

Floyd G. VILLINES, III, County Judge *v.* Nora HARRIS

04-568 194 S.W.3d 177

Supreme Court of Arkansas
Letter opinion delivered September 30, 2004*

Supreme Court of Arkansas

TOM GLAZE
ASSOCIATE JUSTICE

JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201

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682-6870

September 30, 2004

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Dear Counsel:

First, I wish to thank you for your research and arguments. It has been most beneficial to me in reaching a decision on whether I should recuse in your pending case on appeal, *Villines v. Harris*, case number SC 04-00568. After your study of the case law and treatises bearing on the subject of disqualification and recusal of judges, you now may feel either confused or especially learned on

*Reporter's Note: See *Villines v. Harris*, 362 Ark. 393, 208 S.W.3d 763 (2005) for majority opinion on the merits. CORBIN, BROWN, and IMBER, JJ., not participating.

the subject. I trust it is the latter. But, either way, you should always keep in mind that good people can differ and do express opposing views on any given question, albeit legal or otherwise. Regarding the case now before this court, I am fully convinced that I have a duty to remain on your case on appeal.

You have sorted through and studied the applicable law, regarding recusals in this state and beyond its boundaries, and attorneys for each side have come to opposite opinions on whether I should recuse — Villines' attorneys say I should remain on the case and Harris' attorneys respectfully suggest I should disqualify. I do not intend to go into great detail in discussing all the cases, arguments, and policy issues upon which I relied when deciding I should not disqualify. However, I will briefly highlight those legal principles that I weighed that cause me to honor my public duty and rule on the tax and related questions to be presented in this case.

Initially, I note the observation by counsel for Harris that I had previously recused in this same case, which this court reversed. *Villines v. Harris*, 340 Ark. 319, 11 S.W.3d 516 (2000). However, it is settled law that, absent a statutory provision to the contrary, a determination of disqualification will not prevent a judge from reassuming full jurisdiction if the disqualification has been removed. *Matthews v. State*, 313 Ark. 327, 854 S.W.2d 339 (1993).

Since the time I recused in this matter in 2000, our court has decided cases that have further developed our law involving recusal. For example, in *White v. Priest*, 348 Ark. 135, 73 S.W.3d 572 (2000), the members of this court rejected White's motion to recuse, stating the "Rule of Necessity" overrode the rule of disqualification. The court offered an example where a judge might be required to participate in the judicial review of a judicial salary statute. This court said that the Rule of Necessity is most likely invoked in situations where the filing of a suit whose resolution will directly affect the pecuniary well-being of judges as a whole, such as a suit seeking the increase in judicial pay or retirement benefits.

Also, after the *Villines v. Harris* case was in this court in 2000, we delivered the important case of *Worth v. Benton County Circuit Court*, 351 Ark 149, 89 S.W.3d 891 (2002), where county property owners sued Benton County and other taxing authorities, alleging ad valorem taxes were illegal exactions in violation of the state constitutional rollback provision. There, the presiding judge and his family members stood to gain in the refund of taxes that could occur, as well as any rollback that might result. Our court held that, before a judge is disqualified, the judge's personal, propri-

etary, or pecuniary interest must be more than that of an ordinary citizen and taxpayer. As you may recall, I dissented in *Worth*, but I lost that argument.

As you are fully aware, the law is well settled that a judge has a duty to remain on a case if there is no valid reason for the judge to disqualify. Here, neither I, nor my family, has any greater interest in this case than any ordinary citizen or taxpayer. I am also concerned that most judges who would be considered as appointed special justices, and who would sit on this case, would be property owners and taxpayers who likely would be impacted by any decision rendered in this significant case, which involves the interpretation of Arkansas' Constitution and statutory law.

Sincerely,

Tom Glaze

Tom Glaze

TG/mcp

LAKE VIEW SCHOOL DISTRICT NO. 25 of Phillips County, Arkansas, *et al.* *v.* Governor Mike HUCKABEE, *et al.*

01-836 194 S.W.3d 193

Supreme Court of Arkansas
Opinion delivered September 30, 2004

[Rehearing denied November 4, 2004.*]

* GLAZE, J., would grant rehearing. IMBER, J., not participating.

Don Trimble , *E. Dion Wilson*, and *Roy C. Lewellen,* for appellants.

Mike Beebe, Att'y Gen., by: *Timothy G. Gauger*, Sr. Ass't Att'y Gen., for appellees.

PER CURIAM. Now pending before this court is a Request for a Ruling on Pending Motion for Attorney Fees Before Mandate Issues. The Request was filed by attorneys Don Trimble and E. Dion Wilson, who represented the Lake View School District. The Request was filed on July 19, 2004, and related to their motions for attorney fees filed by the lawyers on April 22, 2004, for legal work and costs for work done on behalf of the Lake View class after January 1, 2004. Similarly, on September 8, 2004, attorney Roy C. Lewellen filed a motion for attorney's fees and costs for legal work done on behalf of the Lake View class after January 1, 2004. We deny the motions for additional fees and costs.

On November 21, 2002, this court handed down its decision in this case and awarded $3,397,035 in attorneys fees and costs to counsel for the Lake View class. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (2002). We did so based on our previous opinion that the State of Arkansas had waived a sovereign-immunity defense by its actions. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000). We said:

> . . . We conclude that when the State of Arkansas signed off in two published notices to the class members advocating that attorneys' fees be paid and continued to push for payment of attorneys' fees even after the chancery court refused to sign the Agreed Order, it waived its sovereign-immunity defense to payment of those fees. . . .

340 Ark. at 496, 10 S.W.3d. at 901.

On January 1, 2004, the mandate issued in this case stating that "the parties each bear their own costs on appeal." On January 22, 2004, we recalled the mandate. On March 11, 2004, we denied the motion of attorneys Roy C. Lewellen and Don Trimble for additional costs and attorney's fees incurred during the following time frames:

- Expert witness costs incurred during the compliance trial in 2000;
- Additional attorney's fees for work done between November 1, 2000, and December 31, 2003; and
- Additional attorney's fees and costs for work done between January 1, 2004, and January 22, 2004.

We also refused to "clarify" what fees and costs might be forthcoming to counsel after January 22, 2004, as requested by counsel. The second mandate in this case issued on September 9, 2004.

Attorneys Lewellen and Trimble now return to this court joined by attorney E. Dion Wilson and ask for fees and costs incurred after January 1, 2004. This court has already answered the request in part by denying Lewellen and Trimble's previous motion on March 11, 2004. The reasoning is obvious. What occurred after January 1, 2004, was a separate matter, though the Supreme Court docket number remained the same. We cannot say that the State of Arkansas waived its sovereign-immunity defense with respect to any claims for fees and costs incurred post-January 1, 2004. Accordingly, we deny each attorney's request.

Special Justice CAROL DALBY joins.

GLAZE, J., dissents.

IMBER, J., not participating.

TOM GLAZE, Justice, dissenting. Once again, I write in this case to point to yet another inconsistent stance this court has taken when addressing issues in this important and worrisome case. For others, *see Lake View School Dist. No. 25 of Phillips County v. Huckabee* (Glaze, J., dissenting), delivered September 9, 2004 (where conflicting positions were taken by the majority in its various opinions and per curiams to reach the conclusion that it must release its jurisdiction of the case). Now, this court takes an inconsistent position regarding the award of attorneys' fees.

Early in this litigation, the State claimed that the sovereign-immunity clause, Ark. Const. art. 5, § 20, barred Lake View attorneys any attorneys' fees. This court rejected the State's argument and held the State could and did waive its sovereign-immunity defense.[1] *See Lake View School Dist. No. 25 v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892 (2000) (Glaze, J., dissenting), wherein I set out my initial doubts that Lake View could establish entitlement to attorney's fees in this case.[2] After holding the State had waived its sovereign-immunity defense in this case, our court remanded the case for the trial court to determine reasonable attorneys' fees.

On remand, the trial court awarded attorneys' fees to Lake View counsel in the amount of $9,338,035, and, on November 21, 2002, our court, in addition to holding the current school-funding system to be unconstitutional, reduced the trial court's fees to the Lake View attorneys to $3,088, 035, and Lake View's costs to $309,000. I concurred with this court's attorneys' fees award *only* because this court found the State had waived its sovereign immunity in this case.[3] In its November 21, 2002, opinion, the majority court stayed the issuance of its mandate in this case until January 1, 2004. The mandate was subsequently dated and issued on January 1, 2004. However, on January 7, 2004, Lake View's attorneys filed a motion alleging the State had failed to comply with the court's November 21, 2002, opinion. This court then "directed the parties in this case to file responses and simultaneous briefs by January 15, 2004." On January 22, 2004, our court, by a per curiam opinion, recalled its mandate issued on January 1, 2004, and *reestablished jurisdiction over this case.* The court appointed two masters to advise it on what had been done regarding the parties'

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[1] The court held the State waived its defense when the State signed off in two published notices to the class members advocating that attorneys' fees, even after the chancery court refused to sign an agreed order; this court stated it was hard pressed to reconcile public notices to class members supporting fees.

[2] Lake View had failed to prove the required class action or a common fund in order to qualify for payment of attorneys' fees, nor did Lake View cite a statute that authorized attorney's fees in this type of case.

[3] Attorneys' fees are authorized in only two situations: (1) when fees are provided by statute (commonly labeled the "American Rule"), and (2) in illegal-exaction cases where a class action is sought and a common fund is established, which Lake View's counsel failed to do.

compliance with this court's November 21, 2002, order. In this court's February 3, 2004, order, the masters were given the following authority:

> The Masters, in addition, are authorized to examine and evaluate any other issue they deem relevant to compliance with this court's November 21, 2002 opinion and to report to this court accordingly.
>
> *The Masters shall immediately hold a prehearing conference with the named parties and intervenors and their attorneys. With respect to Lake View School District No. 25, both of the [school's] attorneys who participated in oral argument on January 22, 2004, may appear.*[4] The purpose of the conference will be to delineate the issues and the procedure to be followed with respect to gathering the necessary documents and materials and the taking of additional testimony, if necessary. The Masters shall further decide whether additional briefing by the parties and a hearing for attorneys to be heard on the issues listed above would prove beneficial.

(Emphasis added.)

Clearly, our court endowed the masters with broad authority to order all parties and their counsel to file responses and to be present at oral arguments and hearings when testimony and other evidence would be heard. Also, after the masters filed their report, the parties were invited to file any objections they might have regarding the report. It was this testimony, evidence, and objections that the masters utilized to prepare their report and permitted our court to issue its June 4, 2004, supplemental and final opinion concerning the merits of this case, as well as the attorneys' fee issue. Although the Lake View attorneys had continued their requests for additional fees for their time and work conducted after January 1, 2004, our court's supplemental opinion failed to make any mention of attorneys' fees.

By the court's per curiam today, the majority court now summarily concludes that it could no longer say the State waived its sovereign-immunity defense with respect to any claims for attorneys' fees and costs incurred after January 1, 2004. The court

---

[4] A question arose as to which attorneys were representing Lake View, so this court made it clear that *both* attorneys could participate.

simply ignores its earlier ruling in this case that the State *had waived* its sovereign-immunity defense and had remanded the case for a determination of reasonable attorneys' fees, which the trial court awarded, and our court subsequently reduced. Nowhere in the record do I find Lake View's attorneys ever abandoned their attorneys' fee request, nor has the State ever raised this attorneys' fee issue in order to argue that its sovereign-immunity defense should suddenly be available to the State so it could contend in this case that Lake View was no longer entitled to attorneys' fees for the period beginning on January 1, 2004 (when our court reestablished jurisdiction in this case), and ending on June 4, 2004 (when the court entered its supplemental and final opinion on the merits).

The majority court suggests that the period between January 1, 2004, to June 4, 2004, is a separate matter, which somehow automatically restored the sovereign-immunity defense to the State to fend off Lake View's attorneys' fee requests. However, the court points to no facts or law to support such a suggestion. Moreover, once this court ruled early in this case that Lake View was entitled to reasonable fees in this case, the State made no further objections to Lake View's request for fees, nor does it cite any facts or law to support this court's decision that the school district could obtain fees for time and work during the first part of a case, but that such fees could be denied for work performed in a later segment of the same case. This case is one case, and throughout its litigation, it has borne one case number — 01-836.

As mentioned above, early in this litigation between Lake View and the State, I offered the opinion that Lake View had not established rights to attorneys' fees, but I joined the majority court's award of attorneys' fees to Lake View's counsel based on this court's decision that the State had waived its sovereign-immunity defense. Nothing has changed to strip Lake View's entitlement to reasonable fees for its continued work and time in this case. While this court may harbor the belief that Lake View's attorneys have been awarded enough in fees already, that is no reason to abruptly change the rules of the game at half-time in an attempt to obtain a different result.

Because this court is wrong — so very wrong — in denying Lake View's attorneys' fees, I respectfully dissent.

Aaron SMOTHERS *v.* STATE of Arkansas

CR 04-944 194 S.W.3d 206

Supreme Court of Arkansas
Opinion delivered September 30, 2004

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

No response from appellee.

PER CURIAM. Appellant Aaron Smothers entered a negotiated guilty plea to several felony counts and was sentenced to ten years' imprisonment in the Pulaski County Circuit Court. He was represented below by private counsel, Stephen Morley. A judgment and commitment order was entered on April 20, 2004. On June 9th, petitioner filed a *pro se* notice of appeal in the circuit court. A partial record was tendered to this court on August 31st. That same

date, our clerk's office notified Mr. Morley and informed him that, as attorney of record, he would need to file a motion for belated appeal on appellant's behalf, because the *pro se* notice of appeal was not timely. Instead of filing a motion for belated appeal, Mr. Morley has chosen to file what he calls a "response" to the request from the clerk's office.

In his response, Mr. Morley states that he was never informed by appellant that he desired to appeal. He also states that on the date of his guilty plea, he was not present, but that his brother, attorney Randall Morley, accompanied appellant during the proceeding. Randall Morley has filed an affidavit, which is attached to the response, echoing his brother's statement. Specifically, Randall Morley stated: "At no point did Mr. Smothers, before, during or after the plea, ask to appeal the conviction or request that my brother or I take any affirmative steps to assist in appealing his guilty plea." Based on this information, appellant's counsel insists that he cannot, ethically and truthfully, in good faith, file a motion for belated appeal in which he or his brother must accept fault for not timely filing an appeal.

Complicating this situation is the fact that it is not apparent from the record that appellant has the right to appeal from the entry of his guilty plea, because the partial record does not reveal that the plea was entered conditionally, pursuant to Ark. R. Crim. P. 24.3(b). Generally speaking, a defendant waives his right to appeal when he pleads guilty. *See Berry v. City of Fayetteville*, 354 Ark. 470, 125 S.W.3d 171 (2003); *Barnett v. State*, 336 Ark. 165, 984 S.W.2d 444 (1999). Other than an appeal from a sentence imposed by a jury after a guilty plea, Rule 24.3(b) provides the only procedure for an appeal from a plea of guilty. *Id.*

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* seized evidence or a custodial statement. If the defendant prevails on appeal, the defendant shall be allowed to withdraw the conditional plea. [Emphasis added.]

By the terms of Ark. R. Crim. P. 24.3(b), conditional pleas, and the accompanying right to appeal, are limited to an adverse determination

on a pretrial motion to suppress. *Berry*, 354 Ark. 470, 125 S.W.3d 171. This court has interpreted Rule 24.3(b) as requiring strict compliance with the language that the right to appeal be reserved in writing; otherwise, the appellate court does not obtain jurisdiction. *Barnett*, 336 Ark. 165, 984 S.W.2d 444.

In the present case, it is not clear from the partial record that the requirements of Rule 24.3(b) have been met. There is no writing reflecting that appellant was entering his guilty plea conditionally. Moreover, there appears to be nothing to appeal, as the record does not reflect that the trial court ever made an adverse ruling on a suppression motion. Although the record does reveal that appellant filed a motion to suppress on December 9, 2003, there is no indication that this motion was ever ruled on by the trial court.

Given the unusual posture of this motion and the fact that the record tendered in this case is incomplete, we hereby remand this matter to the trial court to settle the record and make findings of fact on the following issues: (1) whether appellant ever informed his counsel that he wanted to appeal; (2) whether the trial court ever made an adverse ruling on appellant's motion to suppress; and (3) whether appellant's guilty plea was entered conditionally, pursuant to Rule 24.3(b). We therefore grant the parties thirty days from the date of this *per curiam* order to settle these issues.

POPULIST PARTY of ARKANSAS, Ralph Nader and Peter Miguel Camejo, *et al.* *v.* Linda CHESTERFIELD and Democratic Party of Arkansas

04-994 195 S.W.3d 354

Supreme Court of Arkansas
Opinion delivered October 1, 2004

Mike Beebe, Att'y Gen., by: *Wendy L. Kelley*, Deputy Att'y Gen., and *Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd.*, by: *Sam Hilburn*, for appellants.

Vickery & Carroll, P.A., by: *Robin J. Carroll*; and *Brian D. Greer*, for appellees.

BETTY C. DICKEY, Chief Justice. This is an appeal from Pulaski County Circuit Judge Timothy D. Fox's decision granting a writ of mandamus. Linda Chesterfield and the Democratic

Party of Arkansas contested the certification of the Populist Party of Arkansas's Presidential and Vice Presidential candidates. Judge Fox granted the writ of mandamus, and the Populist Party, Presidential candidate Ralph Nader, and Vice Presidential candidate Peter Miguel Camejo bring five points for reversal: (1) whether the trial court had subject matter jurisdiction due to lack of standing; (2) whether the trial court had personal jurisdiction over Nader; (3) whether the trial court interpreted the requirements of Ark. Code Ann. § 7-8-302(5)(B) in a constitutional manner; (4) whether the trial court misinterpreted Ark. Code Ann. § 7-1-101(18); and, (5) whether the Secretary of State should be ordered to verify Nader and Camejo on the ballot even if the trial court's writ of mandamus is valid because the trial court did not remove Camejo from the ballot.

For the reasons explained below, we vacate Judge Fox's order granting the writ of mandamus and order the Populist Party of Arkansas's candidates, Ralph Nader and Peter Miguel Camejo, to be included on the 2004 presidential ballot.

Procedural History

On September 10, 2004, Linda Chesterfield and the Democratic Party of Arkansas filed a complaint and petition for writ of mandamus and declaratory judgment seeking the disqualification of Ralph Nader and Peter Camejo from the general election ballot as nominees for President and Vice President of the United States. Judge Fox heard the matter on September 17, 2004, first addressing Nader and Camejo's "motion to dismiss plaintiffs' complaint and petition for writ of mandamus and declaratory judgment by special appearance for lack of jurisdiction," filed September 17, 2004.

Judge Fox did not make a ruling on the motion to dismiss but took testimony and evidence. He summarized the arguments by stating:

> I believe these are the areas that are in play. That The Populist Party of Arkansas, at least at some point in time, somebody signed as The Better Life of Arkansas, that it's not qualified as a party or a new party because it didn't receive three percent or more of the vote in the last Presidential election for a candidate . . . And the next thing that happens is that you have to get at least 1,000 signatures that are in the proper form and from qualified folks to sign petitions. So those are two separate things. Then also the plaintiffs are arguing

> that the defendants Nader and Camejo have accepted the nomination in other states from parties that are different than The Populist Party and that they are therefore ineligible as candidates for that party in Arkansas pursuant to Ark. Code Ann. § 7-7-204 . . . the petition forms themselves are invalid regardless of the number of signatures, because they do not identify The Populist Party sponsorship of the candidates and they don't contain a canvasser's verification.

On September 20, 2004, after the hearing, Judge Fox issued a memorandum opinion determining that jurisdiction was proper as to Nader but that it did not have jurisdiction as to Camejo. Judge Fox also found that the petitions did not comply with the requirement of Ark. Code Ann. § 7-8-302(5)(B). The trial court wrote:

> The General Assembly has established many requirements for "political parties" with respect to their participation in the election process. "Political parties" have to receive at least three percent (3%) of the votes cast in the last general election for Governor or nominees for presidential electors. If "political parties" fail to receive three percent (3%) they lose their status. In order to become a new "political party" a "political group" has to obtain the signatures of qualified electors, whichever is less, at the last preceding election. And "political parties" are required to hold primary elections.
>
> But the law is clear and unambiguous that the qualified electors signing the petitions of a "political group" must declare that the names to be printed on the ballot be "the names of their candidate". The petitions submitted by the defendant "political group" do not meet such threshold requirement. Accordingly, a writ of mandamus will issue to the defendant Daniels to recall the certified list and to remove the name of Ralph Nader from the certified list as a candidate for the defendant "political group."

Judge Fox ordered the immediate recall of the certification of full lists of all candidates to all county boards of election commissioners issued in accordance with Ark. Code Ann. § 7-5-203(a) and ordered the Secretary of State to issue a new list of candidates after removing the name of Nader as the candidate for the office of President.

Appellants filed a notice of appeal on Tuesday, September 21, 2004, and a brief oral argument on the issue of whether to stay the trial court's order was heard in this court on Thursday,

September 23, 2004. This court then issued an order directing the Secretary of State to advise the counties not to print any other ballots until this case was resolved. Upon review of the briefs filed and arguments made to this court we now vacate the trial court's issuance of the writ of mandamus. "In making our decision in this case we are guided by the overriding constitutional principles in favor of ballot access." *The Reform Party of Florida v. Black,* 2004 WL 2075415 (Fla.) (Sept. 17, 2004).

Before turning to the merits of Nader's argument regarding statutory interpretation, we note that the Populist Party, as a political group, is the party in interest in this case. Under Arkansas law, it is the political group that has a right to place names on the ballot for the office of President and Vice President of the United States. Thus, Nader was not a necessary and indispensable party here. Furthermore, Judge Fox found there is no statutory requirement for the name of the "political group" to be on the petition. As to the issue of standing, it was waived by the Populist Party, as no objection was raised to the trial court below.

The Democratic Party of Arkansas and Chesterfield contend that the Populist Party did not have a valid political convention. However, on August 24, 2004, electors of the Populist Party met by conference call for their convention. Minutes were taken and a vote was taken on the delegates. Arkansas does not define what constitutes a convention and this court cannot say that the telephone conference convention is insufficient under Ark. Code Ann. § 7-8-302(5)(E).

Writ of Mandamus

This court has held that an action for mandamus is the proper method of enforcing the right set forth in Ark. Code Ann. § 7-5-207(b). *State v. Craighead County Bd. of Election Comm'rs,* 300 Ark. 405, 779 S.W.2d 169 (1989). Mandamus is traditionally regarded as a remedy to be used on all occasions where the law has established no specific remedy, and justice and good government require it. *Id.; Ex parte Trapnall,* 6 Ark. 9 (1845). It is a writ which is used to enforce an established right. *Id.; Gregg v. Hartwick,* 292 Ark. 528, 731 S.W.2d 766 (1987). The right the appellant seeks to enforce is contained in Ark. Code Ann. 7-5-207(b) (1987). *Id.* That statute created a right in the people to the proper administration of election laws by prohibiting the inclusion of ineligible candidates on the ballot. *Id.*

Presidential Group Candidate Petition

The Populist Party argues that the trial court's interpretation of Ark. Code Ann. § 7-8-302(5)(B) was unconstitutional. We agree.

Judge Fox determined that the petition forms, used by the Populist Party, failed to comply with the technical requirements of Ark. Code Ann. § 7-8-302(5)(B), which states:

> (B) A political group desiring to have the names of its candidates for President and Vice President printed on the ballot shall file a petition with the Secretary of State by noon on the first Monday of August. The petition shall contain at the time of filing the names of one thousand (1,000) qualified electors of the state declaring their desire to have printed on the ballot the names of their candidate for President and Vice President. The Secretary of State shall verify the sufficiency of the petition within ten (10) days from the filing of the petition. If the petition is determined to be insufficient, the Secretary of State shall notify in writing the political group through its designated agent and shall set forth his or her reasons for so finding. When notice is delivered, the sponsors shall have an additional ten (10) days in which to do any or all of the following:
>
> (i) Solicit and obtain additional signatures;
>
> (ii) Submit proof to show that the rejected signatures or some of them are good and should be counted; or
>
> (iii) Make the petition more definite and certain.

Ark. Code Ann. § 7-8-302(5)(B) (Supp. 2003). Judge Fox found that the petitions were insufficient because petitioners did not state on the petition that Nader and Camejo were "their" candidates. Rather, the petitions stated a desire to have "the" particular candidates on the ballot. Specifically, the petition stated:

> We, the undersigned, propose the name of Ralph Nader and Pete Miguel Camejo as President and Vice President to be placed on the ballot as Presidential group candidate in the General Election to he held on November 2, 2004, and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Arkansas, and my printed name, date of birth, residence, city or town of residence, and date of signing are correctly written after my signature.

■ However, there is no statutory requirement that each person who signs the nominating petition be a member of the group circulating the petition. Ark. Code Ann. § 7-8-302(5)(B) only requires that those persons signing the petition express their desire to have the group's candidates on the ballot and that the petitioners be qualified electors who are registered voters under Ark. Code Ann. § 7-1-101(22).

■ Moreover, the Populist Party is not required to use either of the two forms contained in the "2004 Candidate Information" handbook published by the Secretary of State's Office because Ark. Code Ann. § 7-8-302(5)(B) does not prescribe a certain form. Under Ark. Code Ann. § 7-8-302(5)(B), the Secretary of State's Office is required to accept any form that contains at the time of filing "the names of one thousand (1,000) qualified electors . . . declaring their desire to have printed on the ballot the names of their candidates for President and Vice President." Ark. Code Ann. § 7-8-302(5)(B). The petition used here by the Populist Party, and its candidates, clearly met this requirement

■ Further, there is no specific requirement that the petitioners declare their intention to actually vote for the candidate on the petition. The United States Court of Appeals for the Sixth Circuit dealt with this issue in *Anderson v. Mills,* 664 F.2d 600 (6th Cir 1981). In that case, the court found a Kentucky petition-signature statute unconstitutional. The court wrote:

> Of course, the "desire to vote" provision is not precisely analogous to the factual situations previously discussed. However, this provision, as did the lack of partitions and the thin ballots, results in publicizing the way one intends to vote. Certainly, it can be claimed that the latter two were actual revelations for whom the subscriber voted, while the former is only a declaration of one's desire and intention to vote in a future election. However, we refuse to adopt such an artificial distinction because all such practices jeopardize the right to secrecy of the ballot. The declaration operates to discourage citizens from participation in the electoral process simply because they do not wish people to know how they will vote. Such a revelation invokes the fears sought to be quelled by the secrecy of voting laws in this country, and subjects an elector to the pressure of his neighbors, employers, and social peers. Since the declaration abridges the right to a secret ballot in such a direct and unacceptable manner, it cannot stand.

Id. at 608-609. We agree with the rationale of the Sixth Circuit that a law may not require an electorate to name "their" candidates for President and Vice-President. Further, a petitioning law may only require that the signers state their desire that the named candidate, or named party, appear on the ballot. *Id.* Otherwise, a party who is uncertain about whom he will support in the general election, but has an interest in the candidate, would be unable to sign the petition because of the requisite declaration. *Id.* Furthermore, "the possibility of having new candidates with unusual and creative political philosophies is greatly reduced. As a result this requirement fosters a system which favors the *status quo*, while discouraging independent candidates and new political parties." *Id.* at 609.

Our own court has recognized that the right to become a candidate for public office is, under our form of government, a fundamental right, which should not be in any manner curtailed without good cause. *Fisher v. Taylor,* 210 Ark. 380, 196 S.W.2d 217 (1946). Any law or party rule, by which this inherent right of the citizen is diminished or impaired ought always to receive a liberal construction in favor of the citizen desiring to exercise the right. *Id.*

Statutes are not only presumed to be constitutional, but a court must construe a statute as constitutional if at all possible. *Bunch v. State,* 344 Ark. 730, 43 S.W.3d 132 (2001). As the Supreme Court has recognized, trial courts cannot impose a restriction that denies a group their right to associate or denies them access to the ballot unless narrowly tailored to meet a compelling state interest. *Lubin v. Panish,* 415 U.S. 709, 94 S.Ct. 1315 (1974).

Here, the manner in which the trial court's interpretation of Ark. Code Ann. § 7-8-302(5)(B) leads not only to an absurd result, but also renders the provision unconstitutional. This unconstitutional reading of the petitioning provision at issue infringes upon one of the fundamental civil liberties of our democracy, that of the secret ballot. *Anderson,* 664 F.2d 600. In sum, section Ark. Code Ann. § 7-8-302(5)(B) does not state that an electorate name "their" candidate for President or Vice President. The statute only requires that the signer of the petition state their desire that the named candidates appear on the ballot.

Having vacated the writ of mandamus, we need not address the other issues raised in this appeal, such as the trial court's

interpretation of Ark. Code Ann. § 7-1-101(18) or whether the Secretaty of State should be ordered to verify Nader and Camejo on the ballot.

For the reasons stated above, the writ of mandamus is vacated. Our September 23, 2004, order to the Secretary of State advising the County Board of Election Commissioners to not initiate the further printing of ballots relating to the presidential election is hereby dissolved. The mandate shall issue immediately and the Secretary of State's Office is ordered to certify the ballot with the names of the Populist Party of Arkansas, Presidential Candidate Ralph Nader, and Vice Presidential candidate Peter Miguel Camejo.

BROWN, J., concurs.

GLAZE, IMBER, and HANNAH, JJ., dissent.

ROBERT L. BROWN, Justice, concurring. I join the majority opinion to vacate the writ of *mandamus*, and I write only to address the issues relating to the name of the political group and the convention requirement. *See* Ark. Code Ann. § 7-8-302 (Supp. 2003).

Section 7-8-302 does not require that the specific name of the political group be included on the petitions for nomination. Moreover, the style "Presidential Group Candidate Petition" was included on each petition circulated for signatures, which alerted the signers of the petition that they were signing on behalf of a political group. The following steps were taken by the Secretary of State and the Populist Party to comply with § 7-8-302:

- On August 11, 2004, the Secretary of State certified 1,234 signatures on the Nader petitions for a political group known as The Better Life. This was the verification of sufficiency.
- On August 24, 2004, the Populist Party advised the Secretary of State that the correct name of the political group is The Populist Party of Arkansas and not The Better Life. Tim Humphries, legal counsel for the Secretary of State, testified at the hearing that there was no problem with changing the name. He also testified that issuing another verification of sufficiency to The Populist Party was not necessary because "it was the same group."
- On August 24, 2004, Jim Macri, party chairman of The Populist Party, wrote to the Secretary of State that "The Populist Party of

Arkansas with the slogan 'The Better Life' convened and unanimously nominated Ralph Nader . . . and Peter Miguel Camejo" as the nominees for president and vice-president. An amended letter dated August 24, 2004, and filed September 1, 2004, with the Secretary of State added the statement that the Nader petitions had been presented on August 2, 2004, with additional petitions submitted during the ten-day cure period.

- On August 24, 2004, the Populist Party, through its party chairman, Jim Macri, advised the Secretary of State of the names of its six presidential electors.

Jim Macri testified at the hearing that the convention for The Populist Party was held by conference call on August 24, 2004. He did not recall the timing of when the electors were chosen.

Mr. Macri also testified that he selected the delegates for the convention, which was by conference call, and about ten people, though probably four to six people participated. He had a written agenda for the conference call-convention and kept minutes. He used Roberts Rules of Order on how to proceed with the conference call.

The General Assembly does not define in § 7-8-302 how a group's convention is to be held or what comprises a convention. There is no requirement that it be by an assembly of people as opposed to a conference call. As chairman of The Populist Party, Mr. Macri complied with § 7-8-302(5)(E) by writing the Secretary of State and certifying the group's selection for president and vice-president.

The clear intention of § 7-8-302(5)(B) is to allow political groups access to the ballot for president and vice president, if they file a petition on behalf of their candidates with the signatures of one thousand qualified electors. The Populist Party complied with the requirement with signatures of more than one thousand electors. By doing so, it has shown a modicum of support for the group's candidates, which is what our statute requires.

TOM GLAZE, Justice, dissenting. Most likely, due to the few days this court has had to study and deliberate on the issues raised in this election case, the majority court's decision is confusing and reflects a fundamental lack of understanding of Arkansas' election process. I must dissent.

First, I wish to address those pertinent Arkansas election laws and procedures that must be followed to permit a person's name to be printed on the ballot as a candidate for president or vice president. These statutory procedures *must* (*shall*) be conducted.[1] In each year in which a president and vice president are chosen, each political party or group in the state *shall* choose, by its state convention, electors of president and vice president.[2] Any political party or group which has qualified under § 7-8-302 *shall* by state convention certify its total list of electors to the secretary of state and the certificate *shall* be filed no later than September 15 in the year of the election.

Now, it is necessary to understand how the names of a political party's candidates for president and vice president qualify to have their names printed on the general election ballot. If we are speaking of an established political party candidate, the party *shall* nominate by primary election. A political party under Arkansas law is defined as any group of voters which, at the last preceding general election, polled for its candidate for governor in the state or its nominees for presidential electors with at least three percent (3%) of the entire vote cast for the office. In our case, the Democratic and Republican Parties are political parties that are required to nominate by primary election. On the other hand, a new political party formed under our law may nominate by convention if the presidential election is the first general election after the party was certified. Applied in this case, the Populist Party sought to nominate by convention, assuming the political group complied with Arkansas law, especially the petition requirements set out in § 7-8-302(5)(B). That statutory provision dictates that a political group *shall* file with the secretary of state a petition containing the signatures of one thousand (1,000) qualified electors. In the petition, the electors must declare their desire to have printed on the ballot, the names of their candidates for president and vice president.

If the group's petition was found insufficient, the secretary of state must notify the group's designated agent of the deficiencies. Here, that person was Jim Macri. When the notice is delivered, the sponsors (group) have ten (10) days to correct the insufficiency, but any amendments or corrections *shall not* materi-

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[1] *See* Ark. Code Ann. §§ 7-8-301—307 (Repl. 2000 and Supp. 2003).

[2] *See* Ark. Code Ann. § 7-8-302(1)(A) (2003).

ally change and effect the petition, and no changes shall be made in the group's petition except to correct apparent typographical errors or omissions. Once the new political group qualifies by petition to place its candidate on the ballot, the group shall submit a certificate of choice, stating the names of its candidates for president and vice president, signed under oath by the chair, vice chair, or secretary of the new political party's convention.

The Populist Party repeatedly failed to comply with the laws required to establish its party in Arkansas. To begin with, the group seeking to form its party by petition never informed the person signing the petition of the name of the proposed new party sponsoring the group's petition. The group claims such identifying language is unnecessary because its candidates, Ralph Nader and Peter Camejo, were identified as candidates for president and vice president on some of the petitions. However, this procedure and language used by the Populist Party/Better Life Group are improper because this language is used by persons wishing to qualify as an *independent* candidates. The practice used by the Populist Party only confused matters further, because Arkansas does not authorize or permit persons to run for president and vice president as an independent candidate. In Arkansas, one can only run for president if one is selected and certified by a political party's state convention. Thus, because Arkansas law only provides for *party* candidates to have their names printed on the general election ballot, it is vital for the signers of the petition to be informed of the name of the party attempting to qualify so that it can later select its candidate for president and vice president by convention.

Also adding to the confusion in this case, the persons (or group) that first commenced circulating petitions called themselves the Better Life Party; after failing to gather the requisite number of signatures, the group changed its name to the Populist Party of Arkansas. Obviously, the persons who signed the group's initial petitions did not know what party was being formed because no party name appeared on the petitions. This leads one to ask the question, if a person and legal voter signing a petition is asked to sign a petition to establish a new party, shouldn't she or he be apprised of the name of that party? Too, Arkansas law on this subject is designed such that the names of the persons whom the party may select at its convention need not be identified. For example, in 1972, the American Party in Arkansas was previously known as George Wallace's Party. However, when Mr. Wallace could not run for president, the American Party leaders tried to

qualify as a party in Arkansas so it could subsequently select John G. Schmitz as the party's new presidential candidate. The American Party failed to qualify as a party, so Schmitz was never selected. *See American Party of Arkansas v. Brandon*, 253 Ark. 123, 484 S.W.2d 881 (1972). Nonetheless, under Arkansas law, any political group that does qualify may wait to select its presidential candidates when its state convention meets. If a party has no candidate at the time petitions are circulated, or for some reason loses its intended candidates, the new party can still select other candidates to represent it, since it is the political party that selects its presidential candidates.

In the present case, the political group's failure to identify it by name could only lead to confusion and litigation. As noted above, the original petitions were circulated by persons who referred to themselves as the Better Life Group. That group later labeled itself the Populist Party. While this newly named group was referred to as one touting Nader for president, Nader is also a presidential candidate representing the Reform Party in some states. In his presidential bid in 2000, he ran as the Green Party candidate. Nader is now identifying himself as representing the Populist Party, but, again, that party's name did not appear on the petition that the people (legal voters) signed. It is difficult to know which party Mr. Nader represents. Surely some of this confusion could have been eliminated if the petitions circulated had consistently settled on one party and revealed the group's true name *before and during* the time the petitions were circulated. In short, it defies common sense to conclude that a political group's petitions are valid when they neither identify the group, nor indicate to the signers to the petition the name of the group seeking to gain access to the ballot. As stated by the appellants, if this court condones the Populist/Better Life Group's failure to follow Arkansas law and validates that group's circulation of petitions without identifying the political group's name, a political group could obtain the required number of signatures and later disclose the group's name is the Neo-Nazi Party, and its party's name would be listed as such on the ballot. Surely, the persons signing the petition should have the right to know what group they are proposing to be on the ballot. In addition, if this court approves a petition containing only individual candidates' names with no mention of party or group affiliation and finds that permissible, why did the general assembly provide that "*only* political parties or groups" can have access to the presidential ballot?

The Populist Party also violated other requirements needed to place their presidential candidates names on the ballot. As alluded to above, Arkansas law *required* the Populist Party to hold a convention to select, nominate, and certify Nader and Camejo as its candidates. Mr. Macri, the Populist Party's designated agent and party chairman, conceded that he and Mr. Smith actually selected the list of electors, and that Macri said he held a convention via telephone conference call, which included four, five, or six people (electors). Although Mr. Macri could not recall if these electors were actually picked prior to the convention, his description of what happened before his conference call clearly reflects that the electors had been selected by him and Mr. Smith in preparation for the convention. The appellants take umbrage at calling Macri's conference call a nominating convention, and argue that a political convention is "an assembly of delegates chosen by a political party to nominate candidates for an approaching election." Appellants submit that Macri and Smith fell short of such an assembly. Appellants further argue that, if such a sparsely attended phone conference call can be considered a convention, where would the line be drawn?

In conclusion, it is apparent to me from all the evidence that the Populist Party had little staff and workers to perform the legal steps needed to establish a political party in Arkansas. Because of this, the support he did have simply was unable to perform those requirements the law provides to qualify political parties or groups. As a result, confusion prevailed. It is my firm belief that, while the trial court in this case decided Nader's and Camejo's names should not appear on the General Election ballots based on other grounds, I would affirm his order for the reasons set out above.

IMBER and HANNAH, JJ., join this dissent.

ANNABELLE CLINTON IMBER, Justice, dissenting. The central question in this case is the interpretation of one line in Ark. Code Ann. § 7-8-302(5)(B):

> A *political group* desiring to have the names of its candidates for the President and Vice President printed on the ballot shall file a petition with the Secretary of State by noon on the first Monday of August. The petition shall contain at the time of filing the names of one thousand (1,000) qualified electors of the state *declaring their desire to have printed on the ballot the names of their candidate for President and Vice President.*

(Emphasis added.) When interpreting a statute for the first time, we look to the plain language of the statute. *Barclay v. First Paris Holding Co.*, 344 Ark. 711, 718, 42 S.W.3d 496, 500 (2001). Here, the pivotal question is — in the phrase, "their candidate," to whom does the word "their" refer? The trial court interpreted the plain language to mean the signers had to personally endorse Nadar and Camejo as "their" candidates. In doing so, it must have considered the plurality of the pronoun "their" in applying it to the obviously-plural noun, "electors." This interpretation requires an unconstitutional declaration of how one intends to vote. *Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981). As we must construe a statute to be constitutional, if possible, the trial court's interpretation was incorrect. *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003).

Under a plain-language interpretation, however, there is another option. The phrase "their candidate" could refer to the *political group's* candidate. While the "political group" can be a singular noun with the appropriate possessive pronoun "its", the term "political group" is a collective noun and, thus, can also be plural, with the possessive pronoun "their." For example, the jury rendered *its* verdict; but the jury took *their* seats. In this statute, the legislature refers to the candidates of the political group as both "its candidates" and "their candidates," recognizing the collective nature of the noun. *See* Ark. Code. Ann. §§ 7-8-302(1)(A), (5)(E) (2004). Applying this construction to the statute, it reads "the petition shall contain at the time of filing the names of one thousand (1,000) qualified electors of the state declaring the [*qualified electors'*] desire to have printed on the ballot the names of [*the political group's*] candidate." Because this interpretation merely requires that the electors show their support for the *political group's* access to the ballot and not support for the individual candidates, it is a constitutional interpretation.

As the legislature did not intend to allow access to the presidential ballot for individuals, such a construction also gives effect to the intent of the legislature. When a statute is ambiguous, we must interpret it according to the legislative intent. *Barclay v. First Paris Holding Co.*, 344 Ark. at 718, 42 S.W.3d at 500. Moreover, interpreting the statute as requiring individuals to indicate their support of a *political group's* access to the ballot (rather than supporting the access of an individual) advances the overall legislative scheme by requiring a higher level of support for the presidential petitions. While it may be relatively easy to find 1,000 people who are willing to support the ballot placement of one

candidate, it is much more difficult to find 1,000 people who are willing to give that support to a political group. Thus, when looking at section 7-8-302 in connection with section 7-7-103 (dealing with the placement of independent candidates on the ballot), it follows that section 7-7-103 requires significantly more signatures.

Two statutes should always be construed so as to give effect to both, if possible. *Garrett v. Andrews*, 294 Ark. 160, 741 S.W.2d 257 (1987). Our review becomes an examination of the whole act. We reconcile provisions to make them consistent, harmonious and sensible in an effort to give effect to every part. *Barclay v. First Paris Holding Co.*, 344 Ark. at 718, 42 S.W.3d at 500. Requiring that a presidential ballot petition under section 7-8-302 only state the desire of the signers that the named candidates appear on the ballot renders void the legislature's obvious use of very different language in the drafting of these two statutes. We construe the statute so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute if possible. *Id.* While constitutional, the majority's interpretation unnecessarily violates this fundamental tenet of statutory construction.

In light of the above arguments, the correct interpretation of section 7-8-302 is that a petition for a political group's access to the ballot must be signed by 1,000 electors who state their desire to have the political group's candidates placed on the ballot.[1] Accordingly, as the petition in question did not request ballot access for any particular group but merely two individuals, it is invalid under the statute. Because the trial court reached the right result for the wrong reason, I would affirm. *Middleton v. Lockhart*, 355 Ark. 434, 139 S.W.3d 500 (2003).

For the above reasons, I respectfully dissent.

GLAZE and HANNAH, JJ., join this dissent.

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[1] This interpretation is consistent with the standard Presidential Group Candidate Petition form drafted by the Secretary of State's election expert, Mr. Tim Humphries, which specifically requires the name of the political group to be placed on the petition.

ARKANSAS DEMOCRAT-GAZETTE, INC. *v.*
Honorable Ellen B. BRANTLEY, Judge,
George Ferguson, III, *et. al.*

03-1456 194 S.W.3d 748

Supreme Court of Arkansas
Opinion delivered October 7, 2004

Williams & Anderson, PLC, by: Philip S. Anderson, Kelly S. Terry, and Beth Deere, for petitioner.

Mike Beebe, Att'y Gen., by: *Melanie Winslow Hoover*, Ass't Att'y Gen., for respondent.

BETTY C. DICKEY, Justice. This case is about copyrights and the appropriation of private property, and the court hereby grants the petition for writ of certiorari of the Arkansas Democrat-Gazette, Inc.

On May 8, 2002, an automobile owned by Oscar and Debra Finkbeiner, and driven by Nicolas Finkbeiner, struck a car driven by Amanda Ferguson. George Ferguson and Jason Jarvis, passengers in Amanda's vehicle, were injured in the accident. The Arkansas Democrat-Gazette, the only daily newspaper with statewide circulation, sent its award-winning staff photographer, Stephen Thornton, to the accident scene. He took twenty-five photographs of the accident scene, and one was published in the *Arkansas Democrat-Gazette* on May 9. The other twenty-four unpublished images were stored as negatives.

On February 21, 2003, George Ferguson and Jason Jarvis sued Nicholas, Oscar, and Debra Finkbeiner. While the Arkansas Democrat-Gazette was not a party to that lawsuit, the Pulaski County Circuit Court issued a *subpoena duces tecum* on October 16, 2003, ordering Thornton to appear at a deposition and to bring the accident photographs. Samuel Perroni, attorney for Ferguson and Jarvis, assured Thornton that he would pay the reasonable costs associated with the production of the photographs, but Perroni objected when he learned that the fee was $2,425.00. The newspaper's policy provided that photographic prints for litigation would cost $100 per image for unpublished images and $25 for published images, and all unpublished photographs could only be purchased in their entirety, not individually. In the October 29, 2003 motion to quash the *subpoena duces tecum*, the appellant explained this policy: "A request for such photographs is deemed to include all photographs taken at the accident scene at issue in the lawsuit. Purchasers must buy the complete set of such photos. Selected images are not available due to staff time required to sort and meet with prospective buyers to peruse negatives. . . The Democrat-Gazette's charges for unpublished, archived photographs for use in litigation is based on the value of the copyrighted material and the administrative burden of locating, selecting, processing, and delivering the photographic images."

In a hearing on November 10, 2003, Judge Brantley denied the motion to quash, saying:

> And I will tell you, Ms. Deere, you have made, by bringing the copyright issue up to make me less certain of my ruling than I was when I came in here. Because I'll be the first to tell you that I do not know a whole lot about copyrights. I have to count on other people to educate me. And I understand that the newspaper does have ... I mean, I can see a variety of ethics that they have, but I guess ... I mean, as I said, I think a hundred dollars a picture is high but I would not say it is unreasonable. And I also don't think it's really unreasonable to say you've got to buy it all because we don't want you over there taking up our time. And I am going to assume that Mr. Perroni would be fast and decisive and wouldn't cause any trouble, but I can understand some people, if you gave them a choice and they were going to pay a hundred dollars a picture and they had twenty-five pictures to look at, they would move into your office and you would never be able to get them out before they were going to do that.
>
> Nonetheless, as I read Rule 45, you all have information relevant to a lawsuit. Pursuant to a subpoena you have to give it and you can only charge the reasonable cost, is my belief, and I don't think ... so, I'm granting the motion. Now, I'll tell you, it's not without doubt in my mind. And I think it is an important issue and if you all want to take an appeal up I don't . . . I mean, I'll do whatever I can to facilitate that. But give them the pictures and we'll fight about the money later.

On December 22, 2003, the Democrat-Gazette filed a petition seeking a writ of certiorari with this court, which was the most appropriate means available to them. The right of intervention under Ark. R. Civ. P. 24(a) does not apply. Rule 24(a) provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Ark. R. Civ. P. 24(a) (2004).

In *Reynolds v. Sears,* 327 Ark. 770, 940 S.W.2d 483 (1997), this court said that a non-party may enter into a lawsuit under Rule 24 if he has a "protectable interest in the outcome." *Id.* at 776.

However, in order to intervene under Rule 24(a)(2), the party must prove (1) that he has a recognized interest in the subject matter of the primary litigation, (2) that his interests might be impaired by the disposition of the suit, and (3) that his interest is not adequately represented by existing parties. *Medical Park Hospital v. Bancorpsouth Bank,* 357 Ark. 316, 166 S.W.3d 19 (2004) (citing *Billabong Prods. Inc. v. Orange City Bank,* 278 Ark. 206, 208, 664 S.W.2d 594, 595 (1983)). All three requirements must be satisfied. *Pearson v. First National Bank of DeWitt,* 235 Ark. 127, 924 S.W.2d 460 (1996). When satisfied, the court must allow the party to intervene. *Schact v. Garner,* 281 Ark. 45, 661 S.W.2d 361 (1983).

The subject matter of the underlying litigation is a personal injury suit, *Ferguson v. Finkbeiner.* The Arkansas Democrat-Gazette has no recognized interest in this lawsuit. It merely has pictures that Plaintiff's counsel wishes to obtain for help with his trial. Should the Arkansas Democrat-Gazette have filed a motion to intervene in the lawsuit, the motion would have been denied since they are unable to satisfy the three mandatory elements laid out above, as required by our case law.

Further, permissive intervention under Ark. R. Civ. P. 24(b) does not apply to the facts of this case. Rule 24(b) states in part:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

Ark. R. Civ. P. 24(b)(2004). Absent a statutory conditional right of intervention, Rule 24(b)(2) only applies where there is a common question of law or fact in the main action. *Id.*

The Arkansas Democrat-Gazette's interest in the lawsuit is in its photos. Notably, the dispute over the photos and the personal injury lawsuit have no relationship. Because there is not a common question of law or fact between the Arkansas Democrat-Gazette's claims and the main action, the Arkansas Democrat-Gazette would not have been allowed to permissively intervene.

Traditionally, in addressing exclusive discovery issues, the court does not grant a non-party's petition for writ of certiorari. For example, in *Lupo v. Lineberger,* 313 Ark. 315, 855 S.W.2d 293

(1993), the court said that a writ of certiorari was not appropriate for a physician, a non-party expert, who was subpoenaed and required to testify in depositions. The court said that under Ark. R. Civ. P. 26(a), a party has an absolute right to take a deposition. Further, at depositions, the deponent has the right to not answer or the right to seek a protective order under Rule 26(c). These options available to the deponent, in return, do not "take away from the trial court's jurisdiction to sit and pass judgment on each one of the issues raised during discovery." *Id.* at 320 (upholding the line of cases that support a trial court's broad discretion to decide discovery issues. *Ballard v. Martin,* 349 Ark. 564, 585, 79 S.W.3d 838, 851 (2002); *Banks v. Jackson,* 312 Ark. 232, 239, 848 S.W.2d 408, 412 (1993)).

In addition, this court has also said that discovery issues are interlocutory and not appealable. *Ford Motor Company v. Harper,* 353 Ark. 328, 331, 107 S.W.3d 168,170 (2003); *Farm Service Co-Op of Fayetteville v. Cummings,* 262 Ark. 810, 814, 561 S.W.2d 317, 319 (1978).

The central question in the cases mentioned above concerns the production of discovery, which is not the problem in this case. In sum, for a fee, the Arkansas Democrat-Gazette is willing to comply with the discovery (production) request. While this case does raise an interesting discovery problem under Rule 45, the crux of this case centers around how federal copyright law interplays with Rule 45. Instead of a mere discovery issue, this case is about the control of the copyrighted photos. Because of the unique copyright issue and potential copyright infringement, a writ of certiorari is appropriate.

Moreover, Ark. R. Civ. P. 60(k) does not provide the Arkansas Democrat-Gazette with a more appropriate procedural path. Rule 60(k) states in part:

> *Independent Action to Set Aside Judgment — Writs Abolished.* A motion under this rule does not affect the finality of a judgment or decree or suspend its operation, except as provided herein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment who was not actually personally served with process or to set aside a judgment or decree for fraud upon the court.

The annotation to this rule suggests that the purpose of this rule, following the path of the Federal Rules, is to permit a court to entertain an independent action in order to relieve a party from

judgment. *Bankers Mortgage Co. v. United States,* 423 F.2d 73 (C.C.A. 5th Cir. 1970). In *In Re $3,166,199,* 337 Ark. 74, 987 S.W.2d 663 (1999), this court recognized additional ways that a non-party may use to gain standing to seek appellate review other than through Rule 24 intervention and Rule 19 joinder. The first matter is under Rule 60(k), "which provides that an independent action may be filed to relieve a person from judgment who was not actually served with process." *Id.* at 79 (citing *Arkansas Department of Human Service v. Bailey,* 318 Ark. 374, 885 S.W.2d 677 (1994)).

Rule 60(k) does not apply to this action brought by the Arkansas Democrat-Gazette. There was not a judgment entered in this case. Further, should the Arkansas Democrat-Gazette have waited for a judgment, the Arkansas Democrat-Gazette would not be affected by the judgment of the underlying lawsuit. For lack of a better analogy, the Arkansas Democrat-Gazette had no dog in this fight. They simply wish to protect their copyrighted photos. The function of Rule 60(k) is to protect non-parties who have been adversely affected by a judgment. The Arkansas Democrat-Gazette's injury stems solely from the potential copyright infringement.

Finally, the Arkansas Democrat-Gazette may not appeal because of its pecuniary interest, and even if it could, it may still be granted a writ of certiorari. As noted above, this court has recognized two alternative methods, other than Rule 24 intervention and Rule 19 joinder, that a non-party may use to gain standing to seek appellate review. *In Re $3,166,199,* 337 Ark. 74, 987 S.W.2d 663 (1999). The first way, as discussed above, is Rule 60(k). "The other circumstance is the set of facts where any appellant, though not a party, has a pecuniary interest affected by the court's disposition of the matter below." *Id.* at 79.

This court has recognized, in *In the Matter of Allen,* 304 Ark. 222, 800 S.W.2d 715 (1990), this long-standing exception to the general standing rules for one who is pecuniarily affected by a judgment. In *Arkansas State Highway Commission v. Perrin,* 240 Ark. 302, 399 S.W.2d 287 (1966), this court said that there was standing for the non-party to litigation, the Highway Commission, to seek appellate review because it had been pecuniarily affected by a previous judgment without notice. Further, the court said that a party aggrieved by a judgment has a right of appeal, though he is not a party to the record. *Id.* at 306 (citing *Ouachita Baptist College v. Scott,* 64 Ark. 349, 42 S.W. 536 (1897); *Brown v. Frenken,* 87 Ark. 160, 112 S.W. 207 (1908)).

As a result of these cases, the exception to the standing rule for appellate review is applied only where a non-party's pecuniary interest is affected by a judgment. The Arkansas Democrat-Gazette would never be pecuniarily affected by the judgment of the underlying litigation. As stated above, it has absolutely no interest in the underlying litigation. It merely seeks protection for its copyrighted photos. For these reasons, this rule would not apply to the Arkansas Democrat-Gazette. Their only recourse is by petition for writ of certiorari.

In the alternative, this court has granted writs of certiorari despite a non-party's option to appeal post-judgment. *Arkansas Public Defender Commission v. Greene County Circuit Court,* 343 Ark. 49, 32 S.W.3d 470 (2000). In the *Greene County* case, the court did not preclude the petitioner from seeking a writ of certiorari even though petitioner would have a pecuniary interest affected by the circuit court's judgment. Specifically, we noted in *Greene County* that, in addition to seeking a writ, the petitioner also could have appealed as a non-party with a pecuniary interest. As a result, case law has provided a non-party with two alternatives: through writ of certiorari and by appeal as a party with a pecuniary interest in the judgment.

The question, then, is whether Judge Brantley erred and exceeded her authority and committed a plain, manifest, clear, and gross abuse of her discretion by refusing to quash the subpoena. Petitioner Arkansas Democrat-Gazette argues that "Judge Brantley's order is a plain, clear, and gross abuse of discretion because it abrogates the Democrat-Gazette's property rights, i.e. copyrights, by requiring the Democrat-Gazette to create and produce photographic prints for use in a lawsuit to which it is not a party, while prohibiting it from recovering reasonable compensation for the use of its intellectual property." We agree.

It is undisputed that the photographic images are copyrighted works and the Democrat-Gazette owns the copyrights to them. Judge Brantley's order permits plaintiffs in the underlying lawsuit access to the Democrat-Gazette's valuable intellectual property, the photographs, without paying for them.

The owner of a copyright has certain exclusive rights in the copyrighted material. 17 U.S.C.A. § 106, provides:

> Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C.A. § 106.

"This is copyrighted material . . . we're not talking about xeroxing off some stack of documents," Arkansas Democrat-Gazette counsel argues, and this court agrees that requiring the newspaper to give the photographs to Mr. Perroni's clients without paying the Democrat-Gazette's price is an abrogation of its right to sell its copyrighted material.

In *Images Audio Production v. Perini Building Company, Inc.*, 91 F.Supp.2d 1075, (E.D. 2000), the United States District Court of Michigan wrote:

> Yet, the Court cannot ignore the important distinction between copyrighted works that happen to capture information that proves relevant to subsequent litigation, and works that are intended to capture such information, specifically for the purpose of litigation. In the latter case, where judicial proceedings are one of the intended markets, the copyright holder is entitled to exercise control over the use of his works within this market; the fair use doctrine does not

> require the wholesale abandonment of copyright protection at the courthouse door. Because it does not, it is irrelevant whether Plaintiff demanded an excessive price for additional copies of its photos, or whether it could have been more reasonable in permitting reproduction in color photocopies rather than photographic reprints. As a copyright holder, Plaintiff generally was under no obligation to be reasonable. Rather, beyond establishing the contours of the rights conferred, copyright law leaves such considerations of "reasonableness" to be governed by traditional market principles.

Images Audio Production, 91 F.Supp.2d at 1086-1087.

While *Images Audio Production* involves the "fair use doctrine," the principles discussed are applicable to this case. Arkansas Rule of Civil Procedure 45(b) reads:

> (b) For Production of Documentary Evidence. A subpoena issued pursuant to subdivision (d), (e), or (f) of this rule may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable or oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

Rule 45 does not mention the fair use doctrine, only reasonable cost; however, Rule 45 can still be read in harmony with copyright law. As a holder of a copyright, the Democrat-Gazette is granted certain exclusive rights, including the right to sell copyrighted material. Judge Brantley was without authority to require the Arkansas Democrat-Gazette to give Mr. Perroni's clients the photographs or to adjust its pricing policy. She did not consider copyright protection in her ruling, only the reasonableness of the pricing policy. After stating, "And I will tell you, Ms. Deere, you have made, by bringing the copyright issue up to make me less certain of my ruling than I was when I came in here," Judge Brantley ruled, "Nonetheless, as I read Rule 45, you all have information relevant to a lawsuit. Pursuant to a subpoena you have to give it and you can only charge the reasonable cost . . ."

Barry Arthur, the Assistant Managing Editor for Photos and Electronic Media, testified that retrieving unpublished images

involves considerably more effort than reprinting an image that has already been published. Arthur also testified that "the newspaper is staffed at the level necessary to cover the news efficiently and effectively, and that any added duties, such as sitting at a computer terminal or light table with attorneys . . . would impede the newspaper's ability to perform its primary function of gathering news."

A California district court held that a "non-party to the litigation established that responding to discovery requests would involve substantial personnel hours which might otherwise be devoted to profitable use. Thus, the court held that the non-party was entitled to compensation." *Compaq Computer Corp. v. Packard Bell Electronics, Inc.*, 163 F.R.D. 329 (N.D. Cal. 1995). However, *Compaq Computers* goes on to state that non-parties "should not be forced to subsidize an unreasonable share of costs of litigation," and that the company "is entitled to be compensated at a reasonable hourly rate for its employees' . . . time in searching for, reviewing for privileged material and producing responsive documents. . ."

In *The Grand Forks Herald v. The District Court in and for Grand Forks County,* 322 N.W.2d 850 (N.D. 1982), a plaintiff brought a civil action to determine the liability from an automobile accident and sought to compel disclosure of unpublished photographs of the accident scene taken by a staff photographer for *The Grand Forks Herald*, a non-party to the litigation. In that case, the court held that the trial court did not abuse its discretion in ruling that the newspaper turn over the photographs. However, there the photos were the only available means to discover whether the plaintiff was negligent, and, *The Grand Forks Herald* refused to make its unpublished photographic images available at any prices. Here, the Arkansas Democrat-Gazette has an established policy for the sale of photographs, and the underlying plaintiffs made no showing of need for the photographs to prove negligence.

■ The Arkansas Democrat-Gazette has a pricing policy regarding published and unpublished photographs, and Judge Brantley found that neither the price nor the complete-set requirement was unreasonable. Because her decision was based solely on Rule 45, rather than compatibility with relevant copyright law, this court grants the Arkansas Democrat-Gazette's petition for writ of certiorari.

GLAZE, J., dissents.

TOM GLAZE, Justice, dissenting. Over a decade ago, this court clarified Arkansas law regarding whether the extraordinary writs of prohibition or certiorari could lie in discovery matters. This court said "no" in the case of *Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (1993) (court held the writ of certiorari would not lie to prevent the trial court's order to require a nonparty physician, Dr. Lupo, to testify by deposition as an expert witness in a suit filed against another physician). Our court has steadfastly adhered to its holding in *Lupo* since 1993. The majority court's decision will be difficult to explain when this court is again asked to issue a writ of certiorari in a discovery matter. The bright-line rule set out in *Lupo* is no longer clear.

In the case of *Conner v. Simes*, 355 Ark. 422, 139 S.W.3d 476 (2003), our court reviewed its cases pertaining to writs of certiorari and explained why this court has held such writs do not lie in discovery issues.[1] The court in *Conner* reiterated the standards for determining the propriety of a writ of certiorari as follows:

> A writ of certiorari is extraordinary relief, and we will grant it *only when there is a lack of jurisdiction, an act in excess of jurisdiction on the face of the record, or the proceedings are erroneous on the face of the record.* In determining its application, *we will not look beyond the face of the record* to ascertain the actual merits of a controversy, or *to control discretion, or to review a finding of fact, or to reverse a trial court's discretionary authority.* A writ of certiorari lies only where it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion, and there is no other adequate remedy.

(Emphasis added.)

In the present case, the plaintiffs sued the defendants, alleging the defendants' negligence caused (1) the collision between their two vehicles, and (2) the injuries the plaintiffs sustained. Plaintiffs sought discovery by subpoenaing the *Arkansas Democrat-*

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[1] The majority opinion reads that, while this case raises an interesting discovery problem under Rule 45, it is not merely a discovery issue because of the unique copyright the *Democrat-Gazette* owns in its news photographs that the newspaper stores. However, this unquestionably involves a discovery matter, commenced by the plaintiffs seeking photo evidence of the scene of the parties' accident. In short, the issue raised by the *Democrat-Gazette* is all about money: Can the newspaper charge a fee for its photographs that will include its copyright costs?

Gazette's news photographer, Stephen Thornton, to bring to a deposition the twenty-five photos Thornton had taken of the aftermath of the scene of the parties' accident. Neither Thornton nor the *Democrat-Gazette* was a party to the lawsuit. Plaintiffs' counsel offered to pay a reasonable fee for the production of the photos, but, when Thornton said the fee would be $2,425.00, plaintiffs' counsel objected. The newspaper then moved to quash the subpoena, which the trial judge denied. The judge directed the newspaper and Thornton to provide plaintiffs the photos, and concluded by saying, "We will fight about the money later."

The situation now before us is most similar to *Lupo*. In *Lupo*, the plaintiffs had filed suit against defendants, and in preparation for trial, plaintiffs' counsel subpoenaed Dr. Lupo, who was not a party to the lawsuit. In fact, Lupo was an involuntary expert witness who subsequently filed a petition for a writ of certiorari from our court to prevent the trial court from ordering him to testify at any deposition. The *Lupo* court denied certiorari, stating that, under Ark. R. Civ. P. 26(a), a party has an absolute right to take a deposition and if the deponent is asked questions that are inappropriate or unreasonable, he has a right to refuse to answer the questions and request a protective order. In addition, under Rule 26(c), upon motion by a party *or by the person from whom discovery is sought*, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party *or person* from annoyance, embarrassment, oppression, *or undue burden or expense*. (Emphasis added.) While our general rule is that this court cannot act upon an appeal taken by one not a party to the action below, there is an equally long-recognized exception to the general rule for one pecuniarily affected by a judgment. *See In the Matter of Cindy Lee Allen*, 304 Ark. 222, 800 S.W.2d 715 (1990). It is clear that, while the *Democrat-Gazette* and Thornton may not be entitled to an interlocutory appeal, unless the trial court grants an appeal under Rule 54(b), they may appeal at the end of the trial when the trial court enters a final judgment and order in the case.

Here, though the *Democrat-Gazette* and Thornton did not request a protective order, the trial judge made it clear that she would consider the reasonable fee issue later. Clearly, the trial court has the authority to protect the newspaper's and Thornton's interests, and, at the same time, permit the plaintiffs to have the necessary photos to help plaintiffs make their case against the defendants. For example, the trial judge could require a sufficient

amount be placed in the registry of the court to cover all contingencies; when the trial judge later determines a reasonable fee amount, the amount necessary to cover the costs in reproducing the required photos will be available. If the *Democrat-Gazette* disagreed with the trial court, the newspaper could clearly appeal the trial court's ruling at the trial's end.

Everyone agrees that the *Democrat-Gazette* is not seeking to withhold the photographs from the plaintiffs, but, instead, it merely seeks to include the value of its copyright when figuring the fee amount for its photos. The trial judge plainly has the discretion to determine what a reasonable fee would be in this case. Certiorari is not available when (1) there is another adequate remedy, such as an appeal, and (2) the challenged decision is one within the discretion of the trial court. *See Manila School Dist. No. 15 v. Wagner*, 357 Ark. 20, 159 S.W.3d 285 (2004).

For the reasons above, I would deny certiorari.

Kuntrell O'Bryan JACKSON *v.* STATE of Arkansas

CR 04-45 194 S.W.3d 757

Supreme Court of Arkansas
Opinion delivered October 7, 2004

Charles E. Ellis, Deputy Public Defender, for appellant.

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

BETTY C. DICKEY, Chief Justice. Kuntrell Jackson appeals his judgments of conviction for capital felony murder and aggravated robbery and his sentence of life without parole. He contends that the trial court erred in: (1) denying his motion to suppress; (2) denying his motion for a directed verdict; and (3) instructing the jury on the affirmative defense to first-degree murder. Because this is a criminal appeal in which the death penalty or life imprisonment has been imposed, jurisdiction is proper pursuant to Ark. Sup. Ct. R. 1-2(a)(2). We find no merit to Jackson's allegations of error and affirm the convictions.

Facts

On the evening of November 18, 1999, the appellant, Kuntrell Jackson was walking with Derrick Shields and Travis Booker through the Chickasaw Courts housing project in Blytheville and began discussing the idea of robbing the Movie Magic video store. On the way to Movie Magic, the appellant became aware of the fact that Shields was carrying a sawed-off .410 gauge shotgun in his coat sleeve. When they arrived at the store Shields and Booker went in, while the appellant elected to remain outside by the door. Shields pointed the shot gun at the video clerk, Laurie Troup, and demanded that she "give up the money." Troup told Shields that she didn't have any money. A few moments later, Jackson went inside. Shields demanded that Troup give up the money five or six more times, and each time she refused. After Troup mentioned something about calling the police, Shields shot her in the face. The three boys then fled to Jackson's house without taking any money. Later, Jackson jokingly told his classmates he was responsible for the Movie Magic incident. At trial, he denied any culpability, and admitted he had lied in his earlier statement to the police that the three of them went their separate ways after the shooting.

On March 7, 2000, Detective Ross Thompson of the Blytheville Police Department spoke with Jackson, who was in custody on an unrelated charge. Thompson advised the appellant of his *Miranda* rights and questioned him about the Movie Magic incident, because of some statements that Detective Thompson had previously obtained. In his statement, which was made without any coercion or promises to him, the appellant denied the allegations that he had anything to do with the shooting at Movie Magic. On March 28, 2001, after securing an arrest warrant in connection with the murder at the video store, both Detective

Thompson and Detective Gary Buys of the Blytheville Police Department questioned Jackson again at the juvenile detention facility in Colt, Arkansas, where the appellant was being held on yet another unrelated charge. Once again, Thompson advised Jackson of his rights, offering no promises to him, and the appellant gave another uncoerced statement. After verbally explaining what happened, Jackson gave a written statement which said, "Derrick shot the lady. That's all I'm saying." The appellant refused to say anything else until he could speak with his mother. He was then taken back to Blytheville, where he later asked to speak with Detective Buys. After again being given the same *Miranda* rights as an adult, Jackson gave an uncoerced and tape-recorded statement about the robbery and shooting at the video store. Again, the detectives neither coerced nor made promises to him.

In a pre-trial suppression hearing, Jackson requested that the trial court suppress his prior statements, but his *motion in limine* was denied. At the conclusion of the State's case- in-chief, and at the conclusion of the trial, he moved for a directed verdict. Both motions were denied. Jackson was convicted of both capital murder and aggravated robbery. He was sentenced to life in prison on the capital murder conviction, but he was not sentenced on the robbery conviction. Jackson brings three points on appeal: (1) whether the trial court erred in denying his motion to suppress; (2) whether the trial court erred in denying his motions for a directed verdict; and, (3) whether the trial court erred in instructing the jury concerning an affirmative defense to first-degree murder.

Directed Verdict

Jackson asserts that the trial court erred in denying his motions for a directed verdict because he did not participate in the commission of either the robbery or the shooting to a degree which would support a finding of guilt. We disagree. Appellant actually raises this issue as his second point on appeal, because of double-jeopardy concerns, however, we will address his sufficiency-of-the-evidence argument first. *See Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). When a defendant makes a challenge to the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the State. *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000); *Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999); *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998); *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998). It is well-settled that a motion for a directed verdict is a challenge to

the sufficiency of the evidence. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002); *Smith v. State*, 346 Ark. 48, 55 S.W.2d 251 (2001)(citing *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995)). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Smith, supra.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Smith, supra.* Only evidence supporting the verdict will be considered; when a challenge to sufficiency of the evidence is reviewed, the conviction will be affirmed if there is substantial evidence to support it. *Smith, supra.*

In order to convict the appellant of capital murder, the State had to prove that Jackson attempted to commit or committed an aggravated robbery and, in the course of that offense, he, or an accomplice, caused Ms. Troup's death under circumstance manifesting an extreme indifference to the value of human life. *See*, Ark. Code. Ann. § 5-10-101(a)(1)(Repl. 1997). However, section (b) of the capital murder statute provides:

> (b) It is an affirmative defense to any prosecution under subdivision (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid in its commission.

Ark. Code. Ann. § 5-10-101(b) (Repl. 1997). Jackson avers he carried his burden of proof on the affirmative defense capital murder in that he was not the only participant in the crime, and he did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid in its commission. It is undisputed that Jackson was not the only participant, and there is no question that Shields was the one who shot Ms. Troup. However, there is some contention as to whether Jackson aided, solicited, or encouraged the robbery or murder.

[redacted] Specifically, there is a question of fact as to whether Jackson said "We ain't playin' " or "I thought you all was playin' " upon entering the store. An earlier statement given by Booker reported that the appellant said, "We ain't playin'." However, at trial, Booker recanted, and both he and the appellant testified that Jackson said, "I thought you all was playin'." This court has held that it is within the province of the jury to accept or reject testimony as it sees fit. *Riggins v. State*, 317 Ark. 636, 882 S.W.2d

664 (1994). Moreover, this court has held that we do not attempt to weigh the evidence or pass on the credibility of witnesses. That duty is left to the trier of fact. *Harris v. State*, 331 Ark. 353, 961 S.W.2d 737 (1998). Based on the facts of this case, the jury was well within its right to believe Booker's earlier statement to the police rather than accept his testimony at trial, and thus find that Jackson did, in fact, in some way solicit, command, induce, procure, counsel, or aid in the commission of the crime *sub judice*. Accordingly, we hold that the evidence presented at trial is sufficient to support Jackson's conviction, and we affirm the trial court on this point.

Motion to Suppress

Next, Jackson contends, because he was a juvenile at the time he was questioned, the trial court erred in denying his motion to suppress statements given to the police. He contends the officers did not comply with the protections afforded him by Ark. Code Ann. § 9-27-317, in that they failed to advise him of his *Miranda* rights in his own language, and they failed to inform him of his right to have a parent present during questioning. In cases involving a trial court's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances. *Grillot, supra*. Because Ark. Code Ann. § 9-27-317(i)(2)(A) and (B) had not yet been enacted at the time he was questioned on March 7, 2000, or March 28, 2001, Jackson's reliance upon § 9-27-317 is misplaced. Although the statute in question was enacted in April 2001, we have a duty to construe statutes as having only a prospective operation unless the purpose and intention of the legislature to give them a retroactive effect are expressly declared or necessarily implied by the language used. *Littles v. Flemings*, 333 Ark. 476, 970 S.W.2d 259 (1998). Since the statute in question contained neither an emergency clause nor any language indicating that it was to be applied retroactively, we hold that it can only be applied prospectively.

In addition, this court has recently held that § 9-27-317(i) does not apply where a juvenile has been charged as an adult. *Shields v. State*, No. CR 03-866, slip op. (May 6, 2004); *Jenkins v. State*, 348 Ark. 686, 75 S.W.3d 180 (2002); *Ray v. State*, 344 Ark. 136, 40 S.W.3d 243 (2001). Because, Jackson was charged as an adult, he cannot avail himself of the protections of § 9-27-317 (Repl. 2002). Nonetheless, Jackson argues that we

should overturn controlling precedent because under the current state of the law, it is the police, rather than the prosecutors who decide whether or not a juvenile is to be tried as an adult. Jackson cites to no authority which would allow us to overturn our precedent, and it is well-settled that we will not consider an argument that presents neither citation to authority nor convincing argument. *Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2002); *see also Hollis v. State*, 346 Ark. 175, 55 S.W.3d 756 (2001). Accordingly, we decline his invitation to overturn our prior case law and affirm on this point.

Jury Instruction

For his final point on appeal, Jackson asserts that, by instructing the jury on the affirmative defense to first-degree murder, the trial court confused the issue and presented an insurmountable and unnecessary burden. The affirmative defense to murder in the first degree is as follows:

> (b) It is an affirmative defense to any prosecution under subdivision (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant:
>
> (1) Did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid its commission; and
>
> (2) Was not armed with a deadly weapon; and
>
> (3) Reasonably believed that no other participant was armed with a deadly weapon; and
>
> (4) Reasonably believed that no other participant intended to engage in conduct which could result in death or serious physical injury.

Ark. Code Ann. § 5-10-102(b) (Repl. 1997). We have held that a party is entitled to an instruction on a defense if there is sufficient evidence to raise a question of fact or if there is any supporting evidence for the instruction. *Kemp v. State*, 348 Ark. 750, 74 S.W.3d 224 (2002); *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996). Jackson insists, given the fact he knew Shields was armed, there was no way that he could have met his burden on the third element of the affirmative defense. And, by giving the instruction, the trial court made it impossible for the jury to consider the issue of guilt or innocence on the charge of murder in the first degree.

The State contends that, even if the trial court erred in giving the instruction, any error was harmless. We agree. The trial court instructed the jury on capital murder and then instructed the jury on murder in the first degree and its affirmative defense. The court instructed the jury that, unless it had a reasonable doubt of the appellant's guilt on the charge of capital murder, it was not to consider the charge of murder in the first degree; and it was not to consider the affirmative defense to murder in the first degree unless and until it determined that he had committed that offense. Because the jury found Jackson guilty of capital murder, it could not consider the charge of murder in the first degree nor its affirmative defense. Accordingly, we hold that any error the trial court might have committed in instructing the jury on the affirmative defense murder in the first degree was harmless, and we also affirm the trial court on this point.

Rule 4-3(h) Review

The record has been examined in accordance with Ark. Sup. Ct. R. 4-3(h), and the objections have all been abstracted and certified by the State. There are no other rulings adverse to the appellant which constituted prejudicial error.

Affirmed.

Lee Edward STOKES, Jr. *v.* STATE of Arkansas

CR 04-229 194 S.W.3d 762

Supreme Court of Arkansas
Opinion delivered October 7, 2004

[Rehearing denied October 28, 2004.]

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

Mike Beebe, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant Lee Stokes was convicted on one count of capital murder and two counts of first-degree battery. Stokes was sentenced to life in prison without parole for the murder and ten years' imprisonment for each of the battery convictions, to run concurrent with the life sentence. On appeal, Stokes does not challenge the sufficiency of the State's evidence leading to his convictions, but instead argues that the trial court erred in denying his *Batson* challenge to the prosecution's peremptory strike exercised against African-American veniremen.

During voir dire, the State used peremptory challenges to strike two black venirepersons from the jury panel. The defense objected and argued that the State's use of its peremptory challenges was in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). In determining whether such a violation has occurred, we apply a three-step analysis. *Holder v. State*, 354 Ark. 364, 124 S.W.3d 439 (2003), citing *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998). The first step requires the opponent of the peremptory strike to present facts that show a prima facie case of purposeful discrimination. *Id.* at 378, 124 S.W.3d at 449. In *MacKintrush*, this court held that this first step is accomplished by showing the following: (a) the opponent of the strike shows he is a member of an identifiable racial group; (b) the strike is part of a jury-selection process or pattern designed to discriminate; and (c) the strike was used to exclude jurors because of their race. *MacKintrush*, 334 Ark. at 398, 978 S.W.2d at 296. Once a prima facie case of discrimination has been shown, the process moves to

the second step, wherein the burden of producing a racially neutral explanation shifts to the proponent of the strike. *Holder, supra.* If a race-neutral explanation is given, the inquiry proceeds to the third step, in which the trial court must decide whether the opponent of the strike has proven purposeful discrimination. *Id.*

The *Batson* issue first arose after Mr. Jones's name was drawn as a potential juror. The State immediately informed the court that it intended to strike venireman Jones without questioning him because he had previously been on a hung jury. The State's explanation follows:

> THE STATE: We had a murder case here — and, of course, we keep up with all this stuff — where it hung eleven-to-one, and three or four of the jurors called us and said Mr. Jones refused to deliberate. He wouldn't even consider, wasn't going to convict, and so there's no way I'm going to sit him. So I'm going to move to strike him right now based on what I've got.
>
> But I wanted to let the defense attorney know, it's not out of some arbitrary reason; it's because it was eleven-to-one. Three jurors called us and said this juror refused to even deliberate on it. It was a murder case.

After the State announced that it would be striking Jones, Stokes questioned Jones for the record, eliciting his testimony that he had recently served on a criminal jury, that he would be able to resolve the case on the facts and the law, and that he would follow the judge's instructions on the law, even if they conflicted with his personal views. Stokes then made his *Batson* challenge by questioning the reliability of the information concerning Jones's prior jury service in another murder trial[1].

After the trial court ruled that Stokes had made a prima facie showing of racial discrimination, the State proceeded to give its racially-neutral reasons for exercising its strikes. With respect to both venirepersons Brown and Jones, the following colloquy occurred:

> THE DEFENSE: Well, Your Honor, under *Batson*, Mr. Brown and Mr. Jones have both been black or African-

[1] Prior to Jones, the State had exercised a peremptory challenge against venireperson Brown.

American jurors, and I think it looks like a pattern of striking blacks. They've used half their strikes on black jurors at this point. And my client is black. And I think that has created a sufficient *prima facie* case that they should give a race-neutral reason —

THE COURT: Well, I don't have to have anything further about the current situation. I have some genuine concerns myself . . . just based upon what I know about the previous situation.

But I would like to hear an explanation for why Mr. Brown was stricken with the very limited number of questions that were asked.

THE STATE: First of all, there are two African-Americans on the jury. We've had four strikes. Only two of our strikes have been African-American. And Mr. Brown has a seventh-grade education, and he seemed kind of quiet — nice, but he just seemed not very responsive, a little quiet. And using a peremptory strike on capital murder, I wanted to be careful, and that's why I did it.

THE COURT: All I asked for was some explanation and I find that to be satisfactory, so I will deny your *Batson* challenge for the record.

The trial court ruled that the reasons given by the State for striking each venireperson were racially neutral and overruled Stoke's *Batson* challenge.

In *MacKintrush v. State, supra,* we quoted the United States Supreme Court decision in *Purkett v. Elem,* 514 U.S. 765 (1995) (per curiam), that a race-neutral explanation need not be persuasive or even plausible. 334 Ark. at 398, 978 S.W.2d at 296. Unless discriminatory intent appears in the prosecution's explanation, the reason given will be considered race neutral. *Hernandez v. New York,* 500 U.S. 352, 360 (1991). Furthermore, we will only reverse a trial court's finding on a *Batson* objection when the trial court's decision was clearly against the preponderance of the evidence. *Holder, supra.* In *Pacee v. State,* 306 Ark. 563, 816 S.W.2d 856 (1991), we upheld a prosecutor's peremptory strikes against a *Batson* challenge where potential jurors had served on panels that either acquitted criminal defendants or had resulted in hung juries.

Id. at 565-576, 816 S.W.2d at 858-859. The *Pacee* court further held that there was "no reason why [the State's race-neutral] ground, if sufficient, must be developed by question and answer." *Id.* at 567, 816 S.W.2d at 859.

In this appeal, Stokes alternatively argues that the trial court erred in denying his *Batson* challenge because the factual basis for the strike was unverifiable by the trial judge as a matter of law. Stokes argues that under Ark. R. Evid. 606(b), which bars jurors from testifying about the jury deliberations, the court could not verify the State's contention that Mr. Jones had been the impetus of a previously hung jury. This argument is raised for the first time on appeal; therefore, it will not be considered because the trial court never had an opportunity to rule on it. *London v. State*, 354 Ark. 313, 125 S.W.3d 813 (2003). Furthermore, an appellant may not change his grounds for objection on appeal. *See Wooten v. State*, 325 Ark. 510, 515, 931 S.W.2d 408, 411 (1996). Given the proof and record before us, the trial court's ruling on the *Batson* issue was unquestionably correct.

Because Stokes was sentenced to life in prison, the record has been examined for all objections, motions, and requests made by either party that were decided adversely to the appellant, and no error has been found. *See* Ark. Sup. Ct. R. 4-3(h).

Affirmed.

Ronald A. MAY, Susan E. May, and Gayle Bradford *v.*
Charlie DANIELS, in his Official Capacity as Secretary of State
of the State of Arkansas

Jerry Cox and Chris Stewart, Individually and on Behalf of the
Arkansas Marriage Amendment Committee, *Intervenors*

04-895 194 S.W.3d 771

Supreme Court of Arkansas
Opinion delivered October 7, 2004

N. M. Norton and *Blake S. Rutherford*, on behalf of the Arkansas Civil Liberties Union Foundation, Inc.; and Arkansas Civil Liberties Union Foundation, Inc., by: *Griffin J. Stockley*, for petitioners.

Mike Beebe, Att'y Gen., by: *Timothy G. Gauger*, Sr. Ass't Att'y Gen., for respondent.

Martha Adcock, for intervenors Arkansas Marriage Amendment Committee.

DONALD L. CORBIN, Justice. Petitioners Ronald A. May, Susan E. May, and Gayle Bradford have filed an original action asking this court to declare the popular name and ballot title of Proposed Amendment 3 insufficient and to enjoin Respondent Arkansas Secretary of State Charlie Daniels from placing the measure on the ballot for the November 2, 2004 General Election. The proposed amendment is sponsored by Intervenors Jerry Cox and Chris Stewart, acting individually and on behalf of the Arkansas Marriage Amendment Committee. Our jurisdiction to determine this matter is pursuant to Amendment 7 to the Arkansas Constitution and Ark. Sup. Ct. R. 6-5(a). We deny the petition.

The text of Proposed Amendment 3 is as follows:

SECTION 1: Marriage

Marriage consists only of the union of one man and one woman.

SECTION 2: Marital Status

Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the Legislature may recognize a common law marriage from another state between a man and a woman.

SECTION 3: Capacity, rights, obligations, privileges, and immunities

The Legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage.

The initiative's popular name is "AN AMENDMENT CONCERNING MARRIAGE." Its ballot title, which mirrors the text of the initiative, is as follows:

> A PROPOSED AMENDMENT TO THE ARKANSAS CONSTITUTION PROVIDING THAT MARRIAGE CONSISTS ONLY OF THE UNION OF ONE MAN AND ONE WOMAN; THAT LEGAL STATUS FOR UNMARRIED PERSONS[1] WHICH IS IDENTICAL OR SUBSTANTIALLY SIMILAR TO MARITAL STATUS SHALL NOT BE VALID OR RECOGNIZED IN ARKANSAS, EXCEPT THAT THE LEGISLATURE MAY RECOGNIZE A COMMON LAW MARRIAGE FROM ANOTHER STATE BETWEEN A MAN AND A WOMAN; AND THAT THE LEGISLATURE HAS THE POWER TO DETERMINE THE CAPACITY OF PERSONS TO MARRY, SUBJECT TO THIS AMENDMENT, AND THE LEGAL RIGHTS, OBLIGATIONS, PRIVILEGES, AND IMMUNITIES OF MARRIAGE.

On March 12, 2004, the Attorney General issued an opinion approving the popular name and ballot title and concluding that they accurately and impartially summarize the provisions of the

[1] The letter of certification from Respondent Secretary of State uses the singular "PERSON," while the Attorney General's opinion, No. 2004-081, uses the plural "PERSONS." The parties use the plural term; hence, we will do so as well.

proposed amendment. That same date, Respondent also certified the sufficiency of the popular name and ballot title. Thereafter, Intervenors collected sufficient signatures to place the proposed amendment on the ballot. On July 22, Respondent announced that the signatures were sufficient and certified the proposed amendment to be placed on the ballot for the November 2 General Election. Petitioners filed this original action on August 26, and we heard oral argument on September 23.

Petitioners note at the outset that they are not challenging the wisdom or folly of the proposed amendment, as they concede that such a challenge is not proper at this time. Rather, they challenge the sufficiency of the information supplied to the voters in the measure's popular name and ballot title. They argue that the popular name is insufficient because it contains partisan language and misleads the voter into believing that the proposed amendment deals exclusively with marriage. As for the ballot title, Petitioners argue that it is vague and misleading and that it does not inform voters of the consequences of voting for the proposed amendment.

I. Popular Name

For their first point, Petitioners argue that the popular name, "An Amendment Concerning Marriage," is misleading because it deceptively and inaccurately declares that the amendment only addresses marriage, while it actually has a broader effect. They contend that although the popular name adequately describes Section 1 of the proposed amendment, it ignores Sections 2 and 3.

The standard for reviewing an initiative's popular name is well settled. The popular name is primarily a useful legislative device that need not contain the same detailed information or include exceptions that might be required of a ballot title. *Parker v. Priest*, 326 Ark. 123, 930 S.W.2d 322 (1996). Its purpose is to identify the proposal for discussion prior to the election. *Roberts v. Priest*, 341 Ark. 813, 20 S.W.3d 376 (2000); *Arkansas Women's Political Caucus v. Riviere*, 283 Ark. 463, 677 S.W.2d 846 (1984). The popular name is not held to the same stringent standards and need not be as explicit as a ballot title; however, it cannot contain catch phrases or slogans that tend to mislead or give partisan coloring to a proposal. *Id.* Thus, the popular name must be intelligible, honest, and impartial. *Gaines v. McCuen*, 296 Ark. 513,

758 S.W.2d 403 (1988). This court considers the popular name along with the ballot title in determining its sufficiency. *Roberts*, 341 Ark. 813, 20 S.W.3d 376.

Petitioners argue that the popular name, "An Amendment Concerning Marriage," only describes Section 1 of the proposed amendment, which states that "Marriage consists only of the union of one man and one woman[.]" They argue that the popular name omits any information regarding the limitations that the amendment will impose on the rights of unmarried couples or single persons or of the impact that the amendment will have on the legal recognition of any future union or partnership. They also argue that the word "marriage" is an inviting catchword, and that its use in this popular name is misleading in that very few persons would vote against marriage, even though they may be in favor of other types of relationships.

Petitioners rely heavily on the holding in *Arkansas Women's Political Caucus*, 283 Ark. 463, 677 S.W.2d 846, wherein this court struck a proposed amendment from the ballot on the ground that its popular name, "The Unborn Child Amendment," was misleading, contained partisan language, and omitted pertinent information. This court explained:

> *More significantly, the enactment of the proposed amendment would do two things, equally far-reaching: it would immediately prohibit the use of public funds for abortion*, including a female impregnated by rape or incest, unless the life of the mother were in danger; *and* two, *it would empower the General Assembly to prohibit abortion under any circumstances to the extent permitted under the Constitution of the United States. Yet, the popular name makes no reference whatsoever to this emotionally charged subject. Instead, the ballot name contains only the inviting catch words "unborn child," which gives the voters only the impression the proponents of the amendment want them to have. Very few would vote against a child, born or unborn, even though they are for a woman's right to have an abortion or for the state paying for it.* The popular name is a clear-cut example of the partisan coloring of ballots which we have uniformly condemned in our decisions holding that a ballot name must be fair and impartial.

Id. at 468, 677 S.W.2d at 849 (emphasis added).

Petitioners' reliance on *Arkansas Women's Political Caucus*, is misplaced. The popular name of Proposed Amendment

3, "An Amendment Concerning Marriage," clearly and concisely identifies the measure to the voters. It is intelligible, honest, and impartial and does not contain inflammatory language, political catchwords, or partisan coloring. It merely alerts the voters to the subject on which they will be voting, without attempting to influence them one way or the other. Contrary to Petitioners' urging, we do not believe that the term "marriage" evokes the same type of emotional reaction as the phrase "unborn child."

Moreover, there is no merit to Petitioners' suggestion that only Section 1 of the proposed amendment concerns the subject of marriage. Section 3 plainly concerns marriage by providing that the legislature has the power to determine the capacity of persons to marry and the rights, obligations, privileges, and immunities of marriage. Even Section 2 concerns marriage in that it prohibits recognition of marital status for unmarried persons, except that the legislature may recognize certain common law marriages. We thus reject Petitioners' argument on the sufficiency of the popular name.

II. Ballot Title

Petitioners next argue that the ballot title for Proposed Amendment 3 is vague and misleading and fails to inform the voters of the consequences of voting for the proposed amendment. They also argue that the title fails to disclose to the voters the full scope of the proposed amendment and its impact on current laws. We begin our analyses with a review of the law regarding the sufficiency of ballot titles.

The ballot title must be an impartial summary of the proposed amendment and it must give voters a fair understanding of the issues presented and the scope and significance of the proposed changes in the law. *Scott v. Priest*, 326 Ark. 328, 932 S.W.2d 746 (1996); *Parker*, 326 Ark. 123, 930 S.W.2d 322. It must be free from misleading tendencies that, whether by amplification, omission, or fallacy, thwart a fair understanding of the issues presented. *Id.* It cannot omit material information that would give the voters serious ground for reflection. *Id.* While it is not required that the ballot title contain a synopsis of the amendment, it is required that the title be complete enough to convey an intelligible idea of the scope and import of the proposed law. *Roberts*, 341 Ark. 813, 20 S.W.3d 376; *Bailey v. McCuen*, 318 Ark. 277, 884 S.W.2d 938

(1994). Thus, it must be intelligible, honest, and impartial so that it informs the voters with such clarity that they can cast their ballots with a fair understanding of the issues presented. *Id.* This court has long recognized the impossibility of preparing a ballot title that would suit everyone. *Parker*, 326 Ark. 123, 930 S.W.2d 322; *Hogan v. Hall*, 198 Ark. 681, 130 S.W.2d 716 (1939). Thus, the ultimate issue is whether the voter, while inside the voting booth, is able to reach an intelligent and informed decision for or against the proposal and understands the consequences of his or her vote based on the ballot title. *Roberts*, 341 Ark. 813, 20 S.W.3d 376; *Christian Civic Action Comm. v. McCuen*, 318 Ark. 241, 884 S.W.2d 605 (1994).

The issue of the sufficiency of a ballot title is a matter of law to be decided by this court. *Bailey*, 318 Ark. 277, 884 S.W.2d 938. Thus, we will consider the fact of Attorney General certification and attach some significance to it; however, we will not defer to the Attorney General's certification or give it presumptive effect. *Id.* Our most significant rule in determining the sufficiency of the title is that it be given a liberal construction and interpretation in order that it secure the purposes of reserving to the people the right to adopt, reject, approve, or disapprove legislation. *Porter v. McCuen*, 310 Ark. 562, 839 S.W.2d 512 (1992); *Mason v. Jernigan*, 260 Ark. 385, 540 S.W.2d 851 (1976). It is not our purpose to examine the relative merit or fault of the proposed changes in the law; rather, our function is merely to review the measure to ensure that, if it is presented to the people for consideration in a popular vote, it is presented fairly. *Roberts*, 341 Ark. 813, 20 S.W.3d 376. In other words, "[t]he question is not how the members of this court feel concerning the wisdom of this proposed amendment, but rather whether the requirements for submission of the proposal to the voters have been met." *Ferstl v. McCuen*, 296 Ark. 504, 509, 758 S.W.2d 398, 401 (1988). Ultimately, Amendment 7 places the burden upon the party challenging the ballot title to prove that it is misleading or insufficient. *Roberts*, 341 Ark. 813, 20 S.W.3d 376; *Christian Civic Action Comm.*, 318 Ark. 241, 884 S.W.2d 605. With these standards in mind, we discuss each of the points raised by Petitioners.

A. Vague and Misleading Language

Petitioners first argue that the following phrase in the second clause of the ballot title is vague and misleading: "that legal status

for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas[.]" They submit that the word "status," as defined in *Black's Law Dictionary*, 1447 (8th ed. 2004), refers to "the sum total of a person's legal rights, duties, liabilities, and other legal relations, or any particular group of them separately considered." They submit that the term "legal status" is commonly used in Arkansas law to classify an individual and identify the legal rights and duties for such a classification, like the legal status of an invitee or a stepparent.

Petitioners submit further that the term "marital status" is vague and open-ended in that it is merely a basis of classification consisting of either "married" or "unmarried." They cite to *Black's Law Dictionary*, 987 (8th ed. 2004) as defining the term as "[t]he condition of being single, married, divorced, or widowed." Given this definition, they contend that the ballot title's second clause prohibits an unmarried person from having a legal status that is identical or substantially similar to that of *either* a married or unmarried person. Thus, they argue that the phrase is vague and nonsensical.

Petitioners also argue that, contrary to what Intervenors may have intended, the term "marital status" does not mean marriage. They argue further that Intervenors could have used that readily understood term, but they chose not to do so. To support their argument, Petitioners cite to various proposed amendments from other states which do not employ the term "marital status."

Both Respondent and Intervenors argue that Petitioners' interpretation of these words is unreasonable and absurd and ignores the context in which they are used. They assert that in the context of an employment application, the term "marital status" may be easily understood as referring to the status of being *either* married, single, divorced, or widowed. However, they assert that the context of this proposed measure enables the voters to understand that "marital status" means the status of being married.

■ We conclude that the term "marital status" is not vague because it can be understood by the voters within the context of the ballot title. The fact that a term is capable of more than one possible meaning does not render the term meaningless, so long as its meaning may be fairly gleaned from the context in which it is used. The entire clause in which this term is found provides:

> that legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, *except* that the Legislature may recognize a common law *marriage* from another state between a man and a woman. [Emphasis added.]

We agree with Intervenors that the meaning becomes apparent when considering that the one exception to the ban on recognition of legal status for unmarried persons that is identical or substantially similar to marital status is the recognition of common law *marriages* between a man and a woman from another state. We are not persuaded that the voters will view the term with the same degree of technicality as have Petitioners and their attorneys. Indeed, to accept their construction of the ballot title, that the amendment prohibits unmarried persons from having a legal status identical or substantially similar to that of unmarried persons, would lead to an absurd result.

Moreover, we observe that the ballot title clearly puts the voters on notice that the passage of this amendment is just the beginning, not the end, of the matter. The proposed amendment is not self-executing. In fact, the third clause of the ballot title reflects that the amendment specifically empowers the General Assembly to pass enabling legislation "to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage." Because the actions of the legislature will occur in the future, an interpretation of the particulars of this amendment is yet to come. The voters are sufficiently informed of this.

In sum, our job is not to review the relative merit or fault of the proposed initiative, nor is it to fashion a perfect or even a better ballot title. Rather, we are to review the ballot title liberally, using common sense, with an eye toward the purpose of Amendment 7, which is to reserve to the people the right to adopt or reject constitutional amendments or legislation. *See Walker v. Priest*, 342 Ark. 410, 29 S.W.3d 657 (2000); *Crochet v. Priest*, 326 Ark. 338, 931 S.W.2d 128 (1996); *Christian Civic Action Comm.*, 318 Ark. 241, 884 S.W.2d 605. This court's holding in *Becker v. Riviere*, 270 Ark. 219, 604 S.W.2d 555 (1980), is instructive:

> We must also bear in mind that strict technical construction is not required, but that substantial compliance with Amendment No. 7 is all that is required. As was pointed out in *Hoban v. Hall, Sec'y of*

> *State*, 229 Ark. 416, 316 S.W.2d 185 (1958), it is our duty to approve a ballot title "if it represents an impartial summary of the measure and contains enough information to enable the voters to mark their ballots with a fair understanding of the issues presented." Our task is not to require nor draft the perfect proposed popular name and ballot title, but merely to determine if those presented are legally sufficient.

Id. at 225-26, 604 S.W.2d at 558 (citation omitted). Thus, while Petitioners may be correct in asserting that the ballot title could have been written more clearly, they have not met their burden of proving that the ballot title is misleading or insufficient. *See Roberts*, 341 Ark. 813, 20 S.W.3d 376; *Christian Civic Action Comm.*, 318 Ark. 241, 884 S.W.2d 605.

B. Failure to Disclose Effect on Laws Protecting Both Married and Unmarried Persons

For their next challenge, Petitioners argue that the ballot title fails to disclose to the voter the effect of the amendment. Specifically, they assert that the voter is not informed that the amendment will allegedly repeal existing laws, such as those that prohibit discrimination against and protect the rights of persons regardless of whether they are married or single. *See, e.g.,* Ark. Code Ann. § 4-87-104 (Repl. 2001); Ark. Code Ann. § 9-3-107 (Repl. 2002). They assert further that Proposed Amendment 3 will impliedly repeal Article 9, § 3, of the Arkansas Constitution, which provides homestead rights to state residents who are either married or the head of a family. They contend that the ballot title's failure to disclose these consequences to the voters renders it insufficient.

We note at the outset that Petitioners have failed to cite any legal authority or make any convincing argument in support of this point. Instead, their argument is based entirely on speculation and conjecture as to how this amendment *may* be interpreted or construed in the future and how it *may* affect current laws. The present case is not like that of *Bailey*, 318 Ark. 277, 884 S.W.2d 938, where the proposed amendment undeniably would have changed the current state of the law, but the ballot title made no mention of the change. There, the text of the proposed

amendment plainly provided that the workers' compensation laws would be interpreted liberally, but the ballot title made no such mention of this liberal interpretation. This court concluded that the ballot title was misleading in omitting this information, on the ground that the amendment would have repealed the current law requiring strict construction. This court held that the omission of this information "would give the voters a serious basis for reflection on how to cast their ballots." *Id.* at 288, 884 S.W.2d at 944.

Nor is this case like that of *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000), where the ballot title failed to inform the voters of the far-reaching consequences of the measure, which would have, immediately upon its approval, ceased the collection of revenues collected from sales and use taxes on used goods. The ballot title further failed to inform the voters that those lost revenues could not be made up for until the next regularly scheduled statewide election. This court concluded that such information was so significant and material that it would give the voter serious ground for reflection. This court held that because such information was omitted, the ballot title failed to convey to the voters the scope and import of the proposed measure.

In the present case, the argument made by Petitioners amounts to nothing more than an assertion that some current laws *may* be affected or even impliedly repealed with the passage of Proposed Amendment 3. Unlike the two cases cited above, the laws allegedly implicated in this case are by no means *certainly* implicated, such that the ballot title must inform the voters of this. Accordingly, the ballot title does not fail in this respect. This court has held that it is not necessary that a ballot title include every possible consequence or impact of a proposed measure. In *Ferstl*, 296 Ark. 504, 510, 758 S.W.2d 398, 401, this court stated unequivocally: "Certainly not every detail of an amendment *or how it will work in every situation* can be revealed in the name and title. It is not possible to do so." (Emphasis added.) More recently, this court has reiterated: "The [ballot] title is not required to be perfect, nor is it reasonable to expect the title to cover or anticipate every possible legal argument the proposed measure might evoke." *Plugge v. McCuen*, 310 Ark. 654, 658, 841 S.W.2d 139, 141 (1992), *overruled in part on other grounds by Bailey*, 318 Ark. 277, 884 S.W.2d 938. The bottom line is that Petitioners' assertions on

this point are too speculative for us to hold that such information is so material that it would give the voter serious ground for reflecting.[2]

Before we leave this point, we must address Petitioners' assertion that where the language of the ballot title mirrors that of the amendment itself, this court has no choice but to interpret the amendment. While we agree that in such a situation, our review of the language of one will necessarily result in the review of the other, we do not agree that such a review extends to the prospective application of the amendment. In other words, while we may be required to consider the language of the amendment itself to determine whether a term or phrase in the title is vague or misleading, this does not mean that we will interpret the amendment in the sense of construing or applying it. However, we note that our holding today does not foreclose Petitioners from pursuing this argument in the event the proposed amendment is approved by the voters. Until that time, our review is limited.

C. Failure to Disclose Prohibition on Legal Relationships Other Than Marriage

Petitioners' third argument is that the ballot title does not inform the voters that a vote for this proposal will prohibit the future recognition of legal relationships between unmarried couples other than marriage, like civil unions or domestic partnerships. In other words, they contend that the ballot title does not inform the voter that the amendment not only bans same-sex *marriage*, but also bans any similar legal relationship between unmarried persons. They contend that by using the phrase "legal status for unmarried persons which is identical or substantially similar to marital status," Intervenors are attempting to cloak the

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[2] Justice Thornton's dissent illustrates the speculative nature of this inquiry by posing several questions as to how Proposed Amendment 3 "might be interpreted" or "may result" in the loss of some property rights. Undoubtedly, the dissent uses these contingent terms because the proposed measure has yet to be implemented by the General Assembly or interpreted by this court. Notwithstanding, the dissent then concludes that these speculative, possible future occurrences are so significant that they should be disclosed to the voters. It is unclear how the voter can be adequately informed of the alleged consequences of his vote if such consequences have yet to be realized. Apparently, the dissent would prefer that we skip the step of allowing the citizens the right to vote on the measure and jump right into the step of interpreting it.

intended meaning, which is to prohibit civil unions or domestic partnerships. They rely on this court's holdings in *Christian Civic Action Comm.*, 318 Ark. 241, 884 S.W.2d 605, *Crochet*, 326 Ark. 338, 931 S.W.2d 128, and *Kurrus*, 342 Ark. 434, 29 S.W.3d 669.

In *Christian Civic Action Comm.*, 318 Ark. 241, 884 S.W.2d 605, this court struck a proposed measure from the ballot in part due to the misleading term "additional racetrack wagering." This court explained:

> It is evident, as the petitioners suggest, that "additional racetrack wagering" is a euphemism and, further, that the definition consists of compounded euphemisms designed to cloak in semantic obscurity the actual nature of the proposed enterprise. *What, in fact, the definition obliquely describes in highly technical terms are the elements of casino-style gambling. Yet voters favoring or opposing the inauguration of casino-style gambling may well be unaware that this is precisely what Amendment 4 seeks to accomplish.*

Id. at 249, 884 S.W.2d at 609-10 (emphasis added).

Similarly, in *Crochet*, 326 Ark. 338, 931 S.W.2d 128, this court concluded that the proposed measure's use of the term "video terminal games" was misleading, holding:

> While voters may be able to discern that the term "video terminal games" means slot machines, they should not be forced to guess the meaning of a proposed amendment to their state's constitution. *The very purpose of the ballot title is to convey a fair and impartial understanding of the proposal. To call slot machines "video terminal games," which connotes a present-day video game such as Nintendo or Sega Genesis, is anything but fair and impartial.* Consequently, we conclude that the use of the term "video terminal games" creates a fatally misleading tendency in the popular name and ballot title and tinges them with partisan coloring.

Id. at 346-47, 931 S.W.2d at 133 (emphasis added).

Finally, Petitioners rely on this court's statement in *Kurrus*, 342 Ark. 434, 29 S.W.3d 669, that misleading or vague language "placing the voter in a position of either having to be an expert in the subject of [the proposed amendment] or having to guess as to the effect his or her vote would have is impermissible." *Id.* at 444, 29 S.W.3d at 674 (citing *Dust v. Riviere*, 277 Ark. 1, 638 S.W.2d 663 (1982)). Petitioners argue that because Proposed Amendment

3 fails to disclose what particular kinds of relationships will be prohibited by the amendment and leaves the voters to guess what the amendment means, it is, by its own terms, vague and misleading.

Intervenors argue that it is Petitioners who are being unclear. They assert that the terms "civil union" and "domestic partnership" are not legally recognized terms in Arkansas and would not be readily understood by voters. They also assert that, contrary to Petitioners' urging, Proposed Amendment 3 will not prohibit unmarried couples from entering into civil unions or domestic partnerships, so long as these relationships are not marriage by another name. They contend that Proposed Amendment 3 makes clear that whatever alternative forms of marital status other jurisdictions may recognize and by whatever terms such jurisdictions use to identify them, those unions will not be recognized in Arkansas if they are nothing more than marriages with new labels. Intervenors assert that this is a concept that the voters can readily understand.

As with the previous point, we conclude that Petitioners' argument on this point requires us to interpret the amendment or, at a minimum, to assume that Petitioners are correct in asserting that the amendment will in fact prohibit civil unions or domestic partnerships. We cannot make such an assumption. The ballot title itself does not specifically prohibit unmarried persons from having the legal status of a "civil union" or "domestic partnership"; rather, it prohibits unmarried persons from having a legal status that is "identical or substantially similar to marital status." The text of the amendment mirrors the ballot title. Thus, the ballot title is not misleading for failing to give specifics where the amendment does not. Moreover, the amendment clearly provides the General Assembly with the power to pass further legislation determining the rights, obligations, privileges, and immunities of marriage. Until such legislation is enacted, we cannot know whether the amendment will prohibit civil unions or domestic partnerships.

Finally, we note that the terms "civil union" and "domestic partnership" have not been legally defined in this state.[3] Thus, if

[3] Our statutory code only mentions the term "domestic partnership" two times, both of which are contained in the Uniform Partnership Act for businesses. *See* Ark. Code Ann.

the terms were used in the ballot title, we would have to engage in legal interpretation and construction to ascertain what those terms mean in order to determine whether they will be prohibited as a legal status that is identical or substantially similar to marital status. As with the previous point, Petitioners must wait to be heard on this issue until the amendment is approved by a majority of the voters and a justiciable case arises.

D. Misleading as to the Amendment's Effect on Existing Common Law Marriages

Finally, Petitioners argue that the ballot title is misleading because it gives the voters a false indication of the effect that the measure will have on existing common law marriages. Particularly, they take issue with the phrase: "the Legislature *may* recognize a common law marriage from another state between a man and a woman[.]" (Emphasis added.) They claim that this phrase misleads the voters into thinking that the amendment would expressly require the legislature to vote to recognize common law marriages from other states before such marriages would be recognized. They argue that voters will be misled into thinking that a vote for the amendment would be a vote to ban all existing common law marriages in Arkansas. They claim that this impression is misleading because Arkansas statutory law already provides for recognition of all marriages from other states, except those between persons of the same sex, "which would be valid by the laws of the state or country in which the marriages were consummated[.]" Ark. Code Ann. § 9-11-107 (Repl. 2002).

If we understand Petitioners' argument on this point, it is that the voters will think that the amendment requires an affirmative act of the legislature before common law marriages will be recognized, even though such marriages are recognized, in some instances, under our current law. Thus, their argument amounts to nothing more than a claim that the voters will be misled into thinking that a change in the law will occur. As this court stated in *Becker*, 270 Ark. 219, 224, 604 S.W.2d 555, 558: "The fact that it is an amendment is sufficient to inform [the voter]

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§ 4-46-906 and § 4-46-1207 (Repl. 2001). The term "domestic partner" is used in Ark. Code Ann. § 9-11-208(d) (Repl. 2002), which provides that "nothing in this section shall prevent an employer from extending benefits to persons who are domestic partners of employees." That term, however, is not defined.

that change will result." *Id.* at 224, 604 S.W.2d at 558. Moreover, in that same case, this court held that a ballot title is not insufficient merely because it fails to reflect the current state of the law. Petitioners are not entitled to relief on this point.

Based on the foregoing, we hold that the ballot title and popular name of Proposed Amendment 3 are sufficient, and we deny Petitioners' request to remove the measure from the ballot. The mandate herein will issue within five days from the filing of this opinion unless a petition for rehearing is filed.

Petition denied.

BROWN, J., concurs.

THORNTON and HANNAH, JJ., dissent.

ROBERT L. BROWN, Justice, concurring. Are the proposed popular name and ballot title so unclear and misleading that this court must strike the amendment from the ballot and deprive the people of this state of an opportunity to vote on it? That is the sole issue before this court today. It is *not* this court's function, pre-election, to construe the terms of the amendment, determine its constitutionality or legality, delve into its impact in every situation, or even to decide whether its passage would be a good thing or a bad thing. Our law is clear on this point. *See, e.g., Roberts v. Priest*, 341 Ark. 813, 20 S.W.3d 376 (2000); *Parker v. Priest*, 326 Ark. 386, 931 S.W.2d 108 (1996); *Ferstl v. McCuen*, 296 Ark. 504, 758 S.W.2d 398 (1988).[1] We only decide today whether the popular name and ballot title give the people of this state a fair understanding of what is at issue.

Here, the ballot title mirrors the language of the amendment. This means that the question of clarity by necessity must be addressed to the amendment itself and not merely to the ballot title. I cannot say that the ballot title and amendment are fatally misleading.

Petitioners' core argument goes to whether the public is sufficiently apprised of the fact that not only same-sex marriages are prohibited by the amendment, but also that other relationships

[1] It is true that in an unusual case this court did look to the constitutionality of an amendment, pre-election, but in that case, the issue of impairment of contracts had been raised by the parties. *See Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000). In the instant case, the parties do not argue the constitutionality of the present amendment, as they did in *Kurrus v. Priest*.

for unmarried persons substantially similar or identical to marriage will not be valid or recognized in this state, if this amendment passes. The pertinent language in the amendment dealing with the issue is this:

> that legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas. . . .

That language in the amendment and ballot title tells me that unmarried persons united in a substantially similar or identical relationship to marriage will not be given the same legal status by this state as married persons. As the majority opinion points out, at this point we do not know the effect of this language on relationships known in the vernacular as "civil unions," since civil unions are undefined in our statutes.

Much has been written and argued in this case about what the terms "legal status" and "marital status" mean in this clause of the amendment. But, again, the core notion is obvious from the context of the language. Relationships of unmarried persons, though substantially similar or identical to marriage, will not be recognized in this state. Whether to etch that standard into constitutional stone is the issue for the people of this state to determine at the General Election.

Nor do I believe this quoted language is obfuscated or disguised by the popular name or ballot title. Surely the preclusion of unmarried relationships from the same legal status as married relationships *concerns* marriage as the popular name proclaims. And to read "marital status" in the above quoted phrase as any other status but "marriage" would be an absurd reading, which we will not do. *See, e.g., Yarbrough v. Witty*, 336 Ark. 479, 987 S.W.2d 257 (1999).

The petitioners also raise the spectre of certain laws that may be repealed by this amendment which, they contend, is a fact not revealed to the people of this state. They specifically refer to matters like the undefined term, "domestic partners," found in Act 146 of 1997 and codified at Ark. Code Ann. § 9-11-208(d) (Repl. 2002). They also mention the homestead exemption under the Arkansas Constitution and the reference to a "resident of this State, who is married or the head of a family." Ark. Const. art. 9, § 3. They ask: Is that term, head of a family, still viable or has it been called into question by the amendment? These issues were

debated in oral argument before this court, and, not surprisingly, the two principal parties did not agree. Yet, the "what ifs" and the speculative impact of the amendment are not reasons to dub it unclear or misleading at this juncture. Surely, these suggested legal ramifications do not rise to the level of legal invalidity found by this court in an initiative petition that completely overhauled the property tax structure of this state and substantially amended procedures for selling county-owned property. *See Stilley v. Makris*, 343 Ark. 673, 38 S.W.3d 889 (2001). In short, the pivotal issues of the amendment are sufficiently laid out in the ballot title in ten lines for the public to understand them.

Undoubtedly, as is the case with many constitutional amendments, there will be subsequent legislation and litigation to implement and determine the measure's full impact. There may even be a challenge to the measure's constitutionality. But that is stuff for another day. And that possibility does not equate to a lack of sufficient clarity in the language of the amendment so as to negate the people's right to vote on a proposed amendment, which is a right specifically guaranteed by Amendment 7 to the Arkansas Constitution. For these reasons, I join the majority opinion.

RAY THORNTON, Justice, dissenting. In *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000), Justice Corbin, who wrote for the plurality, stated "[T]he ultimate issue is whether the voter, while inside the voting booth, is able to reach an intelligent and *informed* decision for or against the proposal and *understands the consequences* of his or her vote based on the ballot title." *Id.* (emphasis added). In his concurring opinion in *Kurrus*, *supra*, Justice Brown made the issue clear by asking, "How can we perform our duty if the amendment itself misleads or deceives the people about what is at issue? The answer is obvious. We cannot." *Id.* Additionally, in *Arkansas Women's Political Caucus v. Riviere*, 283 Ark. 463, 677 S.W.2d 846 (1984), Justice Dudley wrote, "[P]opular ballot names which contain catch phrases or slogans that tend to mislead or give partisan coloring to the merit of the proposal will be rejected. *Id.* (Internal citations omitted). The court then concluded that, "The popular name, 'The Unborn Child Amendment' is misleading." *Id.*

In my view, Proposed Amendment 3 with the popular name, "An Amendment Concerning Marriage" is misleading and I respectfully dissent. The popular name, "An Amendment Concerning Marriage," would have been consistent with the text of the following proposal:

Be it enacted by the people of Arkansas:

Section 1. Marriage

Marriage shall only be the union of one man and one woman.

Section 2. Capacity, Rights, Obligations, Privileges, and Immunities

The Legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges and immunities of marriage.

This quoted language is in the proposal under consideration. If the proposal were limited to these provisions concerning marriage, the popular name would not be misleading or deceiving. I would promptly approve its submission to the voters.

However, the popular name and ballot title of Proposed Amendment 3 do not inform the voters of the context of the amendment or the consequences of a vote for or against the proposal. The drafters of Proposed Amendment 3 did not limit the scope and import of the amendment to a prohibition of same-sex marriage or to laws relating to marriage. They included an additional section prohibiting individuals who are not married from having legal rights that are substantially similar to those applicable to married people. They added a section to the amendment under consideration that reads as follows:

Section 2. Marital Status

Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize common law marriages from another State between a man and a woman.

The popular name does not call attention to the addition of this significant provision relating to unmarried persons. The popular name could simply have been revised to read, "An Amendment Concerning Marriage and Prohibiting Unmarried Persons from Having Substantially Similar Rights." This popular name would have informed voters that the amendment was broader than a prohibition of same-sex marriages and that it would also have an effect on unmarried persons, without regard to their gender or sexual orientation.

Proposed Amendment 3 could repeal or modify a number of Arkansas statutes that affect the rights of unmarried persons and I believe that the voters have a right to some warning that this proposal could limit the rights of single persons under Arkansas law.

For example, under Ark. Code Ann. § 26-51-301 (Supp. 2003) *et seq.*, a single person making less than $7,700.00 is exempted from state income taxes while a married couple filing jointly is exempted if their joint income is less than $15,500.00. It seems clear to me that under Proposed Amendment 3, the legislature could not amend the tax code to grant an unmarried head of household a tax exemption for making less than $15,500.00 because that is a legal status *identical* to a married person. Currently, an unmarried head of household is exempt from State income tax if they make less than $12,000.00. Is that exemption *substantially similar* to the rights of a married person under the tax laws? Would a voter looking at the popular name in the voting booth be informed that such a question would be implicated by passage of the amendment? I do not think that voters would be aware of this problem.

The Arkansas Tax Code provides further protections to unmarried persons identical or substantially similar to the protections provided to a married person. Arkansas Code Annotated § 26-51-501 (Supp. 2003), provides a joint tax credit to a surviving spouse that is identical to the joint tax credit for a married person. A widower, who is by definition not married, may not be allowed to retain the surviving spouse benefits under Proposed Amendment 3. Would a voter be aware that a vote for Proposed Amendment 3 may result in widows and widowers no longer being eligible for surviving spouse benefits? I do not think that the popular name informs the voter of the consequences of his or her vote with regard to this matter.

Another example is that the popular name and ballot title do not inform the voters of the possibility that Proposed Amendment 3 could jeopardize the constitutional rights of an unmarried person to a homestead exemption. An unmarried head of household receives identical rights to homestead protection as a married person under Arkansas Constitution Article 9 § 3. Adoption of a new amendment may repeal provisions of previous constitutional law. Does the popular name or ballot title disclose that Proposed

Amendment 3 might be interpreted as prohibiting a homestead exemption for unmarried persons under the Arkansas Constitution? I do not think so.

Arkansas Code Annotated § 9-11-208 (Supp. 2003) allows employers to extend benefits to the unmarried domestic partners of an employee. This statute allows an unmarried man and woman to receive the same benefits from an employer that a married couple receives. These are rights or a legal status that is identical or substantially similar to the rights conferred by marital status. The consequences of Proposed Amendment 3 could reach all domestic partners receiving benefits from employers. Does the popular name adequately inform voters of this possibility?

These examples illustrate why it is important that voters be informed of the scope and import of a proposed amendment. Nothing in the popular name gives any notice that, in addition to prohibiting same-sex marriages, the text of the amendment is designed to impair or invalidate rights of unmarried people without regard to their sexual preferences.

We should follow the sound teaching of *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 884 S.W.2d 605, (1994). There, we held that "[t]he ballot title did not convey an intelligible idea of the scope and import of the proposed law," and wrote:

> It is evident that before determining the sufficiency of the present ballot title we must first ascertain what changes in the law would be brought about by the adoption of the proposed amendment. For the elector, in voting upon a constitutional amendment, is simply making a choice between retention of the existing law and the substitution of something new. It is the function of the ballot title to provide information concerning the choice that he is called upon to make. Hence *the adequacy of the title is directly related to the changes he is given the opportunity of approving.*

Id. (*citing Bradley v. Hall*, 220 Ark. 925, 251 S.W.2d 470 (1952)) (*emphasis in original*). Neither the majority nor the concurrence addresses this part of the holding from *Christian Civic Action Committee*, but to me it is determinative of this ballot title challenge. In my view, the ballot title does not convey an intelligible idea of the scope and import of the proposed amendment because the popular name is misleading and does not indicate that the amendment could be used to impair or invalidate rights of unmarried persons.

For those reasons, I respectfully dissent.

JIM HANNAH, Justice, dissenting. I must respectfully dissent. In my opinion, a voter faced with the popular name and ballot title the majority approves would not be provided a fair understanding of the issues presented or the impact of his or her vote in favor of the amendment.

Based on the briefs and material presented in this case, as well as recent events nationwide, it is apparent that the goal of the proponents of Amendment 3 is to preclude statutory adoption of any state-recognized and state-protected union of persons such as domestic partners and civil unions. While there certainly is no reason that such issues may not be addressed by an amendment, the law requires that the popular name and ballot title so indicate, which was not done in this case. The issue before this court is simply a lack of candor in the popular name and ballot title, and I believe that this court should compel drafters of popular names and ballot titles to be forthright and clear. "[A]mending the constitution is a precise science which entails complete information flowing to the electorate." *McCuen v. Harris*, 321 Ark. 458, 468, 902 S.W.2d 793 (1995).

The issue before this court is not whether the amendment is a wise idea or not. Two issues are presented to this court. The first issue is whether the popular name adequately identifies the nature of the proposal presented by the amendment. *Gaines v. McCuen*, 296 Ark. 513, 758 S.W.2d 403 (1988). The second issue is whether the ballot title gives the voters a fair understanding of the issues presented and of the scope and significance of the proposed changes in the law. *Scott v. Priest*, 326 Ark. 328, 932 S.W.2d 746 (1996). I believe that neither the popular name nor the ballot title satisfy these requirements.[1]

The popular name, "An Amendment Concerning Marriage," is misleading. The Amendment would reach outside marriage to control what the State in the absence of the Amendment could adopt as a state-recognized union of persons. Therefore, it is an amendment that concerns far more than marriage as that term is traditionally understood. The scope of the amendment is not described by the popular name.

Marriage is well defined in this State, and it is clear that the amendment covers more than marriage. "Marriage is a civil

[1] I agree with Justice Thornton in his dissent where he states that if section two of the proposed amendment were deleted, the popular name and ballot title would be sufficient.

contract between a husband and a wife." *Pickens-Bond Constr. Co. v. Case*, 266 Ark. 323, 331, 584 S.W.2d 21 (1979); *see also* Ark. Code Ann. § 9-11-101 (Repl. 2002). Marriage may only be solemnized between a man and a woman, as codified in Ark. Code Ann. § 9-11-109 (Repl. 2002), where we find, "Marriage shall be only between a man and a woman. A marriage between persons of the same sex is void."

I believe that the popular name misleads the electorate. If the Amendment is intended to preclude any state-recognized union of persons aside from the already recognized union of persons through marriage, the popular name should make that clear. I note yet again that the issue is not whether such unions are good or bad, wise or improvident, but rather whether a voter understands what he or she is voting on. Also, while there is nothing in this case to show an affirmative intent to mislead, such an intent could be present. It is not difficult to imagine members of society who would certainly support marriage, but who might be reluctant to support the Amendment if it were clear from the name that the Amendment also precluded any other union of persons. The popular name, "An Amendment Concerning Marriage," does not indicate that other possible unions of persons are at issue in addition to marriage. This is a defect that could have been very easily remedied had this challenge been brought earlier.

I also have concerns about the ballot title. The ballot title to the proposed amendment states in pertinent part that "marriage consists of the union of one man and one woman; that legal status for unmarried persons which is identical or substantially similar to marital status shall not be recognized in Arkansas. . . ." Perhaps the Amendment might have read, "The only union between persons that shall be recognized in Arkansas shall be the union of marriage, consisting of the union between one man and one woman, and no other union of any kind between persons shall be recognized in this State, except . . ." However, we must decide whether the above quoted language from the ballot title is misleading or insufficient as asserted.[2] *Scott, supra*. I do not believe it meets the test. The term "legal status for unmarried persons" is hopelessly vague and ambiguous. The legal status of unmarried persons is clearly "unmarried." In *DHS v. Collier*, 351 Ark. 506, 95

[2] I agree with the majority that because the Amendment sponsors chose to use the Amendment language in their ballot title, we necessarily must interpret that language although our analysis is limited to whether the ballot title meets the requirements of Amendment 7. Use of the Amendment language as a ballot title in no way assures that the

S.W.3d 772 (2003), the term "legal status" was used in the context of wrongful-death decisions, and whether such decisions should be read to confer full legal status upon a fetus. In *Tyson Foods, Inc. v. Conagra, Inc.*, 349 Ark. 469, 79 S.W.3d 326 (2002), the court noted that "trade secret" is a legal status fixed by statute. What is at issue is the legal status of an affected interest. *See, e.g., Tomerlin v. Nickolich*, 342 Ark. 325, 27 S.W.3d 746 (2000). The affected interest in the case before us is unions between persons that this state may recognize. The term "legal status for unmarried persons" is at best redundant and at worst so confusing that it is unintelligible.

Likewise, the term "marital status," which apparently refers back to "legal status," is vague and ambiguous. I disagree that the term "marital status" is clarified by the context of its use. Marital status refers to one's status in relation to marriage, in other words, marriage is one form of marital status, along with unmarried, divorced, or widowed. This is also shown in a footnote in *In Re Adoption D.J.L.*, 341 Ark. 327, 16 S.W.3d 263 (2000), where the court stated, "The appellants argue in their brief that an adoption by two unmarried adults is permissible, but nothing in their abstract denotes their marital status." *Adoption D.J.L.*, 341 Ark. at 328. It remains entirely unclear to me what relationship is referred to by the term "legal status for unmarried persons which is identical or substantially similar to marital status. . . ."

The majority notes that it is unlikely that voters will view the ballot title with the same degree of technicality as the petitioners did in this case. However, it was the intervenors who chose to use legal terms in the ballot title. The use of the legal terms gives rise to the confusion the intervenors now seek to ignore. It is also worthy of note that counsel for intervenors at oral argument stated, "Now, because voters, as long as they know what they are voting on, and if voters think it is misleading, if voters think it is confusing, they can reject it." This is precisely the evil the popular name and ballot must avoid. Because there is indeed the confusion that counsel for intervenors alludes to, this court must strike this measure from the ballot.

In this case, we are yet again presented the unenviable task of ruling on the adequacy of a popular name and ballot title on the

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requirements of Amendment 7 are met. The ballot title must fairly present the amendment to the voters no matter where the language came from. *See, e.g., Roberts v. Priest*, 326 Ark. 123, 930 S.W.2d 322 (1996).

eve of an election. Ten years ago in *Page v. McCuen*, 318 Ark. 342, 884 S.W.2d 951 (1994), this court stated:

> We commend the General Assembly's past effort in attempting to establish reasonable statutory timetables to implement initiative and referendum measures under Amendment 7. We respectfully ask its further consideration and action and encourage the General Assembly to make another attempt to establish an initiative and referendum procedure that will permit early resolution of such issues. Until appropriate action is taken to correct the problems attendant to proposals submitted under Amendment 7, citizens can continue to expect measures to be removed from the ballot immediately prior to the election. This court does not enjoy being in the "last-minute" position of review. The people of Arkansas deserve an initiative and referendum procedure which allows them the confidence that measures, after having been adequately reviewed, will not be removed from the ballot. The sponsors of initiative proposals should also be assured their ballot titles and proposed measures meet required guidelines and rules before they spend their time, energy and monies in getting their proposal before the voters.

Page, 318 Ark. at 348.

The popular name and the ballot title were certified by the Secretary of State to go on the ballot on March 12, 2004. However, the petition commencing the original action challenging the popular name and ballot title was not filed until August 26, 2004.

As we stated in *Page, supra,* we desperately need an initiative and referendum procedure that will permit early resolution of issues such as those presently before this court. No one wishes to see measures removed from the ballot immediately prior to the election. There ought to be an initiative and referendum procedure which assures review early enough so that corrections may be made and measures need not be removed from the ballot. The sponsors of initiative proposals also deserve such a procedure so that their time, energy and monies in getting their proposal before the voters are not wasted.

Neither the popular name nor the ballot title meet the statutory requirements. They are one-sided, and only present a partial description of the proposed change to the Constitution. I would grant the petition.

STATE of Arkansas *v.* Carl Franklin MARKHAM

CR 04-664 194 S.W.3d 765

Supreme Court of Arkansas
Opinion delivered October 7, 2004

Mike Beebe, Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellant.

DONALD L. CORBIN, Justice. This case involves a challenge to the circuit court's jurisdiction to enter a ruling on a posttrial motion in a criminal case, where the motion has been deemed denied under our rules. Appellee Carl Franklin Markham was convicted of driving while intoxicated, fifth offense, following a bench trial in the Pulaski County Circuit Court. He was sentenced by the court to one year imprisonment. He timely filed a posttrial motion for reconsideration. The trial court waited several months before eventually granting Markham's motion and entering an order acquit-

ting him of the DWI charge. The State appeals the order of acquittal on the ground that the trial court lacked jurisdiction to grant the motion because it had already been deemed denied under Ark. R. Crim. P. 33.3(c). Markham has not filed a brief in response. We agree with the State that the trial court was without jurisdiction to rule on the posttrial motion once it had been deemed denied.

Before we turn to the merits of this case, we must determine whether this matter is properly before us. The issue raised by the State is one of law: Whether the trial court loses jurisdiction to act on a posttrial motion after it has been deemed denied under Rule 33.3(c). The State contends that this is an issue of legal significance involving the correct and uniform administration of the criminal law. It thus asserts that the appeal is proper under Ark. R. App. P.–Crim. 3(c).

Under Rule 3, the right of appeal by the State is limited. This court has consistently held that there is a significant difference between appeals brought by criminal defendants and those brought on behalf of the State. *State v. Williams*, 348 Ark. 585, 75 S.W.3d 684 (2002); *State v. Pruitt*, 347 Ark. 355, 64 S.W.3d 255 (2002). The former is a matter of right, whereas the latter is neither a matter of right, nor derived from the Constitution, but rather is only granted pursuant to the confines of Rule 3. *Id.* We accept appeals by the State when our holding would be important to the correct and uniform administration of the criminal law. *State v. Warren*, 345 Ark. 508, 49 S.W.3d 103 (2001); *State v. Thompson*, 343 Ark. 135, 34 S.W.3d 33 (2000); *State v. Stephenson*, 330 Ark. 594, 955 S.W.2d 518 (1997). As a matter of practice, this court has only taken appeals "which are narrow in scope and involve the interpretation of law." *Id.* at 595, 955 S.W.2d at 519 (quoting *State v. Banks*, 322 Ark. 344, 345, 909 S.W.2d 634, 635 (1995)). We do not permit State appeals merely to demonstrate the fact that the trial court erred. *Id.*

Thus, where an appeal does not present an issue of interpretation of the criminal rules with widespread ramifications, this court has held that such an appeal does not involve the correct and uniform administration of the law. *Id.* Similarly, where the resolution of the issue on appeal turns on the facts unique to the case or involves a mixed question of law and fact, the appeal is not one requiring interpretation of our criminal rules with widespread ramification, and the matter is not appealable by the State. *Williams*, 348 Ark. 585, 75 S.W.3d 684; *State v. Guthrie*, 341 Ark. 624, 19 S.W.3d 10 (2000). Finally, where an appeal raises an issue of the

application, not interpretation, of a criminal rule or statutory provision, it does not involve the correct and uniform administration of the criminal law and is not appealable by the State under Rule 3. *Id.*

There is an alternative to an appeal under Rule 3, when, as in the present case, the State contends that the trial court acted without jurisdiction. In such a situation, this court may treat the State's appeal as a petition for a writ of certiorari, as was done in *State v. Dawson*, 343 Ark. 683, 38 S.W.3d 319 (2001). There, the issue was whether the circuit court's judgment of acquittal was void because the defendant had not timely appealed from her conviction in municipal court. This court concluded that the issue was not proper under Rule 3(c), because it did not involve the correct and uniform administration of the criminal law. Notwithstanding, this court granted relief to the State via a writ of certiorari on the ground that the circuit court was wholly without jurisdiction to hear the appeal from municipal court. In so holding, this court relied on the following law:

> A writ of certiorari lies only where it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion, and there is no other adequate remedy. These principles apply when a petitioner claims that the lower court did not have jurisdiction to hear a claim or to issue a particular type of remedy. The court will grant a writ of certiorari only when there is a lack of jurisdiction, an act in excess of jurisdiction on the face of the record, or the proceedings are erroneous on the face of the record. It is not to be used to look beyond the face of the record to ascertain the actual merits of a controversy, or to control discretion, or to review a finding of facts, or to reverse a trial court's discretionary authority. This court has the discretion to treat an appeal from an order, judgment, or decree which lacks judicial support as if it were brought up on certiorari. A writ of certiorari can address actions already taken by the lower court.

Id. at 693, 38 S.W.3d at 325 (citations omitted). With these legal principles in mind, we turn to the issue in this case.

Rule 33.3(c) provides:

> Upon the filing of a posttrial motion or application for relief in the trial court, the time to file a notice of appeal shall not expire until thirty (30) days after the disposition of all motions or applications. *If*

> *the trial court neither grants nor denies a posttrial motion or application for relief within thirty (30) days after the date the motion or application is filed, the motion or application shall be deemed denied as of the 30th day.* [Emphasis added.]

The State asserts that this provision is jurisdictional and that the trial court loses the authority to act on a posttrial motion once it has been deemed denied. We agree.

This court has previously addressed the jurisdictional nature of the "deemed denied" rule. In *Harris v. State*, 327 Ark. 14, 935 S.W.2d 568 (1997), the issue was whether the appellant's notice of appeal, which was filed within thirty days of the date on which the trial court denied a posttrial motion, was nonetheless untimely because it was filed beyond thirty days from the date that the motion was deemed denied. This court held that the notice of appeal was not timely, explaining:

> Harris's new trial motion was filed on October 16, 1995, and under Rule 2, the motion was deemed denied thirty days later, on November 15, 1995. Accordingly, Harris had thirty days within which to file his appeal which date ended on December 15, 1995. Instead, he waited until January 2, 1996, to file his notice of appeal. *Although the trial court belatedly denied Harris's new trial motion on December 5th, it had no jurisdiction to do so. See Rossi v. Rossi*, 319 Ark. 373, 892 S.W.2d 246 (1995); *Mangiapane v. State*, 43 Ark. App. 19, 858 S.W.2d 128 (1993).

Id. at 15, 935 S.W.2d at 569 (emphasis added).

Similarly, in *Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997), this court again held that an appellant's notice of appeal was not timely because it had not been filed within thirty days of the date that a posttrial motion was deemed denied. Relying on *Harris*, this court held:

> In the present case, Appellant's motion for new trial was deemed denied as of November 3, 1996. Accordingly, Appellant had thirty days within which to file a notice of appeal from that denial, which expired on December 3, 1996. It is of no benefit to Appellant that the trial court belatedly denied the motion for new trial on February 24, 1997, *as the trial court lacked jurisdiction to so rule.* Therefore, because Appellant did not file his notice of appeal of the order denying the motion for new trial until February 26, 1997, we dismiss this part of the appeal.

Id. at 617-18, 953 S.W.2d at 54 (citation omitted) (emphasis added).

More recently, in *Davis v. State*, 350 Ark. 22, 86 S.W.3d 872 (2002), this court had another occasion to discuss the "deemed denied" rule. There, the appellant argued that the trial court erred in refusing to hear his posttrial motions. The motions were filed on November 21, 2000, and a hearing was set for December 4. Pursuant to an agreement of the parties, however, the hearing was reset for January 17, 2001. At that hearing, the trial court determined that it lacked jurisdiction to rule on the posttrial motions because they had already been deemed denied under Rule 33.3(c) as of the thirtieth day, which would have been December 21, 2000. This court agreed with the trial court, holding: "The posttrial motions were deemed denied on the 30th day. Therefore, there was nothing to be heard on the motions on January 17, 2001." *Id.* at 41, 86 S.W.3d at 884.

In the present case, the record reflects that Markham was convicted on November 21, 2003. On December 16, he filed a posttrial motion for reconsideration under Rule 33.3. On December 18, Markham was sentenced by the court. The judgment and commitment order was entered one week later, on December 26. Because the posttrial motion was filed prior to the entry of the judgment, his posttrial motion did not become effective until the date the judgment was filed, December 26. *See* Ark. R. Crim. P. 33.3(b). Shortly thereafter, on January 6, 2004, Markham reported to the circuit court to begin serving his prison sentence. Some three months later, on April 6, the trial court granted the posttrial motion for reconsideration and entered an order of acquittal.

Under Rule 33.3(c), Markham's posttrial motion for reconsideration was deemed denied on January 26, 2004,[1] and the trial court lost jurisdiction to rule on the merits of the motion after that date. Accordingly, the ruling made on April 6, which resulted in the entry of an order of acquittal, was of no legal effect. We therefore grant a writ of certiorari and hold that the judgment of conviction entered on December 26, 2003, remains valid and enforceable.

Writ of certiorari granted.

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[1] January 25, 2004, was the thirtieth day; however, because it fell on a Sunday, the motion would not have been deemed denied until Monday, January 26.

Mary LINKER-FLORES, Anastacio Flores *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES
and Adrianna Flores and Aranthza Flores, minor children

03-1099 194 S.W.3d 739

Supreme Court of Arkansas
Opinion delivered October 7, 2004

Cuffman and Phillips, by: *James H. Phillips*, for appellant Anastacio Flores.

Anne Orsi Smith, P.A., by: *Anne Orsi Smith,* for appellant Mary Linker-Flores.

Gray Allen Turner, DHS Office of Chief Counsel, for appellee.

Merry Alice Hesselbein, Attorney *ad Litem*, for appellees Adrianna Flores and Aranthza Flores, minor children.

ANNABELLE CLINTON IMBER, Justice. This case arises out of an order entered by the trial court on March 3, 2003, that terminated all parental rights of Appellants Anastacio Flores and Mary Linker-Flores. Mr. Flores appeals, arguing the evidence against him was insufficient to support a termination of parental rights. Although Mrs. Flores timely filed notices of appeal,[1] her appointed counsel filed a motion in this court to be relieved as counsel on the grounds that she could find no meritorious issues for appeal. Because Mrs. Flores is entitled to representation on appeal under Ark. Code Ann. § 9-27-316(h)(1) (Supp. 2003), we denied counsel's motion to be relieved and ordered the parties to brief the issue of whether counsel representing a parent in a termination proceeding should be required to file a no-merit brief comparable to that required under *Anders v. California*, 386 U.S. 738 (1967), where there appears to be no meritorious grounds for appeal. *Linker-Flores v. Arkansas Dep't of Human Services*,356 Ark. 369, 149 S.W.3d 884, 2004 WL 396342 (March 4, 2004)(per curiam). This is an issue of first impression in Arkansas. Thus, our jurisdiction is proper pursuant to Ark. S.Ct. R. 1-2(b)(1).

[1] Mrs. Linker-Flores filed notice of appeal through her attorney on March 20, 2003 and *pro se* on April 2, 2003. Both notices were timely.

1. Appellant Anastacio Flores — Sufficiency of the Evidence

Mr. Flores is purportedly married to Mary Linker-Flores,[2] who has three children, Kevin, Chad, and Lauren Linker, by another marriage. Additionally, Mr. and Mrs. Flores have two children, Aranthza and Adrianna Flores. This case began on July 27, 2001, when the Arkansas Department of Human Services (DHS) filed a petition for emergency custody of all five children. DHS had been investigating the Linker-Flores family since April 9, 2001, when the Department received an initial report of educational neglect. On May 10, 2001, the case was assigned to a caseworker and services such as home visits and a referral for housing were offered to the family. On July 25, 2001, DHS received a call from a detective with the Little Rock Police Department, stating that Kevin Linker had raped Chad and Lauren Linker. At this time, both parents were arrested on warrants. Kevin was arrested, and the assessor initiated a seventy-two-hour hold on the children because of the uncertainty of the sexual abuse allegations and the lack of a legal caretaker. The court entered an Order for emergency custody and set the matter for an emergency hearing on August 1, 2001.

At the August 1, 2001 hearing, the trial court found that probable cause existed and maintained the children in the custody of DHS. The court also ordered a home evaluation of the Linker-Flores home and supervised visitation for Mr. and Mrs. Flores at the DHS office.

On September 13, 2001, at the adjudication hearing, the court found the children were dependent/neglected and maintained them in DHS custody. The court also ordered both parents to attend and complete parenting classes. The court set March 11, 2001, for another review. Mr. Flores did not appear at the March review hearing.

On July 22, 2002, at the permanency planning hearing, the court ordered Mr. Flores to undergo a drug and alcohol assessment, and attend classes for drug and alcohol abuse and anger management. The court set January 8, 2003, as the date for the termination hearing.

At the termination hearing, numerous witnesses testified to various problems with Mr. Flores that made him an unsuitable parent. Dr. Janice Church, one of the therapists for Lauren Linker,

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[2] Documentation of the marriage was requested but never provided.

testified that Mr. Flores's cooperation was minimal and it took him a long time to get into the program. Once he started the program, he would not voluntarily come to therapy but only attended because of the court order. Dr. Church testified that though Mr. and Mrs. Flores minimized the problems in their relationship and Mr. Flores's abuse of alcohol, the children consistently talked about it and there was no reason to doubt the children's truthfulness. Dr. Church further testified that Mr. Flores admitted to usually drinking twelve to twenty-four beers over a two-day period, but he did not see himself as having a problem with alcohol. After Mrs. Flores was incarcerated, Dr. Church had a few sessions with Mr. Flores, but then Mr. Flores failed to return for further therapy.

Jim Harper, the therapist who had worked with Chad Linker, testified that he was very concerned about Mr. Flores's problems with domestic abuse and alcoholism. Harper testified that at intake, Chad said he got along with Mr. Flores except on Fridays when Mr. Flores became drunk, beat his mother and tore her underwear.

Dr. Paul Deyoub, the clinical psychologist who performed psychological evaluations on Mr. and Mrs. Flores, testified that Mr. Flores "had some interest in getting his biological children, but had no interest in the family, and very little sympathy for the victims." Furthermore, Dr. Deyoub found Mr. Flores to be "resistant beyond the language barrier" and testified that, for Mr. Flores to be capable to take his children would require "that he have a stable situation and that he is providing an adequate home and he will participate in some type of counseling for himself regarding the substance abuse, regarding parenting issues and do better than he did with me in the evaluation when I saw him."

Anna Foster, the case worker, testified both parents completed parenting classes and have had random drug-screens, which have all been negative. She testified she was never able to do a home evaluation because the family didn't have a permanent home. She further testified that on one occasion at the end of November or early December 2002, Mr. Flores came to the DHS office for a visit, smelling very strongly of alcohol. She asked him about it and he originally denied it, but later changed his story to having had one beer due to his many problems. Ms. Foster also testified that Mr. Flores was currently living at 6200 Asher Avenue

in the Chateau Apartments with other Mexican males and that he had said he could not care for his two children without their mother.

Mary Linker-Flores testified that she and Mr. Flores had moved around a lot, living with friends and in some motels. She testified that currently she and Mr. Flores lived in the Chateau Apartments, where usually there were four or five men and an extra on some occasions. She admitted the current living arrangement was inappropriate because of the other men and the drinking there. She denied that Mr. Flores hit her, except for one time when he was drunk and she was pregnant. Mr. Flores did not testify. After hearing all the evidence, the court made the following finding:

> As to Anastachio Flores, father of Adrianna Flores (DOB: 9-8-00) and Aranthza Flores (DOB: 8-17-99), he has attended most of the hearings and visits and he has worked at a job most, if not all, of the time since this case was opened, but he has not had stable housing, despite steady income; it has never been determined if he is a legal resident; he has gone to some counseling sessions, but would not go unless mother went; he lives with five to six male Mexican immigrants in an apartment; he has never worked with the case worker to develop a plan to care for the children without help from the mother; he stated he would take the children to Mexico and have his wife there to care for them. There is evidence of substantial consumption of alcohol and he came to one visit at DHS after drinking beer. The court has accommodated him with interpreters at hearings and evaluations. Still there has been no evidence presented that he could parent these children. Thus, the Court finds that it is in the Flores children's best interest that the parental rights of Mr. Flores be and hereby are terminated.
>
> Throughout this case, the Court finds that the Department made reasonable efforts to offer services to the family. Further, the Court finds that the Department made meaningful efforts to offer services to the family. The mother and father have failed to take advantage of the services, rehabilitate their lives and remedy the situation which caused removal of the children from the home.

Mr. Flores appeals from this order, arguing the evidence was insufficient to support the termination of parental rights by the court. We find the evidence was sufficient and affirm the trial court.

Mr. Flores argues the trial judge was not presented with clear and convincing evidence of meaningful efforts as required pursu-

ant to Ark. Code. Ann. § 9-27-341 (Supp. 2003). Our law is well settled that when the burden of proving a disputed fact is by clear and convincing evidence, the inquiry on appeal is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence is clearly erroneous. *Baker v. Arkansas Dep't of Human Services,* 340 Ark. 42, 8 S.W.3d 499 (2000). Clear and convincing evidence is defined as "that degree of proof which will produce in the factfinder a firm conviction as to the allegation sought to be established. In making such a determination, we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id.*

In this case, the trial judge was presented with clear and convincing evidence of meaningful efforts by DHS. Over the course of the fifteen-month investigation, DHS offered numerous services, therapy options, and classes to Mr. Flores. Mr. Flores had counseling options by Dr. Church, parenting classes, anger management classes, drug and alcohol assessments, and a housing referral offer by DHS. While Mr. Flores did complete the parenting classes and attended some of the counseling sessions, he was a very reluctant participant throughout the entire ordeal. While his first scheduled counseling session was in February, he waited until May to attend a session, and that was only after Dr. Church refused to schedule another appointment until he came in. He was "not enthusiastic about being there but he was not completely unwilling to be there," and he repeatedly complained that it was "too inconvenient for him to be there because of his job situation, work hours, and transportation." Though he could have continued therapy after his wife was incarcerated, he stopped going to counseling sessions entirely after two more visits. During one session with Mr. Flores, Dr. Church suggested Mr. Flores needed to secure suitable housing to get the children back, which he still had not done at the time of the termination hearing. Dr. Church further testified that Mr. Flores's alcohol consumption was "a huge issue and something [the children] were very concerned about." Despite this concern, Dr. Church was unable to make much progress in this area because Mr. and Mrs. Flores minimized his problems with alcohol or anger management.

Mr. Flores argues the evidence that he did not meaningfully participate in the therapy is "beside the point." However, as he maintains that DHS did not provide him with services and that DHS should have considered him individually for placement of the

children, his lack of participation in the family therapy is precisely the point. DHS tried to establish a program of therapy for Mr. Flores to help him with his personal issues, as well as the broader family issues, but he found it "too inconvenient" to participate. He failed to show up for the first three sessions and stopped going entirely after his wife was incarcerated. Furthermore, we reject Mr. Flores's suggestion that some sense of family unity prohibited him from engaging in meaningful therapy without the presence of his wife. Mr. Flores is asking for custody of his two girls, yet he is unable to function in his role as a parent without his wife, who is in jail. Mr. Flores himself admitted to not being able to take care of the children without his wife, and threatened to take his children to Mexico, and have his wife there care for them. All the evidence presented at trial produced in the factfinder a firm conviction that DHS had made meaningful attempts to offer services to Mr. Flores and that he had failed to take advantage of them.

Mr. Flores's failure to secure stable and appropriate housing for the children also supports the termination of parental rights. At the time of the termination hearing, he was living in an apartment with five or six Mexican men, and, at times, living in a motel when the apartment became too crowded. This is an entirely inappropriate living environment for two girls, ages ten and two. Despite being forewarned that he needed to secure more stable housing by Dr. Church and the referral for housing offered by DHS, Mr. Flores failed to find suitable housing. He further rejected all attempts in therapy to deal with his potential alcohol and anger issues, despite the knowledge that his behavior often scared the children.

Termination of parental rights is an extreme remedy and is in derogation of the natural rights of the parents. *Baker v. Arkansas Dep't of Human Services, supra.* However, parental rights should not be allowed to continue to the detriment of the child's welfare and best interest. *Id.* Here, because the evidence shows that Mr. Flores failed to address his problems with alcohol and anger management, failed at any meaningful participation in therapy, and refused to establish a stable living environment for his children, we affirm the trial court's order terminating his parental rights.

2. Appellant Mary Linker-Flores — Appointed Counsel's Motion to be Relieved

In this case, Mrs. Flores filed a timely notice of appeal, and her appointed counsel, Anne Orsi Smith, petitioned this court to

be relieved as counsel, stating she could find no meritorious grounds for appeal. *Linker-Flores v. Arkansas Dep't of Human Services, supra.* We denied Smith's motion and ordered the parties to brief the issue of whether counsel representing an indigent parent in a termination proceeding should be required to file a no-merit brief, comparable to that required under *Anders v. California, supra,* where there appears to be no meritorious grounds for appeal. Based upon our review of Arkansas law and cases from other jurisdictions, we hold that the *Anders* procedure is a correct balancing of the rights of indigent parents and the obligations of their appointed attorneys, and we adopt this procedure for appeals involving indigent parents in termination cases.

At the outset, it must be noted that indigent parents have a right to counsel on appeal in Arkansas. Through Ark. Code Ann. § 9-27-316(h) (Supp. 2003), as well as relevant case law, Arkansas has recognized this right. This statute gives parents involved in proceedings to terminate parental rights "the right to be represented by counsel at all stages of the proceedings and the right to appointed counsel if indigent." *Id.* In *Gilliam v. State,* 305 Ark. 438, 808 S.W.2d 738 (1991), our court interpreted identical language from Ark. Code Ann. § 9-27-316 (Repl. 1991), and concluded that a juvenile delinquent had a right to counsel on appeal. Furthermore, we have allowed the payment of attorney's fees for an attorney who represented an indigent parent on appeal. *Baker v. Arkansas Dep't Of Human Services, supra.* Most notably, in *Linker-Flores v. Arkansas Dep't Of Human Services, supra.,* this court explicitly recognized an indigent parent's right to counsel on appeal.

Given that indigent parents are entitled to court-appointed counsel on appeal, we must determine the extent of counsel's obligations when counsel believes the appeal is frivolous. The Supreme Court addressed this concern in the context of criminal appeals in *Anders v. California, supra.* In *Anders,* the Court delineated the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after counsel has reviewed the record and conscientiously determined that it contains no meritorious issues for appeal. The Court was particularly concerned with possible discrimination against the indigent defendant, and the need for the defendant to have representation in the role of an advocate, rather than that of amicus curiae. To protect the indigent defendant's right to counsel on appeal, the court adopted the following procedure for counsel's withdrawal:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds, it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id. at 744. We must now decide whether to apply this procedure to an indigent parent's appeal of an order terminating parental rights.

Courts throughout the country have examined this issue, and the majority of jurisdictions addressing the question have concluded that the *Anders* procedures are appropriate in appeals from orders terminating parental rights. *People ex rel. South Dakota Dep't of Social Services*, 678 N.W.2d 594 (S.D. 2004); *In the Interest of K.S.M.*, 61 S.W.3d 632 (Tex. Ct. App. 2001); *State ex rel. Children, Youth, and Families Dep't v. Alicia P.*, 127 N.M. 664, 986 P.2d 460 (Ct. App. 1999); *L.C. v. Utah*, 963 P.2d 761 (Utah Ct. App. 1998); *J.K. v. Lee County Dep't of Human Resources*, 668 So.2d 813 (Ala. Civ. App. 1995); *In re V.E. and J.E.*, 417 Pa. Super. 68, 611 A.2d 1267 (1992); *Morris v. Lucas Co. Children Services*, 49 Ohio App.3d 86, 550 N.E.2d 980 (1989); *Matter of Keller*, 138 Ill. App. 3d 746, 486 N.E.2d 291 (1985). In so concluding, some courts have looked at the similarities between the rights of indigent clients and duties of appointed counsel in both criminal and civil appeals. The Texas Court of Appeals in *In the Interest of K.S.M.*, 61 S.W.3d at 634, stated:

> Like indigent criminal appellants, indigent appellants challenging an order terminating their parental rights enjoy a right to counsel on appeal. . . . In addition, the difference in the nature of the case, i.e., civil rather than criminal, makes no difference in the duties court-appointed counsel owes his or her client. From counsel's perspective, counsel's duty to competently and diligently represent the client is exactly the same in a civil appeal from an order terminating parental rights as in an appeal from a criminal conviction.

Appellate courts in South Dakota and Utah have applied similar reasoning in adopting *Anders*-like procedures. *People ex rel. South Dakota Dep't of Social Services, supra*; *L.C. v. Utah, supra.*

Other courts have examined the additional protections and guidance the *Anders* procedures offer the indigent appellant and the court. The Court of Civil Appeals of Alabama has emphasized that the court-appointed appellate counsel should have "some means by which to effectively represent his client and yet be allowed to withdraw without having to file a frivolous appeal. . . ." *J.K. v. Lee County Dep't of Human Resources*, 668 So.2d at 815. The Alabama court went on to explain that there was no practical difference in making the attorney continue with the appeal[3], thus raising frivolous issues that the appellate court will have to review, and requiring an *Anders* brief raising possible issues but notifying the court that counsel believed the appeal was frivolous. Appellate courts in both Alabama and New Mexico have recognized that the arguments and legal authority cited in a no-merit brief would assist both the appellate court and the indigent parent. The appellate court can use the brief to conduct a more thorough and more informed review of the record, and the indigent parent can use the brief in pressing her contentions on appeal. *J.K. v. Lee County Dep't of Human Resources, supra*; *State ex rel. Children, Youth, and Families Dep't v. Alicia P., supra.* Essentially, because the indigent parent has access to the arguments and legal authority in the brief, she is in the same position as those able to afford private counsel. *Matter of Keller*, 138 Ill.App.3d at 747.

Some jurisdictions have declined to adopt the *Anders* procedures for appeals from orders terminating parental rights, arguing the additional time necessary to fulfill the *Anders* requirements could cause harm to the child at issue in the case. *N.S.H. v. Florida Dep't of Children and Family Services*, 843 So.2d 898 (Fla. 2003); *In re Harrison*, 136 N.C. App. 831, 526 S.E.2d 502 (2000); *Denise H. v. Arizona Dep't of Economic Security*, 193 Ariz. 257, 972 P.2d 241 (Ct. App. 1998); *In re Sade C.*, 13 Cal. 4th 952, 920 P.2d 716 (1996); *Ex parte Cauthen v. Almendarez*, 291 S.C. 465, 354 S.E.2d 381 (1987). While we do recognize the need to resolve

[3] Courts in Massachusetts and Washington have refused to allow appointed counsel to withdraw based on the ground that the appeal is frivolous or otherwise lacking in merit. *Care and Protection of Valerie*, 403 Mass. 317, 529 N.E.2d 146 (1988); *In re Welfare of Hall*, 99 Wash. 2d 842, 664 P.2d 1245 (1983).

termination issues "as rapidly as is consistent with fairness," *Lassiter v. Dep't of Social Services of Durham Co. North Carolina*, 452 U.S. 18, 32 (1981), we must balance this need with the substantial loss the parents will face if their child is taken away from them. The need for a prompt resolution of these matters has already been recognized by the adoption of Ark. R. App. P—Civ. 2(e) (2004), which accords priority to appeals involving termination of parental rights. Moreover, as the production of the record is often the most time-consuming part of the appeal process, the only way to reach a significantly faster resolution in termination-of-parental-rights appeals would be to allow the lawyer to withdraw before the preparation of the record. This is not an acceptable alternative, as neither the court *nor the lawyer* can review the record for potential meritorious points of appeal. Fairness requires that the indigent parent is entitled to a review of the record for any appealable issues, and we will not eliminate this step from the process. Because the record must be produced even in circumstances where the lawyer ultimately asks to withdraw, the only time saved by allowing such a withdrawal without the preparation of an *Anders* brief is simply the time it takes for the lawyer to prepare the brief, which is inherently limited by the briefing schedule. While the preparation of a brief does take time, the additional time involved is hardly sufficient to justify doing away with procedures to protect the parent's right to counsel on appeal.

■ ■ Because we conclude that the benefits from the *Anders* protections to the indigent parent's right to counsel outweigh the additional time such procedures require, the *Anders* procedures shall apply in cases of indigent parent appeals from orders terminating parental rights. Thus, we hold that appointed counsel for an indigent parent on a first appeal from an order terminating parental rights may petition this court to withdraw as counsel if, after a conscientious review of the record, counsel can find no issue of arguable merit for appeal. Counsel's petition must be accompanied by a brief discussing any arguably meritorious issue for appeal. The indigent parent must be provided with a copy of the brief and notified of her right to file points for reversal within thirty days. If this court determines, after a full examination of the record, that the appeal is frivolous, the court may grant counsel's motion and dismiss the appeal. If, however, we find any of the legal points arguable on their merits, we will appoint new counsel to argue the appeal.

In light of the announced procedure for motions for withdrawal, we hold Mrs. Smith's motion to be premature until such time as a no-merit brief is filed.

Tony HARPER *v.* STATE of Arkansas

CR 03-1457 194 S.W.3d 730

Supreme Court of Arkansas
Opinion delivered October 7, 2004

Leverett & Watts, PLLC, by: *Mark D. Leverett*, for appellant.

Mike Beebe, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

JIM HANNAH, Justice. A Pulaski County jury convicted appellant Tony Harper of capital murder and aggravated robbery. He was sentenced to a term of life imprisonment without parole for the capital murder, and a concurrent term of 360 months for the aggravated robbery. The charges arose from the shooting death of Little Rock taxi driver Leroy Johnson on December 17, 2002. Harper appeals, arguing that the circuit court erred in denying his motion to suppress his statement. He also argues that there is insufficient evidence to support his convictions for capital murder and aggravated robbery; alternatively, he argues that even if this court finds there was substantial evidence to support the verdict, the circuit court erred by sentencing him for both capital murder and the underlying felony. Finally, Harper argues that the circuit court erred in admitting into

evidence photographs of the deceased that were gruesome and inflammatory. We find no error and affirm. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(2).

Facts

Detective John White of the Little Rock Police Department testified that on December 17, 2002, he was called to investigate the shooting death of taxi driver Leroy Johnson at 24th and Monroe Streets in Little Rock. White contacted the cab company and learned that Johnson had picked up his last customer at 923 McAlmont. White, Detective Eric Knowles, and another officer went to that address. No one was at that address, so they canvassed the neighborhood to see if anyone had called the cab company during the night. At a nearby apartment building, the officers found Arthur Culps, who told the officers that his next-door neighbor, Tony Harper, had used his phone the night of the murder. Detective White testified that according to Culps, on that night, Harper was carrying a shotgun and talking about killing his wife. White stated that Culps told him that he and Harper drank a shot of whiskey. Further, White testified that Culps told him he tried to prevent Harper from leaving the apartment because he could tell that Harper was "clearly upset." White stated that Culps told him that Harper eventually left the apartment, still carrying the shotgun. White testified that at that time, he knew that Johnson had been killed with a shotgun.

The officers approached the apartment next to Culps's as Brenda Aldridge was leaving it. Aldridge told the officers that she lived there with her boyfriend and Harper, and that both of them were home. Aldridge knocked on the door, but no one answered. Aldridge left, and the officers knocked several more times. Eventually, Harper opened the door, and he identified himself as Jonathon White. Detective White testified that Harper was unable to provide his date of birth, and he stated that Harper was acting deceptive and evasive. White told Harper that he and the other officers were there investigating a homicide.

White stated that he returned to his police car to run a check on Jonathon White, but there was no information on anyone with that name. Shortly thereafter, Aldridge returned and went back into the apartment. Another woman, who the officers later learned was Harper's mother, Ruby Humphrey, also arrived at the apartment building. The officers again attempted to speak with Harper, but he maintained that his name was Jonathon White. Detective

White stated that he told Humphrey he was investigating a homicide, and that eventually, she went into Harper's residence and told him he needed to tell the officers the truth. Subsequently, Harper revealed his true name. The officers then checked Harper's name and learned that there were outstanding warrants for his arrest; they arrested Harper based on those warrants.

In his statement to the police, Harper stated that on the night of the shooting, he called a taxi, and when the taxi arrived, Harper told Johnson, the taxi driver, that he did not have any money and offered Johnson drugs as payment for the ride. Harper stated that Johnson told him he wanted methamphetamine, but Harper told Johnson that he only had "powder, some rocks." Harper stated that he gave Johnson a gram of powder worth $50.00. Harper stated that when the cab stopped at his destination, Johnson gave him $10.00. At that point, according to Harper, he told Johnson repeatedly to give the powder back to him and keep his money. Then, Harper stated, Johnson grabbed the shotgun and it went off. Harper stated that he again asked Johnson for his money, and that he noticed Johnson reach under the driver's seat. Harper testified that he was about to drop the gun when again, the gun went off. He stated that after he busted a window in the cab with the butt of his gun, "I got my dope and I ran." Harper then ran to a friend's house and called his mother to come and pick him up. Harper stated that after his mother came to get him, he told her he had done something bad and that she needed to take the gun and get rid of it. Harper stated that he had no intention of robbing Johnson.

Sufficiency of the Evidence

Preservation of Harper's right against double jeopardy requires that we consider his challenge to the sufficiency of the evidence before we consider alleged trial error even though the issue was not presented as the first issue on appeal. *Davis v. State*, 350 Ark. 22, 86 S.W.3d 872 (2002). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003). We will affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* On review, this court neither weighs

the evidence nor evaluates the credibility of witnesses. *Kirwan v. State*, 351 Ark. 603, 96 S.W.3d 724 (2003).

Pursuant to Ark. Code Ann. § 5-12-103(a)(1) (Repl. 1997), a person commits aggravated robbery if he commits robbery and is armed with a deadly weapon or represents by word or conduct that he is so armed. A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another. Ark. Code Ann. § 5-12-102(a) (Repl. 1997). A person commits capital murder if "he commits . . . robbery . . . and in the course of and in furtherance of the felony, or in immediate flight therefrom, he . . . causes the death of any person under circumstances manifesting extreme indifference to the value of human life." Ark. Code Ann. § 5-10-101(a)(1) (Repl. 1997).

Harper first argues that this court's decisions in *Parker v. State*, 292 Ark. 421, 731 S.W.2d 756 (1987), and *Sellers v. State*, 295 Ark. 489, 749 S.W.2d 669 (1988), require reversal of his convictions. We disagree. In *Parker*, the appellant entered the victims' home with the intent to kill the victims. The State proceeded on a felony-murder theory, using burglary as the underlying felony to support the conviction. We reversed, stating: "For the phrase 'in the course of and in furtherance of the felony' to have any meaning, the burglary must have an independent objective which the murder facilitates." *Parker*, 292 Ark. at 427, 731 S.W.2d at 759. Similarly, in *Sellers*, the State proceeded on a felony-murder theory, using burglary as the underlying felony to support the conviction. The State attempted to distinguish the *Sellers* case from the *Parker* case, arguing that the appellant's intent on entering the victim's home was to assault and batter him rather than to murder him, thus there was an objective of the burglary, independent of the murder. We rejected the State's argument and stated: "[W]e cannot find a way to say that the murder facilitated the burglary if the assault and battery were the underlying offenses. We cannot say that the murder facilitated the assault and battery as it was the very culmination of them." *Sellers*, 295 Ark. at 493, 749 S.W.2d at 671.

Harper's reliance on *Allen v. State*, 310 Ark. 384, 838 S.W.2d 346 (1992), is also misplaced. In that case, we held that the trial court erred in giving the felony-murder instruction because the assault "was only in the furtherance of the murder, not some

other felony." *Allen*, 310 Ark. at 388, 838 S.W.2d at 348. In the present case, the State did not contend that the aggravated robbery was in furtherance of the murder; rather, the State contended that Harper caused Johnson's death in the course of, and in furtherance of, the aggravated robbery. Thus, *Allen* is inapplicable.

While Harper does not couch his argument in terms of whether there was an objective of the aggravated robbery, independent of the murder, he argues that there is no evidence in the record that he attempted to rob the victim, and that absent proof of the underlying felony, there cannot be a conviction for capital murder with an underlying felony. He argues that the only basis for a finding of aggravated robbery is circumstantial evidence, which in this case is not legally sufficient to convict him.

The longstanding rule in the use of circumstantial evidence is that, to be substantial, the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). The question of whether the circumstantial evidence excludes every other reasonable hypothesis consistent with innocence is for the jury to decide. *Id.* Upon review, this court must determine whether the jury resorted to speculation and conjecture in reaching its verdict. *Id.*

A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence. *See Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003). Intent to commit a robbery may be inferred from the facts and circumstances of the particular case. *Jenkins v. State*, 350 Ark. 219, 85 S.W.3d 878 (2002). In *Owens v. State*, 313 Ark. 520, 856 S.W.2d 288 (1993), we stated:

> As to the general rule concerning sufficient proof of the necessary "intent to rob," the principles espoused in *Grigsby v. State*, 260 Ark. 499, 542 S.W.2d 275 (1976), are applicable here. In relevant part the *Grigsby* court stated the following:
>
> > Where the robbery and the killing are so closely connected in point of time, place and continuity of action as to constitute one continuous transaction it is proper to consider both as a single transaction and the homicide as a part of the res gestae of the robbery. (cites omitted.) The sequence of events is unimportant and the killing may precede, coincide with or follow the robbery and still be committed in its perpetration. (cites omitted.)

Owens, 313 Ark. at 525, 856 S.W.2d at 292.

As pointed out by the State, the only account of what occurred in the cab prior to the shooting is the statement that Harper gave to police officers the morning after the shooting. According to Harper, he offered Johnson drugs as payment for the ride. Harper stated that he gave Johnson a gram of cocaine powder worth $50.00; however, when the cab stopped at Harper's destination, Johnson gave Harper only $10.00. The State contends that apparently, Harper wanted to be paid the full $50.00 for the cocaine or he wanted Johnson to return the substance to him, even though he claimed he gave the drug to Johnson as payment for the ride. Harper claimed that he and Johnson struggled over the shotgun, and that when Johnson grabbed the shotgun, it fired. Harper stated that as he was leaving the cab, the shotgun again fired.

The State contends that, even if Harper's account is accurate, his intent to commit a theft at gunpoint was established by his admission that he shot Johnson in order to reobtain the drugs that he had just given to Johnson in exchange for the ride and to get money from Johnson as payment for the drugs. We agree with the State's contention that the jury could infer that Harper shot Johnson in order to steal the drugs and money from Johnson, based on Harper's own account of what occurred.

The credibility of witnesses is an issue for the jury and not this court. *Ross, supra.* The jury may resolve questions of conflicting testimony and inconsistent evidence and may choose to believe the State's account of the facts rather than the defendant's. *Id.* We hold that there was substantial evidence to support Harper's conviction for aggravated robbery. We further hold that there was substantial evidence that Harper shot and killed Johnson during the course of, and in furtherance of, an aggravated robbery.

Alternatively, Harper argues that if this court determines that there is substantial evidence to support the conviction for aggravated robbery, this court should nevertheless set aside his sentence for aggravated robbery because he cannot be sentenced for both capital murder and the associated felony. This argument is without merit. Separate convictions and sentences are authorized for capital murder and any felonies utilized as underlying felonies for the murder. *See* Ark. Code Ann. § 5-1-110(d)(1)(A) (Repl. 1997); *see also Walker v. State*, 353 Ark. 12, 21, 110 S.W.3d 752, 757 (2003). The circuit court did not err in sentencing Harper on both counts.

Motion to Suppress

Harper contends that the confession obtained from him was taken while he was under the influence of intoxicants and drugs, which made him incapable of giving a voluntary and knowing waiver of his constitutional rights. He further contends that the confession was obtained through coercion and threats, primarily in the nature of threats made against his mother. In reviewing a circuit court's refusal to suppress a confession, we make an independent determination based upon the totality of the circumstances, *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003); *Cox v. State*, 345 Ark. 391, 47 S.W.3d 244 (2001), and we will reverse only when the circuit judge's finding of voluntariness is clearly against the preponderance of the evidence. *Trull v. State*, 322 Ark. 157, 908 S.W.2d 83 (1995). Conflicts in the testimony are for the circuit court to resolve, and again, we will not reverse unless the circuit court's finding is clearly erroneous. *Id.*

A statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. *Jones v. State*, 344 Ark. 682, 42 S.W.3d 536 (2001). In order to determine whether a waiver of *Miranda* rights is voluntary, this court looks to see if the confession was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Id.* This court has consistently held that relevant factors in determining whether a confession was involuntary are age, education, and the intelligence of the accused, as well as the lack of advice as to his constitutional rights, the length of detention, the repeated and prolonged nature of questioning, and the use of mental or physical punishment. *See, e.g., Pilcher v State*, 355 Ark. 369, 136 S.W.3d 766 (2003); *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998). Other relevant factors in considering the totality of the circumstances include the statements made by the interrogating officer and the vulnerability of the defendant. *Pilcher, supra*; *Hood v. State*, 329 Ark. 21, 947 S.W.2d 328 (1997).

When an appellant claims that his confession was rendered involuntary because of drug or alcohol consumption, the level of his comprehension is a factual matter to be resolved by the circuit court. *Grillot, supra; Jones, supra.* In testing the voluntariness of one who claims intoxication at the time of waiving his rights and

making a statement, this court determines whether the individual was of sufficient mental capacity to know what he was saying — capable of realizing the meaning of his statement — and that he was not suffering from any hallucinations or delusions. *Grillot, supra; Jones, supra.*

White stated that when he encountered Harper, Harper understood what White was saying, and he seemed to understand the situation. White stated that Harper was steady on his feet. White testified that while he noticed the smell of alcohol in Harper's residence, he did not notice the smell of alcohol on Harper's person. After Harper was taken to the police station, Detective Knowles advised him of his *Miranda* rights, and Harper stated that he understood his rights. Knowles stated that Harper did not appear to be suffering from any delusions or hallucinations as he was speaking to the officer. White did note that Harper was sniffing during the interview; however, he testified that Harper started sniffing only after he began crying during his confession. Harper told the officers that he attended school through the ninth grade and had completed his GED in 1994. The circuit court heard the tape recording of Harper's statement, and a transcript of the interview was introduced.

Humphrey was also interviewed. White testified that he did not know if Harper had been told that his mother was being interviewed, but he denied telling Harper his mother would be arrested if he did not tell the truth. Knowles testified that after he interviewed Harper, he learned that other officers had interviewed Humphrey. He stated that he found out from other officers that Humphrey had taken the shotgun and thrown it in the river.

Harper testified that he had been drinking gin heavily the day and night before Johnson was killed. He also stated that he had been using cocaine that day. He stated that he had smoked "probably about three or four rocks of crack" and sniffed "probably an eight ball" of powder. Harper stated that he had a forty-ounce beer in his hand when the police officers came to his door.

Harper stated that he confessed when the officers threatened to arrest his mother and charge her with capital murder. He stated that detectives provided him with specific facts to include in his confession. Harper also testified when he made his statement, he was high on cocaine and sniffed throughout the entire interview.

After hearing the evidence, the circuit judge stated that while there was some evidence that Harper might have been ingesting drugs or alcohol at the time of the incident, the evidence showed that Harper voluntarily waived his rights, and that if Harper was suffering from any kind of impairment, that impairment was not such that it would prevent Harper from understanding what the officers were asking him and what was taking place. The circuit court also ruled that Harper's confession was not the result of coercion and denied Harper's motion to suppress the statement.

The issue of whether the circuit court erred in denying Harper's motion to suppress turns on the credibility of the witnesses. This court has held that issues regarding the credibility of witnesses testifying at a suppression hearing are within the province of the circuit court. *Branscum v. State*, 345 Ark. 21, 43 S.W.3d 148 (2001). "Conflicts in the testimony are for the trial judge to resolve, and the judge is not required to believe the testimony of any witness, especially that of the accused since he or she is the person most interested in the outcome of the proceedings." *Branscum*, 345 Ark. at 30, 43 S.W.3d at 155 (quoting *Wright v. State*, 335 Ark. 395, 983 S.W.2d 397 (1998), *overruled on other grounds by Grillot, supra*).

The circuit court heard testimony from Harper that he was so incapacitated from alcohol and drugs that he could not have knowingly and voluntarily waived his rights. On the other hand, White and Knowles testified that Harper did not appear to be intoxicated, that he did not smell of alcohol, that he was steady on his feet, and that he was able to understand and respond to their questions. Further, the circuit judge listened to the tape of the interview, and so was able to hear for himself whether or not Harper sounded as though he were impaired by drugs or alcohol. *See Jones*, 344 Ark. at 689, 42 S.W.3d at 542. Clearly, the circuit court found the testimony of the police officers to be more credible than the testimony of Harper. We cannot say that the circuit court's decision on credibility was clearly erroneous.

As for Harper's claim that his confession was coerced, again, the issue is one of credibility. Harper testified that he confessed because the officers threatened to arrest his mother. White denied telling Harper his mother would be arrested if Harper did not tell the truth. Knowles testified that at the time he was interviewing Harper, he was unaware that Harper's mother

was also being interviewed. Again, it appears that the circuit court found the police officers to be more credible than Harper. Viewing the totality of the circumstances surrounding Harper's statement, we cannot say that the circuit court erred in denying Harper's motion to suppress.

Admissibility of Photographs

This court has repeatedly stated that when photographs are helpful to explain testimony, they are ordinarily admissible. *Smart v. State*, 352 Ark. 522, 104 S.W.3d 386 (2003); *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 evidence to exclude it. *Smart, supra; 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. *Smart, supra; 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. *Smart, supra.* 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. *Smart, supra; Bradford v. State*, 306 Ark. 590, 815 S.W.2d 947 (1991).

Harper contends that the circuit court erred in admitting into evidence photographs that were gruesome and inflammatory. Harper objected to the admission of two of the crime-scene photographs, State's Exhibits 2 and 4, during the testimony of Officer Mickey Holloway, a crime scene specialist for the Little Rock Police Department. During his testimony, Holloway explained that State's Exhibit 2, a photograph taken outside the cab, showed Johnson's "defensive position," as well as one gunshot wound near the elbow in his left arm and another gunshot wound to the face. Holloway stated that State's Exhibit 4, a photograph taken after the door of the cab was opened, showed the position of Johnson's body inside the car; further, Holloway noted that one of Johnson's legs was jammed between the door and the steering wheel as if Johnson were raising his leg.

During the testimony of Dr. Frank Peretti, the state medical examiner, the State offered photographs taken during the autopsy performed on Johnson's body. Dr. Peretti stated that it was his opinion that photographs taken during the autopsy would help the jury understand the nature of the injuries. Harper objected to the admission of two autopsy photographs. State's Exhibit 34 depicted the injuries to Johnson's left arm. State's Exhibit 35 was a picture of Johnson's face and depicted the gunshot wound to Johnson's left cheek.

Here, the circuit court determined that State's Exhibits 2, 4, 34, and 35 were not so inflammatory that they would prejudice the jury. Harper contends that none of the photographs were necessary to explain the testimony of any witness. We disagree. State's Exhibits 2 and 4 allowed the jury to see the condition of the body, the probable type or location of the injuries, and the position in which the body was discovered. State's Exhibits 34 and 35, the autopsy photographs, were used to corroborate the medical examiner's testimony.

Finally, Harper argues that there was no reason for the State to introduce close-up photographs of Johnson's injuries "since the heinous nature of the crime or the nature of the injury had no bearing upon the ultimate issue to be decided by the jury." He further states that the nature of the injuries, other than the fact that they caused the death of the victim, were of no relevance to this trial. Photographs showing the condition of the body are relevant, and it is not an abuse of discretion to admit them. *O'Neal v. State*, 356 Ark. 674, 158 S.W.3d 175 (2004). The circuit court did not abuse its discretion in admitting State's Exhibits 2, 4, 34, and 35.

4-3(h)

In accordance with Ark. Sup. Ct. R. 4-3(h), the transcript of the record before us has been reviewed for adverse rulings objected to by the appellant, but not argued on appeal, and no such reversible errors were found.

Affirmed.

Jerry HERRON *v.* STATE of Arkansas

CR 04-938 194 S.W.3d 770

Supreme Court of Arkansas
Opinion delivered October 7, 2004

Dennis R. Mullock, for appellant.

No response.

PER CURIAM. Appellant Jerry Heron, by and through Dennis R. Mullock, has filed a motion for a rule on the clerk. His attorney 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.

Robert McINTOSH *v.* STATE of Arkansas

02-1266 194 S.W.3d 769

Supreme Court of Arkansas
Opinion delivered October 7, 2004

PER CURIAM. On September 16, 2004, we ordered attorneys Rickey Hicks and R.S. McCullough to appear before this court on September 30, 2004, to show cause as to why they should not be held in contempt for failing to perfect the appeal of Appellant Robert McIntosh. Both attorneys appeared on that date and entered pleas of not guilty and requested a hearing.

We therefore appoint the Honorable John E. Jennings as a master to conduct the hearing for both attorneys. After the hearing, we direct the master to make findings of fact and file them with the court. The master's findings should include a determination as to which attorney represented Appellant in his appeal and therefore was responsible for perfecting the appeal. We also direct the master to determine the status and the whereabouts of the record for Appellant's appeal. Once we receive the master's findings, we will decide whether Mr. Hicks and Mr. McCullough should be held in contempt.

It is so ordered.

Alexander NEWBORN *v.* STATE of Arkansas

CR 04-989 194 S.W.3d 770

Supreme Court of Arkansas
Opinion delivered October 7, 2004

Alan Le Var, for appellant.

No response.

PER CURIAM. Appellant Alexander Newborn, by and through his attorney, Alan LeVar, has filed a motion for rule on the clerk. Attorney LeVar 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.

C.D. NOLAN *v.*
Darryl LITTLE, Director, State Plant Board

03-1115 196 S.W.3d 1

Supreme Court of Arkansas
Opinion delivered October 14, 2004

[Rehearing denied December 2, 2004.]

Nolan & Henry, PLLC, by: *Mark Murphey Henry*, for appellant.

Mike Beebe, Att'y Gen., by: *Eric F. Walker*, Ass't Att'y Gen., for appellee.

BETTY C. DICKEY, Chief Justice. This case involves whether seed samples are public records under the Arkansas Freedom of Information Act (hereinafter "FOIA"). The Pulaski County Circuit Court, Honorable Jay Moody presiding, found that the actual physical seeds that were the subject of the FOIA request did not fall under the terms and definition of "public records," as defined by Ark. Code Ann. § 25-19-103 (5)(A) (Supp. 2003). We affirm.

On July 15, 2003, C.D. "Duff" Nolan filed a complaint against Darryl Little, Director of the Arkansas State Plant Board, alleging Little failed to comply with the Arkansas FOIA by denying his request for various seed samples. Little denied the request, contending that the seeds were not public records and thus not subject to FOIA.

Duff Nolan testified that he was an agriculture lawyer involved with a number of seed companies who have created and developed useful varieties of seed on which they expect to receive royalties. These companies attempt to eliminate illegal reproduction and illegal sale of an inventor and owner's property rights in germ plasm, which relates to genetic codes. Nolan said that during the last few years seeds are being reproduced and sold illegally, and one way of investigating this illegal trade is through the Arkansas State Plant Board. The State Plant Board receives seeds from different seed dealers and different farmers, submitted as seed samples, as opposed to regulatory samples. The Board performs germination tests or a vigor test, then identifies and stores the samples.

Nolan wanted to know if the Alice-Sidney Dryer and Seed Company of Dermott had submitted wheat samples to the State Plant Board. According to Nolan, Alice-Sidney Dryer asked the

Plant Board to provide a germination test on certain seeds, because that test is required in order to sell the seed. On June 20, 2003, Nolan made a FOIA request to the Board for the disclosure of representative seed samples, 100 grams of both regulatory and service samples, submitted by Alice-Sidney Dryer and maintained in the State Plant Board's files. The State Plant Board responded that the seed itself was not a public record, and therefore not subject to FOIA.

Aaron Palmer, a State Plant Board seed lab manager, testified to the testing procedure explaining that, "if a customer sends in a sample for germination and they later request a purity test, if some of the seed has been removed, then we have less than the amount of weight that we need to go through that sample and create an analysis. So, they're going to have to resample, if the sample is even available." He also testified that the resulting data is subsequently compiled into analysis reports and those reports are turned over for FOIA.

Darryl Little said that, in responding to FOIA requests, he had previously given Nolan copies of records, but has "never considered the seeds to be a record because they are a sample. It's not a compilation of information or data that our agency puts together. It's merely the physical sample that we use to compile the data." If these seeds were given out under FOIA, it "would deplete the file sample to a point where we wouldn't be able to not only service the farmer or the farm community here in Arkansas, but may jeopardize our ability to meet federal requirements with regards to interstate shipments of seed. This would be because we might run out of seeds."

On appeal, Nolan first argues that a "public record," as defined by FOIA, includes seed samples. Ark. Code Ann. § 25-19-103 (5)(A) defines a public record as follows:

> "Public records" means writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.

Furthermore, the term "medium" is defined as "the physical form or material on which records and information may be stored or represented and may include, but is not limited to, paper, microfilm, microform, computer disks and diskettes, optical disks, and magnetic tapes." Ark. Code Ann. § 25-19-103 (3) (Supp. 2003).

Nolan contends that a "public record" includes data as contained within "any medium," to include seed samples and the genetic information contained therein. Nolan also argues that the canons of statutory interpretation require "any medium" to be given plain meaning and effect, and that a broad definition of "public record" be applied.

This court reviews issues of statutory construction *de novo*, as it is for this court to decide what a statute means; thus, we are not bound by the circuit court's determination in that regard. *Cockrell v. Union Planters Bank,* 359 Ark. 8, 194 S.W.3d. 178 (2004); *Hartford Fire Ins. Co. v. Sauer,* 358 Ark. 89, 186 S.W.3d 229 (2004). The basic rule of statutory construction is to give effect to the intent of the General Assembly. *Id.* In determining the meaning of a statute, the first rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* This court construes the statute so that no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible. *Id.* When 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. *Id.* However, this court will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. *Id.* This court will accept a circuit court's interpretation of the law unless it is shown that the court's interpretation was in error. *Id.; Barclay v. First Paris Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (2001). This court takes pain to reconcile statutory provisions to make them consistent, harmonious, and sensible. *Id.*

A seed sample does not meet the definition of a "public record," because it cannot be said to be an object "on which records and information may be stored or represented." Although the list of items that can be mediums is not exhaustive, it does not contain a seed or any other organic object. Moreover, the various items that constitute a "public record" are writings, recorded sounds, films, tapes, electronic or computer-based information,

and data compilations in any medium. "Mediums" are paper, microfilm, microform, computer disks and diskettes, optical disks, and magnetic tapes. Giving the words of the statute their plain and ordinary meaning as required by the rules of statutory construction, a seed sample does not constitute a "public record," nor does it fall within the definition of a medium. Our interpretation is consistent with the provisions of the entire Act, which provides for all public records to be open to "inspection and copying" by any citizen. Ark. Code Ann. § 25-19-105(a)(1). Removal and destructive testing of seed samples go far beyond the inspection and copying of public records.

In each of the cases cited by Nolan, the items at issue were books, writings, paperwork, paper reports, logs, photographs, memorandums, and notes, and the cases in no way indicate that an organic object is subject to a FOIA request. Although courts have ruled that FOIA requests be interpreted broadly, it is not so broad as to include any item located within the doors of a state agency that may contain some kind of genetic information. Here, the actual physical seed sample that the State Plant Board uses to compile data is not a "public record." Only the documents relating to the testing of a seed sample are available under FOIA.

Since this court holds that the actual seed sample is not a public record, we need not address Nolan's argument that all "public records" not specifically exempt by statute are subject to public inspection under Ark. Code Ann. § 25-19-105(a)(1)(A) (Supp. 2003).

For his second point on appeal, Nolan argues that the trial court failed to apply a "common sense" solution to this narrow issue. This court has said that we will balance the interests between disclosure and non-disclosure using a common sense approach. *Arkansas Department of Finance & Administration v. Pharmacy Association,* 333 Ark. 451, 970 S.W.2d 217 (1998). We agree that a common sense approach should be used, and that the trial court properly ruled that a seed is not a public record.

Nolan says that the unique nature of seed samples prompts a common sense solution when balancing the public interest with the State Plant Board's current policy of annually discarding seed samples. Nolan contends that when the State Plant Board discards

the seed samples the information is already in the public domain, and it should be disposed of in a manner that contemplates FOIA requests.

Since seed samples are not public records, the trial court need not have given special consideration to the unique nature of seed samples. However, testing the seed sample does destroy the seed, and if the State Plant Board had to turn over a sample in response to a FOIA request, the Board would lose the seed sample.

The State Plant Board does discard the seed after a period of time. Nolan cites to *California v. Greenwood,* 486 U.S. 35 (1988), where the United States Supreme Court held that household garbage is not subject to Fourth Amendment protection from warrantless search and seizure since "an expectation of privacy does not give rise to Fourth Amendment protection . . . unless society is prepared to accept that expectation as objectively reasonable." The Court went on to hold that there is no reasonable expectation of privacy in trashed items. Nolan suggests, then, that once the seeds are designated for destruction or are otherwise of no use to the State Plant Board, they should be made available.

In this case, at the time of the FOIA request, the seed sample is not garbage. They are stored by the State Plant Board for purposes of testing. The FOIA is not implicated in any of the Fourth Amendment cases cited by Nolan, nor is the Fourth Amendment implicated in the present case. Furthermore, FOIA only requires that the State Plant Board provide "public records" for inspection and copying, not for taking and destroying. Ark. Code Ann. § 25-19-105 (a)(1)(A).

Affirmed.

Jeffery D. MORGAN *v.* STATE of Arkansas

CR 03-1476 195 S.W.3d 889

Supreme Court of Arkansas
Opinion delivered October 14, 2004

Buckley, McLemore & Hudson, P.A., by: *Kent McLemore*, for appellant.

Mike Beebe, Att'y Gen., by: *Brent P. Gasper*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Jeffery D. Morgan appeals the order of the Miller County Circuit Court convicting him of battery in the second degree and kidnapping. He was sentenced to terms of imprisonment of fifteen years and life, respectively. On appeal, he argues that the trial court erred in: (1) denying his motion for a directed verdict with regard to the kidnapping charge; (2) refusing to allow him to proceed *pro se*; and (3) allowing the State to introduce evidence of prior bad acts during the trial. Our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). We find no error and affirm.

On August 12, 2002, Appellant drove to the home of Amanda Simmons, his former girlfriend. Once there, he attempted to talk to her, but Ms. Simmons told Appellant that she had nothing to say to him and asked him to leave. Appellant got into his vehicle and then struck Ms. Simmons as she walked to a nearby mailbox. Appellant again exited his vehicle and began to kick Ms. Simmons and drug her into his vehicle. He then drove around while he threatened to kill Ms. Simmons. At one point, Appellant held a knife to her throat and ordered Ms. Simmons to take a bunch of pills, but she was able to spit the pills back out. After Appellant stopped at a friend's house, Ms. Simmons attempted to escape but was caught by Appellant who again tried to run over her.

Ms. Simmons begged Appellant to take her to a hospital so she could receive treatment for her leg that was injured when Appellant ran over her. Initially, Appellant refused and only agreed to take her to a hospital after Ms. Simmons promised to lie about the cause of her injury. Before entering the hospital, Ms. Simmons agreed to tell the hospital staff that she was involved in a four-

wheeler accident. Ms. Simmons was admitted to the hospital and surgery was ordered to repair her broken leg. Appellant remained near Ms. Simmons's side during her initial admittance, at one point signing an authorization form after he identified himself as her "husband." Appellant also instructed the nurses that Ms. Simmons wanted no calls or visitors.

Sometime later, Appellant left the hospital in order to retrieve clothes and makeup for Ms. Simmons. Once Appellant left, Ms. Simmons contacted hospital security, expressing fear that Appellant might return and harm her. She decided to be classified as a "no information" patient, meaning that the hospital would not release any information on her. She was also moved to a different hospital room.

Ms. Simmons contacted Paula Cochran of the Texarkana Police Department on August 15, 2002, and made a statement that Appellant had hit her with his car on August 12. Thereafter, on October 2, 2002, a felony information was filed charging Appellant with kidnapping and first-degree battery. Prior to trial, Appellant indicated that he was dissatisfied with his appointed attorney because he would not pursue certain motions that Appellant had attempted to file. The trial court explained to Appellant the perils of representing himself and eventually ruled that the appointed counsel would continue to represent Appellant.

A jury trial was held on August 19-20, 2003, and resumed on August 26, 2003. Several medical personnel employed at St. Michael's Hospital testified about their encounter with Ms. Simmons upon her admission there. Roger Stanley, a registered nurse, testified that he was responsible for assessing Ms. Simmons's condition upon her admission. According to Stanley, Appellant signed an admission form on behalf of Ms. Simmons, after indicating that he was her husband. Stanley also testified that he recalled no specific problems between Appellant and Ms. Simmons.

Misty Rhoden, a floor nurse responsible for patient care, also testified that she first had contact with Ms. Simmons on August 13. Rhoden recalled that a male friend was at Ms. Simmons's bedside when she stated that the injury to her leg was the result of a four-wheeler accident. Rhoden also testified that Pamela Kroll, Ms. Simmons's mother, called and expressed concern that Appellant might be responsible for her daughter's injuries. When Rhoden first told Ms. Simmons that her mother had called, Ms.

Simmons told the nurse to tell her mother that "I am out of it at that time." Appellant then told Rhoden that they wanted no phone calls or visitors. Rhoden also testified that she did not notice any problems between Ms. Simmons and Appellant.

Kay Caballero, a security employee for St. Michael's, testified that she was called in to pick up some valuables in Ms. Simmons's room. At that time, Appellant was in the room, and according to Caballero, she noticed an uncomfortable feeling between the two. Later, once Appellant was no longer there, Appellant again contacted Caballero and asked if there was any way Appellant could be kept away from her room. This occurred on August 13, at approximately 4:25 p.m. Ms. Simmons was subsequently designated as a "no information" patient and moved to another room.

Also testifying at trial was Detective Cochran. According to her, Ms. Simmons contacted her on the afternoon of August 15, 2002. She reported that Appellant had run over her with his vehicle and, as a result, she was in the hospital with a broken leg. Ms. Simmons told Detective Cochran that Appellant was trying to kill her and that she was afraid that he was going to hurt her in the hospital, because he had threatened her since she had been there. Detective Cochran also testified that she was aware of a history of complaints made by Ms. Simmons against Appellant.

Mary Works, Ms. Simmons's grandmother, testified that she first saw Appellant on the evening of August 12, at approximately 8:00 p.m., when he drove by her house and honked his horn demanding that Ms. Simmons come and talk to him. Works next saw Appellant at approximately 1:00 a.m., when he came back to her house so that he could retrieve some clothes and makeup for Ms. Simmons. He told Works that her granddaughter was in the hospital with a broken leg after being involved in a "three-wheeler" wreck.

Ms. Simmons testified that she had been dating Appellant for about two and a half years, but that they had recently split. She described how Appellant struck her with his vehicle and then forced her into the car. She said Appellant told her that he was going to have to kill her. Ms. Simmons explained that the only way she could convince Appellant to take her to the hospital was to promise to lie about the cause of her injuries. Once Ms. Simmons agreed to tell the hospital employees that she was injured while riding a four wheeler, Appellant took her to the emergency room

at St. Michael's. At the hospital, Appellant continued to threaten to harm Ms. Simmons and her family if she told anyone the truth about her injuries.

At the close of the State's case, Appellant moved for a directed verdict. With regard to the charge of kidnapping, he argued that the evidence demonstrated that he had released Ms. Simmons at a place of safety. The trial court denied his motion. Appellant then rested without presenting any evidence. The jury subsequently convicted Appellant of kidnapping, a Class Y felony, and battery in the second degree. He was sentenced as a habitual offender to life imprisonment on the charge of kidnapping and fifteen years' imprisonment on the battery charge. This appeal followed.

I. Motion for Directed Verdict

For his first point on appeal, Appellant argues that the trial court erred in denying his motion for a directed verdict as to the charge of kidnapping. Specifically, Appellant argues that the evidence demonstrated that he released Ms. Simmons at a place of safety, the hospital, and, thus, under Ark. Code Ann. § 5-11-102(b) (Repl. 1997), Appellant can only be found guilty of a Class B felony kidnapping charge. The State counters that the issue of whether Appellant released the victim at a place of safety was a fact question properly submitted to the jury. The State is correct.

This court treats a motion for directed verdict as a challenge to the sufficiency of the evidence. *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004); *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000). When reviewing the denial of a directed-verdict motion, we will look at the evidence in the light most favorable to the State, considering only the evidence that supports the verdict and will affirm if there is substantial evidence to support the jury's conclusion. *Burmingham v. State*, 342 Ark. 95, 27 S.W.3d 351 (2000). 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. *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998).

A person commits the offense of kidnapping if, without consent, he restrains another person so as to interfere substantially with his liberty for the purpose of holding him for ransom or reward, or for any act to be performed or not performed for his

return or release, or for inflicting physical injury upon him, or of engaging in sexual intercourse, deviate sexual activity, or sexual contact with him. Ark. Code Ann. § 5-11-102(a)(1) & (a)(4) (Repl. 1997). "Restraint without consent" includes "restraint by physical force, threat, or deception[.]" Ark. Code Ann. § 5-11-101(2) (Repl. 1997). Kidnapping is a Class Y felony, except that if the defendant shows by a preponderance of the evidence that he voluntarily released the person restrained alive and in a safe place prior to trial, it is a Class B felony. Section 5-11-102(b).

The jury convicted Appellant of kidnapping, a Class Y felony, but in his directed-verdict motion Appellant argued that there was insufficient evidence to support that charge, because the evidence demonstrated that he released his victim in a safe place. Thus, according to Appellant, he should have been convicted of the reduced charge of kidnapping, a Class B felony. The trial court denied Appellant's motion, stating in relevant part:

> The evidence is at this point is not refuted that the defendant did take Ms. Simmons to the emergency room facility of St. Michael's hospital. That did take place. And that is certainly looking at that step alone would be in the defendant's favor. The other testimony, from not only the victim, but the medical personnel, shows that the defendant was still exercising some control over the victim even while at the hospital up to a point in time that a report was made by the victim, and or her family members, that the injuries she had sustained were not the result of a four-wheeler accident, but in fact, by the actions . . . of the defendant toward the victim.
>
> Those then put into question, those then — that testimony then puts into question about whether or not the defendant had actually relinquished his control or his influence over the victim at that point in time. And because of those actions, because of the testimony of the medical personnel alleged in their testimony as to what the defendant said to them, upon their arrival at the hospital, I think it is a question of fact for the jury to determine whether or not the actions of the defendant constitute a release or didn't constitute a release at a safe location, and therefore I would deny the defendant's motion on the second part and find that at this point the kidnapping charge Class Y felony still stands.

We agree with the trial court that the evidence as presented created a fact question to be decided by the jury. A couple of the nurses who attended Ms. Simmons testified that they

did not notice any trouble between her and Appellant. Ms. Caballero, the security officer, testified, however, that she noticed tension between Appellant and Ms. Simmons during her initial encounter with them. According to Nurse Stanley, Appellant signed a patient form on behalf of Ms. Simmons stating that he was her husband. Nurse Rhoden testified that when she informed Ms. Simmons that her mother had called, Appellant spoke up and told her that they did not want any phone calls or visitors. The testimony of medical personnel also indicated that Appellant stayed at Ms. Simmons's bedside for several hours after she was admitted to the hospital. Moreover, Ms. Simmons testified that she lied to hospital personnel about the cause of her injuries because Appellant had threatened to harm her and her family. It was only after Appellant left the hospital that Ms. Simmons told a nurse and hospital security the real cause of her injuries and asked that she be classified as a "no information" patient. Considering this evidence, the jury determined that Appellant failed to prove by a preponderance of the evidence that he released Ms. Simmons in a safe place. As we have repeatedly stated, it is not within this court's province to try issues of fact. *See Mills v. State*, 351 Ark. 523, 95 S.W.3d 796 (2003); *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998). Accordingly, Appellant's argument on this point fails.

II. Waiver of Right to Counsel

Next, Appellant argues that he attempted to discharge his counsel and proceed *pro se*, and the trial court failed to conduct an inquiry into whether he was knowingly or intelligently waiving his right to counsel and ignored his attempts to dismiss counsel. Appellant also asserts that the trial court erred in finding that his purported waiver of counsel was not timely made. The State counters that the trial court committed no error in this regard, as Appellant failed to unequivocally assert his desire to waive his right to counsel. We find no error.

First, we must note that Appellant's argument on this point is simply that the trial court erred in forcing him to go to trial with the representation of counsel. Based on this assertion, he asks this court to reverse his conviction. Notably absent from his argument is any assertion that Appellant was prejudiced as a result of the trial court's ruling with regard to the waiver of counsel. It is axiomatic that some prejudice must be shown in order to find grounds to reverse a conviction. *Jefferson v. State*, 328 Ark. 23, 941

S.W.2d 404 (1997); *see also Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985) (announcing the rule that it is "no longer presumed that simply because an error is committed it is prejudicial error."). Stated differently, we do not reverse a decision by the trial court absent a showing of prejudice. *See Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558 (2003).

Assuming, *arguendo*, that Appellant was prejudiced, his argument on this point is still without merit, as he failed to unequivocally waive his right to counsel. The United States Supreme Court addressed the right of a criminal defendant to proceed *pro se* in *Faretta v. California*, 422 U.S. 806 (1975), stating that "in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits [traditionally associated with the right to counsel]." *Id.* at 835. Likewise, this court has recognized that the constitutional right to counsel is a personal right and may be waived at the pretrial stage or at trial. *Collins v. State*, 338 Ark. 1, 991 S.W.2d 541 (1999); *Mayo v. State*, 336 Ark. 275, 984 S.W.2d 801 (1999). A criminal defendant may invoke his right to defend himself *pro se* provided that (1) the request to waive the right to counsel is unequivocal and timely asserted; (2) there has been a knowing and intelligent waiver of the right to counsel; and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. *Id.*; *Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001), *cert. denied*, 536 U.S. 963 (2002).

Appellant asserts that he did in fact attempt an unequivocal waiver of his right to counsel, but this assertion is not supported by the record before us. The record reveals that Appellant attempted to file several *pro se* motions, but was not allowed to do so because of his failure to serve the State with copies of the motions. In discussing those motions at a pretrial hearing on May 6, 2003, Appellant never asserted that he wanted to represent himself in this matter. Instead, he stated that he had attempted to contact the public defender's office to find out who would be representing him and about filing the motions he wanted to pursue. When addressing the court, Appellant specifically stated that he had asked for representation. Again, at a hearing held on August 18, 2003, Appellant stated that he was dissatisfied with his appointed counsel. He stated:

> And I ask that Mr. Potter be dismissed and appoint, another counsel appointed. As you can, as the Court can see by the motions

> that I filed, I am not, you know, I am not that high grade of education and filing these motions I don't have no legal, access to a legal library to where I can look it up to see what I have to do.

It is apparent that Appellant did not seek to represent himself; rather he sought the appointment of different counsel. The present situation is similar to one this court addressed in *Collins*, 338 Ark. 1, 991 S.W.2d 541, where we rejected an appellant's contention that it was error for the trial court to refuse to allow the appellant to proceed *pro se*. In that case, we noted that it was undisputed that the appellant was displeased with his counsel, but held that he failed to make an unequivocal request to waive counsel. This was based on the appellant's request for another lawyer made one month prior to trial. We agree with our reasoning in *Collins* that a defendant's right to counsel is not absolute and "he may not use his right to counsel to frustrate the inherent power of the court to command an orderly, efficient, and effective administration of justice." *Id.* at 6, 991 S.W.2d at 545 (citing *Edwards v. State*, 321 Ark. 610, 906 S.W.2d 310 (1995)).

III. Rule 404(b)

For his final point on appeal, Appellant argues that the trial court erred in allowing the State to introduce evidence about prior incidents of violence involving him and Ms. Simmons. Appellant contends that such evidence was not relevant and was highly prejudicial and, thus, should have been excluded. The State counters that the evidence was properly admitted under Ark. R. Evid. 404(b) to show an absence of mistake on the part of Appellant. We agree with the State.

Rule 404(b) states:

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

In *McCoy v. State*, 354 Ark. 322, 123 S.W.3d 901 (2003), this court stated that pursuant to Rule 404(b), evidence of other crimes may be admissible to prove motive, opportunity,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This court held that if the evidence of another crime, wrong, or act is relevant to show that the offense of which the appellant is accused actually occurred and is not introduced merely to prove bad character, it will not be excluded. *Id.* The test for establishing motive, intent, or plan as a Rule 404(b) exception is whether the evidence of the other act has independent relevance. *Id.* In addition, to be probative under Ark. R. Evid. 403, the prior criminal act must be similar to the crime charged. *See Sasser v. State*, 321 Ark. 438, 902 S.W.2d 773 (1995).

Thus, in order to determine whether the evidence of the other incidents were properly admitted in this case, we must determine if such evidence is independently relevant. Ms. Simmons's testified that there were two prior incidents when Appellant had been violent toward her. The first occurred on July 4, 2002, when Appellant tried to drown Ms. Simmons as she took a bath. He also grabbed a knife and attempted to stab Ms. Simmons's sister. Appellant then grabbed Ms. Simmons and drug her outside and hit her. The second incident occurred on July 13, 2002. On that day, Ms. Simmons went to the Twilight Motel to visit her mother, Pamela Kroll. Appellant arrived and pulled a knife on Ms. Simmons and hit her in the chest with the butt of the knife after her mother called the police. He threatened to kill everyone in the room.

The State introduced this evidence to establish that Appellant acted with a purposeful intent and that there was a lack of mistake or accident. Appellant's defense to the charges against him was that he was innocent. Specifically, Appellant alleged that Ms. Simmons's original story that her injuries had been caused by a four-wheeler accident was the truth. In *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003), this court stated that when the purpose of evidence is to show motive, anything and everything that might have influenced the commission of the act may, as a rule, be shown. *See also Lee v. State*, 327 Ark. 692, 942 S.W.2d 231; *cert. denied*, 522 U.S. 1002 (1997). Moreover, the State is entitled to produce evidence showing circumstances which explain the act, show a motive, or illustrate the accused's state of mind. *Id.* In sum, the evidence of prior violence introduced in this case proved Appellant acted with a purposeful intent, as he had previously exhibited violence toward Ms. Simmons. The fact that the previous acts were not ones in which he struck her with a vehicle is

irrelevant. Under our case law, the previous acts do not have to be identical, just similar. *See Sasser*, 321 Ark. 438, 902 S.W.2d 773. Accordingly, we find no merit in Appellant's argument on this point.

IV. Rule 4-3(h) Review

Because Appellant received a sentence of life imprisonment, the record in this case has been reviewed pursuant to Ark. Sup. Ct. R. 4-3(h) for adverse rulings objected to by Appellant but not argued on appeal. No such reversible errors were found. For the aforementioned reasons, the judgment of conviction is affirmed.

Virgil McDUFFY *v.* STATE of Arkansas

CR 04-465 196 S.W.3d 12

Supreme Court of Arkansas
Opinion delivered October 14, 2004

Gary W. Potts, for appellant.

Mike Beebe, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Virgil McDuffy appeals from the circuit court's judgment and commitment order in which he was convicted of rape and sentenced to life imprisonment. He argues these points on appeal: (1) the circuit court erred in denying his proffered jury instruction on the lesser-included offense of sexual misconduct; and (2) the circuit court erred in denying his motions for directed verdict, because there was insufficient evidence to prove that the victim was under the age of fourteen when the offense occurred. We affirm the judgment.

The facts related to the jury are that C.W., a male, was born on February 19, 1986. In March or April 1999, C.W. moved from Tampa, Florida, where he was living with his mother, Sheila Bevel, to live with his aunt, Claudette Reed, in Dumas. McDuffy was living with Ms. Reed in her home. C.W. testified that

beginning in June or July 1999, McDuffy made C.W. put his mouth on McDuffy's penis, and McDuffy put his mouth on C.W.'s penis. McDuffy also engaged in anal sex with C.W. Ms. Reed and McDuffy later had a falling out over other matters, and she moved to Tampa to be with her sister in August 1999. C.W. remained in Dumas with McDuffy.

On March 12, 2003, Investigator Houston Talley, a member of the crimes against children division of the Arkansas State Police, interviewed McDuffy after he waived his *Miranda* rights. Investigator Talley testified that McDuffy confessed to engaging in oral and anal sex with a thirteen-year-old boy, R.V. On March 20, 2003, after waiving his *Miranda* rights, McDuffy gave a taped statement to Investigator Talley that several times he had engaged in oral and anal sex with C.W.

On May 7, 2003, the State filed a criminal information charging McDuffy with rape by engaging on multiple occasions in deviate sexual activity with a child less than fourteen years old. On May 8, 2003, the State filed an amended information charging McDuffy with rape but stated that the crime was punishable by life imprisonment, because McDuffy had been convicted twice of the same offense.

On January 28, 2004, Mr. Duffy was tried before a jury. At trial, C.W. testified that he was born on February 19, 1986, and that he had engaged in sexual activity with McDuffy beginning sometime within the first four months that he arrived in Dumas, which was in March or April of 1999. The State introduced as evidence the taped interview between McDuffy and Investigator Talley in which McDuffy confessed to oral and anal sex with C.W. In the statement, McDuffy stated that the sex occurred after Ms. Reed moved to Tampa.

McDuffy submitted a motion and a renewed motion for directed verdict for insufficient evidence (1) that sexual contact or deviate sexual activity occurred between McDuffy and C.W. and (2) that C.W. was less than fourteen years old at the time of the alleged sexual deviate acts. The court denied both motions.

At the end of the testimony, McDuffy proffered the following jury instructions, which the circuit court had refused to give to the jury:

AMCI 2d 301
LESSER INCLUDED OFFENSES:
INTRODUCTORY INSTRUCTION

Virgil McDuffy is charged with Rape. This charge includes the lesser offense of Sexual Misconduct.

You may find the defendant guilty of one of these offenses or you may acquit him outright.

If you have a reasonable doubt of the guilt of the defendant on the greater offense, you may find him guilty only of the lesser offense. If you have a reasonable doubt as to the defendant's guilt of both offenses, you must find him not guilty.

AMCI 2d 1405-OBS
SEXUAL MISCONDUCT

To sustain this charge the State must prove the following things beyond a reasonable doubt:

First: That Virgil McDuffy engaged in deviate sexual activity with C.W.; and

Second: That C.W. at the time of the alleged offense was less than 16 years old.

The jury found McDuffy guilty of rape, and he was sentenced to life in prison. The circuit court entered its judgment and commitment order accordingly.

McDuffy first contends that the evidence of his guilt was insufficient. Specifically, he claims that the circuit court's denial of his motions for directed verdict was clearly against the weight of the evidence, because the State failed to prove beyond a reasonable doubt that C.W. was less than fourteen years old at the time of the offense. McDuffy maintains that C.W. never testified specifically that he was less than fourteen years old at the time of the offense, and the evidence presented by other witnesses was inconclusive.

Motions for directed verdict are challenges to the sufficiency of the evidence. *See Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004). When reviewing the denial of a directed

verdict motion, this court will look at the evidence in the light most favorable to the State, considering only the evidence that supports the verdict, and we will affirm the judgment if there is substantial evidence to support the jury's conclusion. *See id.* Substantial evidence is that evidence which is forceful enough to compel reasonable minds to reach a conclusion one way or the other and which permits the trier of fact to reach a conclusion without having to resort to speculation or conjecture. *Id.*

Because of double jeopardy concerns, this court must first address a challenge to the sufficiency of the evidence. *See Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004). Thus, this court must first consider McDuffy's second argument.

With regard to a rape conviction, the testimony of a rape victim, standing by itself, constitutes sufficient evidence to support a conviction. *See Pinder v. State*, 357 Ark. 275, 166 S.W.3d 49 (2004); *Hanlin v. State*, 356 Ark. 516, 157 S.W.3d 181 (2004). Furthermore, even though appellant denied the allegations, the jury is not required to believe the appellant's self-serving testimony. *See Pinder v. State, supra.*

McDuffy was charged by amended information with rape by engaging in "deviate sexual activity" with a child less than fourteen years old in violation of § 5-14-103. At the time of the alleged offense, § 5-14-103(a)(4) read in part:

> (a) A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person:
>
> . . .
>
> (4) Who is less than fourteen (14) years of age. It is an affirmative defense to prosecution under this subdivision that the actor was not more than two (2) years older than the victim[.]

Ark. Code. Ann. § 5-14-103(a)(4) (Repl. 1997).

> "Deviate sexual activity" is defined as any act of sexual gratification involving:
>
> (A) The penetration, however slight, of the anus or mouth of one person by the penis of another person; or
>
> (B) The penetration, however slight, of the labia majora or anus of one person by any body member or foreign instrument manipulated by another person[.]

Ark. Code Ann. § 5-14-101(1) (Repl. 1997).

At trial, C.W. testified that he was born on February 19, 1986. C.W. further testified that he moved to Dumas in March or April of 1999. He also testified that he began having oral sex with McDuffy in June or July 1999. McDuffy disputes the time frame of the sexual activity and claims that the sexual activity did not begin until after August 1999. Regardless, C.W. would still have only been thirteen years old at that time. Because testimony of the rape victim alone is sufficient to sustain a rape conviction, the evidence was sufficient for the jury to conclude without resorting to suspicion or conjecture that oral and anal sex was deviate sexual activity and that C.W. was thirteen years old when he and McDuffy engaged in this activity. We hold that the evidence was sufficient to sustain the judgment of conviction.

McDuffy next claims that the circuit court erred in refusing to instruct the jury on the lesser-included offense of sexual misconduct pursuant to Ark. Code Ann. § 5-14-107, because there was a rational basis for the instruction. McDuffy urges that there was evidence presented that C.W. was less than sixteen years old at the time of the offense and the jury should not be denied the possibility of alternative verdicts and sentencing. Additionally, McDuffy maintains that the failure to give the instruction was a "failure of due process and a miscarriage of justice."

We have repeatedly stated that it is reversible error to refuse to instruct on a lesser-included offense when there is the slightest evidence to support the instruction. *See, e.g., Pratt v. State*, 359 Ark. 16, 194 S.W.3d 183 (2004). However, we have made it clear that we will affirm a trial court's decision not to give an instruction on a lesser-included offense if there is no rational basis for giving the instruction. *See id.* Once an offense is determined to be a lesser-included offense, the circuit court is not obligated to instruct the jury on that offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. *See* Ark. Code Ann. § 5-1-110(c) (Repl. 1997).

As already noted, at the time of the crime in the instant case, the statute defined the apposite category of rape as engaging in deviate sexual activity with a person who is less than fourteen years of age. *See* Ark. Code Ann. § 5-14-103(a)(4) (Repl. 1997). Also at the time of the offense, sexual misconduct under Ark. Code Ann.

§ 5-14-107(a) read: "A person commits sexual misconduct if he engages in sexual intercourse or deviate sexual activity with another person not his spouse who is less than sixteen (16) years old." Ark. Code Ann. § 5-14-107(a) (Repl. 1997), *repealed by* Act 1738, § 9 of 2001.

In order to be deemed a lesser-included offense, that offense must satisfy one of the three tests enumerated in Ark. Code Ann. § 5-1-110(b):

> (b) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
>
> (1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or
>
> (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or
>
> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

Ark. Code Ann. § 5-1-110(b) (Repl. 1997).

The State directs this court's attention to *Gaines v. State*, 354 Ark. 89, 118 S.W.102 (2003), as illustrative of a situation where we held that third-degree carnal abuse was not a lesser-included offense of rape. In *Gaines*, we concluded that third-degree carnal abuse was not a lesser-included offense of rape under § 5-1-110(b)(1), because the carnal abuse statute required certain elements for conviction that the rape statute did not. For example, we noted that the defendant must be twenty years old or older, that the victim must not be the defendant's spouse, and that the victim must be less than sixteen years old. *See Gaines v. State, supra.* None of those elements was required under the rape statute.

In the case at bar, the same holds true. McDuffy was charged with committing rape by engaging in deviate sexual activity with another person who was less than fourteen years of age pursuant to § 5-14-103(a)(4). Sexual misconduct, however, as

defined under § 5-14-107(a), is not a lesser-included offense of rape under § 5-14-103(a)(4), because none of the three tests under § 5-1-110(b) are satisfied. The test under § 5-1-110(b)(1) is not satisfied, because the sexual misconduct statute requires additional elements to establish the commission of the offense charged. The test under § 5-1-110(b)(2) is not satisfied, because McDuffy was not charged with an attempt to commit rape. And the test under § 5-1-110(b)(3) is not satisfied, because the injury is the same under either sexual misconduct or rape and the culpable mental state is the same. We hold that sexual misconduct is not a lesser-included offense of rape. Accordingly, there was no abuse of discretion by the circuit court in denying the proffered instructions.

We have reviewed the record pursuant to Arkansas Supreme Court Rule 4-3(h) and found that one potentially prejudicial issue was not briefed by either party but was included in McDuffy's abstract. That issue was whether it was error for the circuit court to admit McDuffy's statement about sexual contact with another thirteen-year-old boy, R.V., that occurred two or three years after McDuffy's rape of C.W.

We conclude there was no abuse of discretion. In *Hernandez v. State,* 331 Ark. 301, 962 S.W.2d 756 (1998), this court ruled, based on the pedophile exception, that it was not an abuse of discretion for a court to allow a witness to testify that the accused committed sexual misconduct with her two years after committing rape with the victim in the case. In dismissing the appellant's objection to the order of the offenses, this court stated that the basis of the pedophile exception is the acceptance of the notion that evidence of sexual acts with children may be shown as evidence demonstrating a particular proclivity or instinct for pedophilia. And in this case, the court accepted the testimony for the limited purpose of showing proclivity. *Hernandez* governs the instant case because that proclivity clearly was the basis for the circuit court's ruling, and the circuit court in the instant case allowed the testimony for the purpose of showing proclivity. Moreover, the circuit court concluded that the probative value of the R.V. testimony outweighed the danger of unfair prejudice.

Affirmed.

Buel D. SWAIM and Sharon Ruth Swaim and David J. Kinney, Sr.
v. STEPHENS PRODUCTION COMPANY,
A Division of Stephens Group, Inc.

03-1385 196 S.W.3d 5

Supreme Court of Arkansas
Opinion delivered October 14, 2004

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Lonnie C. Turner; and *Warner, Smith & Harris, PLC*, by: *P/K. Holmes, III*, for appellants.

Daily & Woods, P.L.L.C., by: *Thomas A. Daily*, for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellants Buel D. Swaim and Sharon Ruth Swaim and David J. Kinny, Sr., are successors-in-interest to Carrie Davidson and J.T. Harris who separately owned two real property tracts in Franklin County, both tracts being located adjacent to the Arkansas River.[1] Beginning in 1957, the owners of the Davidson tract entered into an oil, gas and mineral lease with Appellee Stephens Production Company, a division of Stephens Group, Inc. In 1964, Gulf Oil Corporation entered into an oil and gas lease with the State of Arkansas that encompassed a certain tract of land underlying the Arkansas River.[2] Likewise, in 1966, the owners of the Harris tract, which tract is located south of the Davidson tract, entered into an oil, gas and mineral lease with Stephens Production. The State lease and the Harris and Davidson leases were in customary form, reserving to the lessors a one-eighth (1/8th) royalty[3] in oil and gas produced under the leases. In addition, the Davidson and Harris leases included provisions stating that accretion land would be subject to the individual lease agreements.

In connection with the development and production of natural gas in Franklin County, Appellee Stephens Production, Gulf Oil and another company not involved in this appeal, Petroleum, Inc., executed a Declaration of Pooling and Unitization on March 17, 1967. Among other things, the pooling agreement enabled Stephens Production to proceed with the develop-

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[1] Davidson owned the northern tract. Harris owned the southern tract. The Arkansas River abuts the eastern side of both tracts.

[2] The State of Arkansas holds title to the river bed underlying the Arkansas River. *Gill v. Porter*, 248 Ark. 140, 450 S.W.2d 306 (1970); *Owen v. Johnson*, 222 Ark. 872, 263 S.W.2d 480 (1954). This lease has been assigned. It is now owned by Stephens Production and Gulf Oil's successor, XTO Corporation.

[3] A "royalty" is the landowner's share of production, free of expenses of production and normally amounts to a one-eighth of eight-eighths interest. *Barrett v. Kuhn*, 264 Ark. 347, 572 S.W.2d 135 (1978) (citing Williams & Meyers, *Oil and Gas Terms* (4th ed. 1976)).

ment and production of natural gas located in the Davidson-Harris tracts and under the Arkansas River.

In 1990, Davidson and Harris amended their leases with Stephens Production to provide for a three-sixteenth (3/16th) royalty. The State Lease, however, remained fixed at the one-eighth (1/8th) royalty.

Meanwhile, over the course of many years of operation under the oil and gas leases, the Arkansas River shifted eastward in its course, causing accretion on the appellants' land. In January of 2000, the appellants, pursuant to Ark. Code Ann. § 22-5-405 (2004), obtained quitclaim deeds from the State of Arkansas covering the accreted land.

On August 24, 2001, the appellants filed a suit against Stephens Production for payment under the terms of the Davidson and Harris leases for their share of gas produced from the accreted acreage after confirmation of title by the State of Arkansas. Both parties moved for summary judgment. The trial court granted summary judgment in favor of Stephens Production, ruling that the State Lease providing for a one-eighth (1/8th) royalty remained effective for the accreted land. The appellants appealed to the Arkansas Court of Appeals. The case has been certified to us as an issue of first impression. Therefore, this court has jurisdiction under Rule 1-2(b)(1) of the Arkansas Rules of the Supreme Court.

We hold that the appellants, as riparian owners, are owners of the additional land formed by accretion, which ownership encompasses both the surface and mineral rights. Furthermore, because the lease agreements between Stephens Production and the appellants, i.e. the Harris and Davidson leases, by their express terms include any accretions, the accreted land is subject to the appellants' respective royalty interests granted under those leases. Thus, we conclude that the trial court erred in granting summary judgment in favor of Stephens Production. The trial court's summary-judgment order is hereby reversed and the case remanded for entry of summary judgment in favor of the appellants.

I. Standard of Review

As noted above, the instant appeal arises out of a trial court's grant of summary judgment in favor of Stephens Production Company. In *Linn v. Nations Bank*, 341 Ark. 57, 14 S.W.3d 500 (2000), we set out the standard of review for a grant of summary judgment:

> The law is well settled that summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998), *supp. opinion on denial of reh'g.*, March 5, 1998. Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties.

Id. at 60-61, 14 S.W.3d at 503 (citing *Adams v. Arthur*, 333 Ark. 53, 62, 969 S.W.2d 598, 602 (1998)).

In this summary-judgment matter, there is no dispute as to any material fact. In cases where the parties agree on the facts, appellate courts simply determine whether the appellee was entitled to judgment as a matter of law. *Jackson v. City of Blytheville Civ. Serv. Comm'n*, 345 Ark. 56, 43 S.W.3d 748 (2001)(citing *Aloha Pool & Spas, Inc. v. Employer's Ins. of Wausau*, 342 Ark. 398, 39 S.W.3d 440 (2000), and *City of Little Rock v. Pfeifer*, 318 Ark. 679, 887 S.W.2d 296 (1994)).

This appeal also involves a matter of statutory interpretation. Issues of statutory interpretation are reviewed *de novo* because it is for this court to decide what a statute means. *City of Maumelle v. Jeffrey Sand Co*, 353 Ark. 686, 120 S.W.3d 55 (2003). While we are not bound to the trial court's ruling, we will accept the trial court's interpretation of a statute unless it is shown that the trial court erred. *R.N. v. J.M.*, 347 Ark. 203, 615 S.W.3d 149 (2001).

II. The Doctrine of Accretion — Arkansas

Accretion is the "gradual deposit and addition of soil along the bank of a waterbody caused by the gradual shift of the waterbody away from the accreting bank." 8-A Williams & Meyers, *Oil and Gas Law* § 51 (2003). It is well settled in our case

law that when accretion land is formed by a gradual and imperceptible alteration in the land, the ownership of the land vests in the riparian owner "from whose shore or bank the water receded." *Warren v. Chambers*, 25 Ark. 120 (1867). Almost thirty years after *Warren v. Chambers, supra,* in the case of *Wallace v. Driver*, 61 Ark. 429, 33 S.W. 641 (1896), we explained that while the land contiguous to water may change ownership where the change is gradual and imperceptible, "the true test 'as to what is gradual and imperceptible in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.' " *Wallace v. Driver*, 61 Ark. at 429, 33 S.W. at 642. As a general rule, the water itself is a natural boundary and contiguous landowner's rights change as the natural boundary lines change. *Wallace v. Driver, supra.*

This court has dealt with cases that are similar to the instant appeal. For example, in *Kansas City Fibre Box Co. v. Burkart Mfg. Co.*, 184 Ark. 704, 44 S.W.2d 325 (1931), the appeal involved a question regarding the ownership of property contiguous to the Arkansas River where timber was being cut. The timber had originally been located in the river bed. Over time, the river boundary changed paths, leaving the timber on accretion land. The court, after stating that the law concerning accretion is beyond dispute, held that the additional land formed by accretion belonged to the contiguous landowner. *Kansas City Fibre Box Co., supra.* (citing *Nix v. Pfeifer*, 73 Ark. 199, 83 S.W. 951 (1904)). More on point, perhaps, is the case of *Porter v. Arkansas Western Gas Co.*, 252 Ark. 958, 482 S.W.2d 598 (1972), where the gas company sought to have ownership determined for a gas well located on a piece of land near the Arkansas River. Although the appellants contended that the land was an island, the court concluded that the area was a non-navigable area and that title vested in the riparian owners. *Id.* While the facts in the *Porter* case and this case are not identical, this court has consistently held that additional land formed from the river's change in flow generally belongs to the riparian owners of the contiguous land. *See Wyatt v. Wycough,* 232 Ark. 760, 341 S.W.2d 18 (1960); *Desha v. Erwin,* 168 Ark. 555, 270 S.W. 965 (1925); *Yutterman v. Grier,* 112 Ark. 366, 166 S.W. 749 (1914).

The common law doctrine of accretion has also been codified by the Arkansas legislature with the enactment of Ark. Code. Ann. § 22-5-404 (2004), which statute acknowledges that title vests in riparian landowners when lands emerge by accretion from lakes or river beds. Specifically, section 22-5-404 states as follows:

> (a) The *title* to all lands which have formed or may form in the beds of nonnavigable lakes, or in abandoned river channels or beds, whether or not still navigable, which reformed lands or alluvia are above the ordinary high-water mark, *shall vest* in the riparian owners to the lands and shall be assessed and taxed as other lands.
>
> (b) The lands referred to in subsection (a) of this section shall include those lands which have emerged or which may emerge by *accretion*, reliction, evaporation, drainage, or otherwise from the beds of lakes or from former navigable streams, whether by natural or artificial causes, or whether or not the lakes were originally formed from the channel or course of navigable or nonnavigable streams.

Ark. Code Ann. § 22-5-404 (2004)(Emphasis added). Furthermore, section 22-5-405 provides in relevant part:

> (a) The Commissioner of State Lands is empowered and authorized to execute deeds to lands described in § 22-5-404 to riparian owners upon application and the filing of proof of record ownership of adjacent lands and proof of proper survey of the lands, conveying all the right, title, and interest of the State of Arkansas to lands as have emerged or may emerge to the mean high-water mark of any such stream or lake.

Ark. Code Ann. § 22-5-405 (2004).

According to the plain language of the statute, "title to all lands which have been formed . . . in the abandoned river channels or beds . . . shall vest in the riparian owners . . ." Ark. Code Ann. § 22-5-404(a). Thus, under that section, and under common law, title vests in the riparian landowner by virtue of the land emerging by accretion. The following section, Ark. Code Ann. § 22-5-405, which empowers the State Land Commissioner to execute deeds to riparian owners upon application, merely serves as a means to confirm title in the adjacent riparian owner of

accretions to his or her property. *River Land Co., Inc. v. McAlexander,* 10 Ark. App. 123, 661 S.W.2d 451 (1983); *Gill v. Porter,* 248 Ark. 140, 450 S.W.2d 306 (1970) (statutes at issue designed to furnish a means by which the State can acknowledge the abandonment of a river bed).

Although Stephens Production admits that the appellants obtained quitclaim deeds from the State of Arkansas pursuant to Section 22-5-404, it nonetheless cites the case of *Hillard v. Stephens,* 276 Ark. 545, 637 S.W.2d 581 (1982), for the proposition that oil and gas leases should have special legal recognition due to the fact that oil and gas leases are "more than conveyances of determinable interests in the oil and gas below the lands which they cover." Furthermore, Stephens Production contends that, due to the express terms of the State lease, that lease continues to run with the land because the lease provisions state "any conveyance of any interest in said production and/or royalties hereafter made while this lease is in full force and effect shall be made subject to this agreement."

Stephens Productions' reliance on *Hillard v. Stephens, supra,* is misplaced. In that case, we merely construed certain provisions contained in the respective oil and gas leases. *Hillard* is certainly not authority for the proposition that an oil and gas lessee continues to hold mineral lease rights in the land where due to accretion title becomes vested in a subsequent riparian landowner. Likewise, the express provisions of the State's lease fail to support the assertion by Stephens Production that the State lease continues to run with the accreted land. Unlike a conveyance where a grantor transfers title to a grantee, when land accretes, ownership of the land vests automatically in the riparian landowner both under the common law doctrine of accretion and Section 22-5-404. As explained earlier, the issuance of a quitclaim deed by the State of Arkansas is merely confirmation of title. *River Land Co., Inc. v. McAlexander, supra*; *Gill v. Porter, supra.* As the accreted land was not transferred by conveyance and it is no longer acreage contributed by the State to the drilling unit, the State lease no longer applies to the accretion lands.

III. Doctrine of Accretion and Mineral Rights — Other Jurisdictions

Other jurisdictions have concluded that mineral interests in land are subject to the doctrine of accretion. For example, in *Ely v. Briley,* 959 S.W.2d 723 (Tex. App.–Austin

1998), where landowners filed suit against an oil and gas lessee claiming mineral royalties from the accreted property, the Texas Court of Appeals decided that a mineral interest is a property interest irrespective of whether or not the mineral interest is constructively severed from the land. "Because a constructively severed mineral estate is a property interest of equal dignity as a surface estate, it logically should be subject to accretion." *Id.* at 726. Likewise, another division of the Texas Court of Appeals recently adopted the same approach. *Siegert v. Seneca Resources Corp.*, 28 S.W.3d 680 (Tex. App.–Corpus Christi 2000).

In *Nilsen v. Tenneco Oil Co.*, 614 P.2d 36 (Okla. 1980), the Oklahoma Supreme Court was asked to decide whether accretion carries with it title to the underlying minerals, when the minerals have been severed from the surface estate. The trial court had ruled that a severed mineral interest could not be lost by accretion. The Oklahoma Supreme Court disagreed based upon its view that distinguishing between severed and unsevered mineral interests would allow fee owners to convey a greater mineral estate than they themselves possess. *Id.* The court also noted that such a rule would inevitably result in inequities because an unsevered mineral interest would still be subject to loss by virtue of accretion; whereas, a severed mineral interest would never be subject to such loss. *Id.* The Supreme Court of Montana adopted the *Nilsen* court's analysis, holding that severed mineral interests are subject to the doctrine of accretion. *Jackson v. Burlington Northern, Inc.*, 205 Mont. 200, 207, 667 P.2d 406, 409-410 (1983). Finally, various treatises on oil and gas law agree that the majority of courts are consistent in holding that mineral rights are subject to the doctrine of accretion. 1-2 William & Meyers, *Oil and Gas Law* § 224. 9 (2003); Eugene Kuntz, *Law of Oil and Gas* § 3.2(c) (2003).

Stephens Production nonetheless suggests that the above-cited cases are inapposite because the appeal here does not concern the distinction between severed and unsevered mineral rights. While we agree that such a distinction is not at issue here, other jurisdictions have not extended additional protection for a "working interest" under an oil and gas lease.[4] In fact, the Texas Court of Appeals has acknowledged that an unsevered

[4] The "working interest" is the operating interest under an oil and gas lease. *Barrett v. Kuhn*, 264 Ark. 347, 572 S.W.2d 135 (1978) (citing Williams &Meyers, *Oil and Gas Terms* (4th

riparian mineral estate is subject to the doctrine of accretion. *Ely v. Briley, supra.* Similarly, the Oklahoma Supreme Court in *Ellis v. Union Oil Co. of California*, 630 P.2d 306 (Okla. 1981), noted that *Nilsen* stood for the proposition that "mineral estates, whether severed or not, are like surface estates, both subject to loss or gain by the process of accretion." *Id.* at 309. *See also, Seigle v. Thomas*, 627 P.2d 417 (Okla. 1981). Here, it is undisputed that the appellants own both the surface and mineral estates; that is, the mineral interests at issue are unsevered and therefore subject to the doctrine of accretion. Even those commentators who are critical of court decisions holding that severed minerals estates are subject to accretion unanimously agree that unsevered mineral estates should be subject to accretion. Daniel K. Brough, *Alternatives In Accretions: Why There Is Not Yet An Appropriate Solution To The Application of Accretion Law to Mineral Estates*, 2004 B.Y.U. L. REV. 169 (2004); Robert K. Kimball, *Accretion and Severed Mineral Estates*, 53 U. CHI. L. REV. 232 (1986).

Notwithstanding the previously noted authority to the contrary, Stephens Production asserts that we should treat a "leasehold working interest" in a production unit differently by recognizing an oil and gas lease exception to our doctrine of accretion. As defined by Stephens Production, a leasehold working interest is automatically acquired by a lessee under an oil and gas lease, without regard to whether the mineral interest is severed or not.[5] Although Stephens Production may indeed have a working interest under the oil and gas leases, neither party has cited us to any authority that supports an exemption from the doctrine of accretion for a leasehold working interest. This court will not consider an argument without citation to authority, unless the argument is so well-established that no additional research is necessary. *Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2002); *Rainey v. Hartness*, 339 Ark. 293, 5 S.W.3d 410 (1999).

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ed. 1976)). An oil and gas lease grants to the lessee the right to drill and produce oil and gas, subject to a duty to pay royalty upon that production. *Osborn v. Arkansas Territorial Oil & Gas Co.*, 103 Ark. 175, 146 S.W. 122 (1912). No title passes until the oil and gas is reduced to possession. *Pasteur v. Niswanger*, 226 Ark. 486, 290 S.W.2d 852 (1956); *Osborn v. Arkansas Territorial Oil & Gas Co., supra.*

[5] The object of a leasehold estate working interest is to produce the mineral sought. *Pasteur v. Niswanger, supra.*

Similarly, Stephens Productions also contends that the unique nature of leasehold working interests should override "some technical interpretation of when and how title vests when riverbed lands emerge and become dry land." In other words, Stephens Production urges this court to ignore the common law doctrine of accretion and the Arkansas legislature's acknowledgment of that doctrine by the enactment of Section 22-5-404. Once again, we decline to consider an argument without citation to authority.

Finally, the terms of the Davidson and Harris leases expressly acknowledge the common law doctrine of accretion. The oil and gas leases between Stephens Production and the appellants provide that the leases extend to any accretions.[6] Thus, we hold that the accreted land is subject to the appellants' respective royalty interests granted under those leases.

Reversed and Remanded.

THORNTON, J., not participating.

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[6] From the Davidson Lease:

"Lessor . . . hereby grants, leases, and lets exclusively unto Lessee . . . the following described land in Franklin County, State of Arkansas, . . . It is intended to convey all that part of above fractional quarter section West of the Arkansas River, together *with all accretions* and riparian rights thereto belonging." (Emphasis added)

From the Harris Lease:

"Lessor . . . hereby grants, leases and lets exclusively unto Lessee . . . the following described land in Franklin County, State of Arkansas, . . . containing 114 acres, more or less, including *any accretions* hereto or hereafter formed." (Emphasis added)

George HALL *v.* STATE of Arkansas

CR 04-1007 195 S.W.3d 897

Supreme Court of Arkansas
Opinion delivered October 14, 2004

Thomas B. Devine, III, for appellant.

No response.

PER CURIAM. Thomas B. Devine III, a full time, state-salaried public defender for the Sixth Judicial District, was appointed by the trial court to represent Appellant, George Hall, an indigent defendant on the charge of Capital Murder. Following a trial, Hall was convicted of the charge and was given two sentences of life without parole. A notice of appeal was timely filed, and the request for the transcribed record has been timely lodged in this court.

Mr. Devine now asks to be relieved as counsel for Appellant in this criminal appeal, based on the case of *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000) (holding that full-time 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, however, the law was changed by the General Assembly. Act 1370 of 2001 provides in part: "Persons 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. 2003).

Mr. Define'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.

Erica SUGGS-RENDON *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

04-970 195 S.W.3d 888

Supreme Court of Arkansas
Opinion delivered October 14, 2004

Thomas B. Wilson, for appellant.

No response.

PER CURIAM. Appellant, Erica Suggs-Rendon, moves the court for a rule on clerk. She states that the clerk refused to

docket the record in her case when it was presented on September 8, 2004. She claims that the record was not untimely as she had previously filed motions requesting extensions of time in which to file a brief on appeal in the court of appeals based on the fact that additional time had been necessary to complete the record. Counsel for Ms. Suggs-Rendon states that he originally submitted part of the record on March 4, 2004, and that on September 8, 2004, the complete record of the case was presented to the court.

A review of the docket and the record reveals that Ms. Suggs-Rendon is the mother of three children: S.S., M.M., and M.R. On December 4, 2003, the circuit court entered its order terminating her parental rights as to S.S. and M.M. She promptly filed her notice of appeal and lodged the record regarding those two terminations with the clerk on March 4, 2004. A briefing schedule was set, and that appeal was docketed in the court of appeals as CA04-253.

While her appeal in that matter was proceeding, the circuit court continued its proceedings with respect to Ms. Suggs-Rendon's third child, M.R. On March 26, 2004, the circuit court entered its order terminating her parental rights as to M.R. On April 6, 2004, counsel for Ms. Suggs-Rendon moved the court of appeals for an extension of brief time in CA04-253. Counsel stated that certain hearings held over the course of 2002-03 needed to be transcribed. The court of appeals granted the extension in brief time, allowing counsel until August 11, 2004, in which to file a brief on Ms. Suggs-Rendon's behalf.

Counsel then filed a notice of appeal of the circuit court's termination of parental rights as to M.R. on April 13, 2004. A second motion for extension of brief time was filed on August 5, 2004, in CA04-253. In that motion, counsel asserted that while the transcripts of the hearings from 2002-03 had been completed, he needed more time to complete his brief. Accordingly, the court of appeals granted an extension of time, permitting counsel until November 9, 2004, in which to file his brief.

On August 31, 2004, Ms. Suggs-Rendon's counsel tendered a five-volume record of the circuit court proceedings to the clerk. Included within that record was the circuit court's termination regarding M.R., dated March 26, 2004. The Clerk of the Supreme Court rejected the record and advised Suggs-Rendon's counsel of the need to file a motion for rule on clerk.

We deny the motion for rule on clerk. It is clear that the record tendered on August 31, 2004, was tendered outside of the ninety-day time limit prescribed by Ark. R. App. P.–Civ. 5(a) with respect to the circuit court's second termination order regarding her third child, M.R. Although the tendered record also contains the circuit court's first termination order of December 4, 2003, that order is the subject of a separate appeal with docket number CA04-253. The record has already been lodged in that appeal. Should counsel wish to supplement the record of Ms. Suggs-Rendon's appeal of the circuit court's first termination order with respect to S.S. and M.M. in CA04-253, he should do so by way of motion to the court of appeals. The circuit court's second termination order constitutes a separate, appealable order, which would have been the subject of a separate appeal from the one already at issue in CA04-253. The two separate cases might have been consolidated upon motion, but the record of the circuit court's second termination order was not timely filed, and any appeal of that order is now precluded.

Motion denied.

Jeff HOUSE and Don Strahl *v.*
Honorable John N. FOGLEMAN, Circuit Judge

04-1072 195 S.W.3d 897

Supreme Court of Arkansas
Opinion delivered October 15, 2004

Charles Brian Williams, for petitioners.

Mike Beebe, Att'y Gen., by: *Tim Gauger*, Ass't Att'y Gen., for respondent.

PER CURIAM. Petitioners move for an accelerated proceeding and petition for writ of *certiorari* and *mandamus*. We deny the petition for *certiorari* and *mandamus*. The Petitioners seek an order from this court vacating the orders of the circuit court and directing the West Memphis city clerk to count the signatures on the petitions before a deficiency in the petitions due to the absence of an enacting clause on the proposed initiative is addressed. A second issue is whether amended petitions filed less than sixty days before the General Election violated Article 5, § 1 of the Arkansas Constitution.

At this writing, the General Election will be held in seventeen days. That time frame does not allow this court sufficient time to have the matter thoroughly briefed and reviewed. *See, e.g., Stilley v. Young*, 342 Ark. 378, 28 S.W.3d 858 (2000) (*per curiam*). Moreover, the petitioners rely on two cases that have been overruled by this court. *See Finn v. McCuen*, 303 Ark. 418, 798 S.W.2d 34 (1990) and *Scott v. McCuen*, 289 Ark. 41, 709 S.W.2d 77 (1986), *overruled by Stilley v. Priest*, 341 Ark. 329, 16 S.W.3d 251 (2000).

Petition denied.

SHIPLEY, INC., d/b/a That Bookstore in Blytheville; Arkansas Library Association; American Booksellers Foundation for Free Expression, Inc.; Association of American Publishers, Inc.; Comic Book Legal Defense Fund; Freedom to Read Foundation; International Periodical Distributors Association, Inc.; American Civil Liberties Union of Arkansas, Inc., *v.* Fletcher LONG, Jr., District One Prosecuting Attorney, et al. (Namely All the Other Prosecuting Attorneys in the State of Arkansas)

04-136 195 S.W.3d 911

Supreme Court of Arkansas
Opinion delivered October 21, 2004

Sonnenschein Nath & Rosenthal LLP, by: *Michael A. Bamberger*; and *Lavey & Burnett*, by: *John L. Burnett*, for petitioners.

Mike Beebe, Att'y Gen., by: *Timothy G. Gauger*, Sr. Ass't Att'y Gen. and *Jill Jones Moore*, Ass't Att'y Gen., for respondents.

TOM GLAZE, Justice. This case is before us on certification from the United States District Court for the Eastern District of Arkansas, pursuant to Ark. Sup. Ct. R. 6-8 (2004). The federal court has certified four questions to us, asking us to provide an interpretation of Act 858 of 2003, as codified at Ark. Code Ann. § 5-68-501 *et seq.* (Supp. 2003). *See Shipley, Inc. v. Long*, 356 Ark. 220, 148 S.W.3d 746 (2004).

In 1969, the General Assembly enacted Act 133, which made it unlawful for any person to knowingly sell to a minor certain materials considered "harmful to minors." *See* Ark. Code Ann. § 5-68-502(a) (Repl. 1997). The definition of "harmful to minors" at that time comported with the United States Supreme Court's decision in *Ginsberg v. New York*, 390 U.S. 629 (1968). In 1993, the General Assembly passed Act 1263, which amended Act 133 of 1969 by changing the definition of "harmful to minors" to reflect the definition of obscenity the Supreme Court adopted in *Miller v. California*, 413 U.S. 15 (1973). The new definition — which is still in use in the current version of the statute — provides as follows:

> "Harmful to minors" means *that quality of any description, exhibition, presentation, or representation, in whatever form*, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when the material or performance, taken as a whole, has the following characteristics:

(A) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors;

(B) The average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement, or sadomasochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and

(C) The material or performance lacks serious literary, scientific, medical, artistic, or political value for minors[.]

§ 5-68-501(2)(A) (Supp. 1999 & 2003) (emphasis added).

The 1999 version of the statute prohibited the "display [of] material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material." § 5-68-502(1)(A) (Repl. 1999). However, the statute also contained a "safe harbor" provision that provided a person "shall be deemed not to have displayed material harmful to minors if the material is kept behind devices commonly known as 'blinder racks' so that the lower two-thirds (2/3) of the material is not exposed to view[.]" § 5-68-502(1)(B) (Supp. 1999).

In 2003, the General Assembly amended §§ 5-68-501–502 even further by enacting Act 858, which requires material deemed "harmful to minors" to be obstructed from view and physically segregated. In relevant part, the 2003 version of the statute provides as follows:

It shall be unlawful for any person, including, but not limited to, any persons having custody, control, or supervision of any commercial establishment, to knowingly:

(1)(A) Display material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material.

(B) Provided, however, a person shall be deemed not to have displayed material harmful to minors if the lower two-thirds (2/3) of the material is not exposed to view and segregated in a manner that physically prohibits access to the material by minors; or

(2)(A) Sell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor, with or without consideration, any material which is harmful to minors.

On June 10, 2003, a group of bookstore owners, booksellers' associations, librarians, publishers[1] (collectively hereinafter "the booksellers") filed a complaint in the United States District Court, Eastern District of Arkansas. The named defendants were each of the State's prosecuting attorneys ("the State"). The complaint sought to enjoin the enforcement of, and to declare facially unconstitutional and void, the newly amended portions of § 5-68-502. Among other things, the booksellers alleged that the "offending sections" would impose severe restrictions on the availability, display, and distribution of material that was not obscene as to adults; in particular, they contended that it would not be possible under § 5-68-502, as amended, to restrict the display of materials deemed "harmful to minors" without also restricting access by adults.

After the State answered, generally denying the allegations of the complaint, both the booksellers and the State filed cross-motions for summary judgment. After a hearing on the motions, the federal district court issued a "Certification Order," dated February 4, 2004. In the order, the federal court expressed a number of concerns about the constitutional issues raised by a variable obscenity statute, such as Arkansas', in the context of access and display regulation.[2] In particular, the district court questioned whether a narrowing interpretation might be able to save the statute, or whether such an interpretation would "distort the obvious objectives of the statute." As such, the federal district court certified four questions to this court. Those questions are as follows:

I. Is the statute (§ 5-68-501, *et seq.*) intended to protect *all* minors, i.e., all persons seventeen years of age and younger, from expo-

[1] The named plaintiffs are Shipley, Inc., d/b/a That Bookstore in Blytheville; the Arkansas Library Association; American Booksellers Foundation for Free Expression, Inc.; Association of American Publishers, Inc.; Comic Book Legal Defense Fund; Freedom to Read Foundation, Inc.; International Periodical Distributors Association; and the American Civil Liberties Union of Arkansas, Inc.

[2] We point out that the instant case involves a challenge only to the display provisions of Act 858, now codified at Ark. Code Ann. § 5-68-502(a)(A) & (B) (Supp. 2003); the prohibition on selling harmful materials to minors, *see* Ark. Code Ann. § 5-68-502(2)(A) (Supp. 2003), is not at issue.

sure to "materials harmful to minors?" If the answer is "yes," may the statute nevertheless be interpreted under Arkansas law to protect only those who are the older, more mature minors from exposure to such materials, if that interpretation is the only way to protect the statute from a successful attack under the United States Constitution?

II. The statute (§ 5-68-502) makes it unlawful to "display material which is harmful to minors in such a way that minors, as part of the invited general public, will be exposed to view such material." Are books and magazines that have contents containing materials harmful to minors but which have no such materials on their binders or covers being "displayed" under the statute if they are simply shelved in bookcases or on book shelves without any additional action or effort to single them out or to draw the attention of the "invited general public" thereto?

III. Does a bookseller or librarian "allow to view . . . to a minor . . . any material which is harmful to minors," § 5-68-502(2)(A), by simply shelving and displaying such material, or must he or she affirmatively give permission (i.e. "allow") the minor to view such materials before he or she breaches the "allow to view" provision?

IV. The "safe harbor" provision contained in § 5-68-502(1)(B) requires that the material be "segregated in a manner that physically prohibits access to the material by minors." What must booksellers and librarians do to avail themselves of this provision?

The first of the federal court's four questions poses the heart of the matter: can § 5-68-502, as amended, be given a narrow enough construction that will both save the statute from constitutional infirmity and, at the same time, leave it with any meaning? Before answering the question, we first address our standards for statutory construction.

Statutes, of course, are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute. *Reinert v. State*, 348 Ark. 1, 71 S.W.3d 132 (2002). If it is possible to construe a statute as constitutional, we must do so. *Id.* However, the cardinal rule of statutory construction is to effectuate the legislative will. *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (2003); *Ozark Gas Pipeline v. Arkansas Pub. Serv.*

Comm'n, 342 Ark. 591, 29 S.W.3d 730 (2000). Further, we have said that we will not engage in interpretations that defy common sense and produce absurd results. *See Green v. Mills*, 339 Ark. 200, S.W.3d 492 (1999); *Yarbrough v. Witty*, 336 Ark. 479, 987 S.W.2d 257 (1999); *Citizens To Establish A Reform Party v. Priest*, 325 Ark. 257, 926 S.W.2d 432 (1996).

The federal district court first asks this court whether the statute is intended to protect *all* minors, or all persons seventeen years of age and younger, from exposure to material deemed "harmful to minors." The answer to this question is plainly yes. Ark. Code Ann. § 5-68-501(7) (Supp. 2003) defines a minor as "*any person* under the age of eighteen (18) years" (emphasis added). There is no limitation or qualification on this definition; thus, we construe the phrase "any person" to mean "every person" under the age of eighteen. Both the booksellers and the State agree on this issue. Because the statute defines a minor as "any person under the age of eighteen," the statute is obviously intended to protect *all* minors from exposure to material deemed "harmful to minors."

The second part of the district court's question asks whether, if the answer to the first part is "yes," may the statute be interpreted under Arkansas law "to protect only those who are the older, more mature minors from exposure to such materials, if that interpretation is the only way to protect the statute from a successful attack under the United States Constitution." This is the approach taken by the supreme court of Virginia in *Commonwealth v. American Booksellers Ass'n, Inc.*, 236 Va. 168, 372 S.E.2d 618 (1988). There, the Virginia court construed a statute that forbade selling or "display[ing] . . . in a manner whereby juveniles may examine and peruse" various materials deemed harmful to juveniles. *See* Va. Code Ann. § 18.2-391 (1985). The Virginia statute was initially found to be unconstitutional in federal court. *See American Booksellers Ass'n, Inc. v. Strobel*, 617 F. Supp. 699 (E.D. Va. 1985), *aff'd*, *American Booksellers Ass'n, Inc. v. Virginia*, 802 F.2d 691 (4th Cir. 1986). However, on appeal to the United State Supreme Court, the Court noted that the highest court of Virginia had yet to provide an authoritative interpretation of the statute, and so the Court remanded the case to the supreme court of Virginia for its review. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988).

The Virginia Supreme Court first examined the exhibits submitted during the trial of this case in the federal district court.

Commonwealth v. American Booksellers Ass'n, Inc., 236 Va. 168, 372 S.E.2d 618 (1988) (*American Booksellers IV*). First, the Virginia court examined the sixteen books submitted by the plaintiffs, and determined that the issue, as phrased by the United States Supreme Court, was whether any of those books were "harmful to juveniles" within the statutory definition. The Virginia court then noted that a "publication must be judged for obscenity as a whole, . . . and not on the basis of isolated passages." *American Booksellers*, 236 Va. at 175, 372 S.E.2d at 622. The court then cited the three-pronged test for determining when material is "harmful to minors," as set out in *Miller v. California, supra*: 1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; 2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable public law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *See Miller*, 413 U.S. at 24.

In applying that test, the Virginia supreme court noted that the first two prongs are "purely questions of fact for determination by a properly instructed jury," and thus matters inappropriate for an appellate court. *American Booksellers*, 236 Va. at 176, 372 S.E.3d at 623 (citing *Miller*, 413 U.S. at 30). However, the court then noted that the third prong, "lack of serious merit," was a mixed question of law and fact, which the appellate court might properly decide. *Id.* Because a work could not be deemed "harmful to minors" without meeting all three prongs, the court determined that it would consider and address the third prong alone. *Id.*

The Virginia high court concluded that the focus of the inquiry should not be upon the youngest members of the class, not upon the most sensitive members of the class, and not upon the majority of the class. The court concluded, "if a work is found to have a serious literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole." *Id.*, 372 S.E.2d at 624, 372 S.E.2d at 177.

In the present case, the State urges us to adopt the same "narrowing" interpretation utilized by the Virginia court, reminding this court that it is our duty, if it is at all possible, to adopt an interpretation of an act that preserves its constitutionality. However, under the Virginia court's so-called "variable obscenity" interpretation, works which are plainly inappropriate for

younger children would not fall within the scope of the statute, because those works would have some serious literary, artistic, political, or scientific value for an older adolescent. For example, during oral argument, counsel for the booksellers pointed out that a book such as *The Joy of Sex* could be considered to have serious value for a married seventeen-year-old, who might refer to the book for guidance. That book, counsel surmised, has serious value for the older minor, and therefore it would not be considered "harmful," within the meaning of the statute and would thus be available for all minors to examine. However, *The Joy of Sex* is obviously not suitable for a five-year-old child, who would nonetheless have access to this book under the State's proffered interpretation.[3]

As noted above, by its specific language in § 5-68-501(7), the General Assembly clearly intended to protect *all* minors from harmful materials. However, it is also obvious that the State's construction does *not* protect *all* minors, because it permits younger minors to have access to material that may actually be "harmful" to them, within the meaning of the Arkansas statute. Under such an interpretation, the "exception[s] would swallow the rule, and the rule would be meaningless." *Griffen v. Arkansas Judicial Discipline & Disability Comm'n*, 355 Ark. 38, 130 S.W.3d 524 (2003).

The State asserts that the five-year-old would still be protected from material that is considered "harmful" to a seventeen-year-old, and that the statute can be saved by interpreting it in that manner. However, the General Assembly's declared intent was to protect "minors," defined as "any person under the age of eighteen years." If the younger minors are to be protected from "harmful" materials, surely the General Assembly did not intend for those younger children to be permitted to access materials that would arguably be "harmful" to them, even though not "harmful" to an older child. We cannot construe Arkansas' statutory law in such a way as to render it meaningless, and we will not interpret a statute to yield absurd results that are contrary to legislative intent. *City of Maumelle v. Jeffrey Sand Co.*, 353 Ark. 686,

[3] Other books would serve equally as well in this hypothetical scenario: for example, works by authors ranging from D.H. Lawrence to Judy Blume contain graphic depictions of sexual conduct. Innumerable works, such as health books and art books, contain depictions of nudity.

120 S.W.3d 55 (2003). Therefore, we must reject the "narrowing interpretation" proposed by the State, and as such, we answer the second part of the federal district court's first question in the negative.

The second question the federal court certified to us requires us to interpret the word "display," as set out in § 5-68-502, which, as noted above, provides in relevant part that it shall be unlawful to "display material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material." The federal court asks whether books and magazines with "harmful" contents, but with no "harmful" material on their covers, are "displayed" under the statute if they are simply shelved in bookcases or on bookshelves without any additional action or effort on the part of the bookseller to single them out or draw attention to them. In *Ginsberg v. State of New York*, 390 U.S. 629 (1968), the Supreme Court held that a state may prohibit the distribution of sexually explicit materials to children, even though the materials would not be considered obscene if they were distributed to an adult. *Ginsberg*, 390 U.S. at 636-37. Such prohibitions are permissible, so long as they do not unreasonably restrict adults' access to material which is not obscene as to them. *See Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1986).

The Arkansas statute employing the word "display" does not define the term. However, other sources define the word to mean "to present or hold up to view." *See The American Heritage College Dictionary* at 400 (3d ed. 1997). The booksellers argue that the "display" provisions of the Arkansas statute encompass books without "harmful" materials on their covers, suggesting that the deletion of the blinder rack provision,[4] and the addition of the "physical segregation" requirement, means that the display restriction also includes within its scope works without harmful materials depicted on their covers. Specifically, the booksellers claim, the phrase "segregated in a manner that physically prohibits access to the material" indicates that more than visual obstruction is in-

[4] A "blinder rack" is a device used to shield from view the lower two-thirds of a work's cover.

tended; otherwise, simply using blinder racks — the option previously provided, but now deleted by the General Assembly — would be sufficient.

The State, on the other hand, asserts that books and magazines without harmful materials on their covers should not be considered "on display" if they are simply shelved in bookcases or on book shelves. The State suggests that the physical segregation requirement is intended to prevent minors from browsing through books or magazines that, by virtue of "harmful" materials on their covers, might tempt minors to browse through or view matters inside the book or magazine.

However, the State's argument overlooks the fact that the statute's definition of "material" does not limit that term to the covers of books and magazines. "Material" is defined as "any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture, film, record, recording tape, CD-ROM disk, magnetic disk memory, magnetic tape memory, video tape, or other media, but does not include matters displayed, transmitted, retrieved, or stored on the internet or other network for the electronic dissemination of information[.]" § 5-68-501(6). The question posed to this court was whether "*materials*" that are "harmful to minors" are displayed when they are set out on the bookstore shelf. A literal reading of the statute would have to mean that materials harmful in terms of their content, even if they have no "harmful" material on their covers, *are* "displayed in such a way that minors . . . will be exposed to view such materials," if they are simply shelved, because the terms of the statute make it plain that "material" is *not limited to the covers* of books and magazines.

The concurring opinions assert that a book without a harmful cover is not "displayed" to minors if it is merely present on a bookshelf. However, this ignores the fact that the statutory definition of "material" makes no distinction between contents and covers. Clearly, the General Assembly's intent was to include all material harmful to minors, whether that "harmful" material is on a book's cover or is contained within its pages.

In sum, if "material harmful to minors" is shelved on a bookshelf, even without some other effort made to draw attention to it, it is "displayed" within the meaning of the statute. Even if a book only has "harmful" content, but not a "harmful" cover,

the bookseller could still be subject to prosecution if that book were not obstructed from view *and* physically segregated. Thus, we answer the second question in the affirmative.

The federal court's third question pertains to § 5-68-502(2)(A), which makes it unlawful for any person to "[s]ell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor, with or without consideration, any material which is harmful to minors." There is no "safe harbor" provision in this subsection, as there is in § 5-68-501(1)(A), other than a provision that the prohibition does not apply to dissemination by a parent, guardian, or relative, or a dissemination with the permission of the parent or guardian. The question is whether a bookseller "allow[s] [a minor] to view . . . any material which is harmful to minors" if the bookseller merely places books on a shelf, or whether there must be some active involvement on the part of the bookseller, such as affirmatively granting permission, before he or she breaches the "allow-to-view" provision. In other words, does "allow" connote active or passive involvement on the part of the bookseller?

As with the other issues, the parties take radically different views of the word "allow," which, like "display," is not defined in the statute. The booksellers argue that it means something passive, citing the definition in *Webster's II New College Dictionary*, which provides that "to allow" means "to let do or happen." Therefore, the booksellers contend, the statute is violated by a mere passive "failure to prevent," and a party could be prosecuted for failing to take active steps to prevent minors from viewing allegedly harmful materials.

The State responds that, given the context of the statute, "allow to view" must connote some active step. The phrase "allow to view" is embedded in a clause that forbids a bookseller to "sell, furnish, present, distribute, . . . or otherwise disseminate to a minor" harmful materials. The other prohibited activities are efforts in which a bookseller must actively engage, argues the State, and therefore, to "allow [a minor] to view" harmful material must involve an affirmative act, or a deliberate decision to "turn a blind eye knowing that a minor is viewing material covered by the statute."

Our answer to this question hinges on the fact that the phrase "allow to view" is combined with the word "knowingly." It is unlawful, under the statute, for a person to "*knowingly*

. . . allow [a minor] to view" "harmful" materials. The *scienter* requirement thus puts an affirmative burden on the bookseller to actively permit a minor to view harmful materials. Under the criminal code, a person "acts knowingly with respect to his [or her] conduct or the attendant circumstances when he [or she] is aware that his [or her] conduct is of that nature or that such circumstances exist." Ark. Code Ann. § 5-2-202(2) (Repl. 1997). Thus, to violate the "allow-to-view" provisions, a bookseller must be aware that certain circumstances exist — i.e., that a minor is viewing "harmful"material. Simply shelving and displaying "harmful" materials is likely not enough for a bookseller to violate the "allow-to-view" provisions, but neither is a bookseller required to grant affirmative permission for a minor to look at "harmful" materials before he or she will be in violation of the statute. The language of the statute indicates that a bookseller must be aware that a minor is viewing "harmful" material, and then deliberately turn a blind eye to that activity, before the bookseller will have allowed a minor to view "harmful" material.

The federal district court's fourth and final question asks us to declare what booksellers and librarians must do in order to avail themselves of the "safe harbor" provision, contained in § 5-68-502(1)(B). That provision reads, "a person shall be deemed not to have displayed material harmful to minors if the lower two-thirds (2/3) of the material is not exposed to view and [is] segregated in a manner that physically prohibits access to the material by minors."[5]

Both the booksellers and the State propose means by which the booksellers might avoid prosecution under the statute. The booksellers suggest that they and librarians must "create a separate room or physically segregated area, with one or more entryways, with entry limited to adults either through technology or human control." Such a requirement, they contend, would unreasonably and substantially restrict adult access to materials protected by the First Amendment. The State, on the other hand, contends that

[5] This question necessarily involves some fact-based issues, and we have no evidentiary record before us. Ordinarily, this court will refuse to issue an advisory opinion based on facts not in evidence and events that have not yet occurred. *See Tsann Kuen Enterprises Company v. Campbell*, 355 Ark. 110, 127 S.W.3d 486 (2003); *Harris v. City of Little Rock*, 344 Ark. 95, 40 S.W.3d 214 (2001). However, given the unique procedural posture of this case, certified as it is from the federal court, we will nevertheless answer the question.

simply displaying the materials behind the sales counter, placing them in an area defined by ropes, or placing the materials in an "adults only" section to which minors have no access, would suffice.

We conclude that the "safe harbor" provision requires only that some physical obstacle stand between minors and the area where prohibited material is displayed, so that minors have no access to such material. Although this permits the booksellers to choose the method best suited to their individual establishments, it remains for the federal court to ultimately determine whether such a requirement violates the First Amendment rights of booksellers, librarians, and their adult customers.

DICKEY, C.J., BROWN and IMBER, JJ., concurring in part and dissenting in part.

ANNABELLE CLINTON IMBER, Justice, concurring and dissenting. With regard to the first question certified by the federal district court, I concur with the majority that the "narrowing" interpretation proposed by the State would completely nullify the statutory protections afforded by Ark Code Ann. § 5-68-501, *et seq.* (Supp. 2003). I write separately merely to clarify the wide-reaching effect such a construction would have on the protection of minors under the statute. The statute currently prohibits both the "display" of material harmful to minors as well as the "sale" of such material to minors. Ark. Code Ann. § 5-68-502(1)(A),(2)(A) (Supp. 2003). These provisions place notably different burdens on the booksellers and the First Amendment rights of adults to access these materials. Displays are permanently set for all customers who enter the store, regardless of age. Any display that restricts a minor's access to material necessarily restricts to some degree an adult or more mature minor's access to that material. Conversely, the sale of material happens on an individual level. Consequently, booksellers can tailor each sale to the maturity of the purchaser. Hence, when a 10-year-old attempts to purchase a book, the bookseller can evaluate at the time of purchase whether the book is appropriate for the child wishing to purchase it. If the book is not appropriate, the bookseller can refuse to sell the book to that child. The bookseller is, however, still free to shelve and sell that same book to an adult or a more mature minor, if appropriate. Thus, the potential constitutional defects of the "display" provision are not present in the "sale" provision because of the individualized nature of a sale.

Here, the State's proposed "narrowing" interpretation would be applicable to both the "sale" and "display" provisions, as the definition of material that is "harmful to minors" applies equally to both provisions. If we apply a limiting interpretation to the definition of "harmful to minors" so as to avoid the constitutional defect of the "display" provision, such an interpretation will necessarily be applicable to the "sale" provision. Under the interpretation proposed by the State, the statute would only prohibit the sale of material that is harmful to older, more mature minors and not restrict at all the sale of material that is harmful to younger minors. Thus, the proposed "narrowing" interpretation would enable a 10-year old to both browse *and purchase* material that was harmful to him because such material was not harmful to a mature 17-year old. I cannot believe such a construction could ever have been anticipated or supported by the legislature in enacting this statute, and I agree with the majority that we must reject the State's interpretation.

I depart from the majority, however, in answering the second question certified by the federal district court. In this question, the district court asks if books and magazines that have contents containing materials harmful to minors but which have no such material on their binders or covers are being "displayed" if they are simply shelved in the bookshelves. I would answer this question in the negative and interpret the "display" provision to only apply to material with harmful covers or binders. Such an interpretation is consistent with the plain language of the statute. Although "display" is not defined within the statute, Webster's Dictionary defines "display" as, "to spread out before the view; to exhibit to the sight or mind; to exhibit conspicuously." *Webster's Third New International Dictionary* at 654 (2002). Thus, a book that is not harmful on its cover is not "displaying" the harmful-to-minors material. This interpretation makes sense, as a book that only *contains* sexually explicit content does not, by its mere presence on the shelves, cause harm to minors if the harmful content is not being "exposed to view".[1] A minor suffers no harm from viewing a benign cover of a book. Moreover, without an "inviting" cover, a minor is highly unlikely to randomly pick up and browse the contents of the book. Furthermore, minors will be

[1] In the unlikely and highly improbable situation that the book was open to the harmful passage, the material would likely be "displayed."

unable to purchase material with harmful content, as the sale of such material is prohibited. Ark. Code Ann. § 5-68-502(2)(A) (Supp. 2003).

This interpretation is also consistent with the legislative history of the statute's safe-harbor provision. The original safe-harbor clause provided that material was not "displayed" for purposes of the statute if it was "kept behind devices commonly known as 'blinder racks' so that the lower two-thirds (2/3) of the material is not exposed to view." Ark. Code Ann. § 5-68-502(1)(B) (Supp. 1999). The plain language of this provision clearly indicates that the legislature was targeting only material with harmful covers and not targeting material with benign covers. In fact, the State and the booksellers are in agreement on this point. Blinder racks are only effective to shield minors from harmful covers and would be completely ineffective to shield minors from the harmful content within a book. Yet, under the majority's interpretation, books with entirely benign covers must nevertheless be concealed so that the lower two-thirds of the cover is not exposed to view. Such a requirement does not in any way increase the protection afforded by the statute but only leads to an absurd result. *City of Maumelle v. Jeffrey Sand Co.*, 353 Ark. 686, 120 S.W.3d 55 (2003).

On the other hand, the protection of the blinder racks alone could be easily subverted by a mischievous minor lifting the material off the rack to view a harmful cover. Thus, in 2003, the legislature modified the safe-harbor provision by adding a requirement that the material also be physically segregated from minors. The safe-harbor provision now reads:

> A person shall be deemed not to have displayed material harmful to minors if the lower two-thirds (2/3) of the material is not exposed to view *and* segregated in a manner that physically prohibits access to the material by minors.

Ark. Code Ann. § 5-68-502(1)(B) (Supp. 2003) (emphasis added). The amendment did not substantively change the requirement that the lower two-thirds of the material not be exposed to view; it merely deleted the specific reference to "blinder racks," thereby enabling store owners to implement the provision in the manner that best suited their store. The most obvious reading of the 2003 amendment is that it was aimed at expanding the protection of the previously targeted material (material with harmful covers), and *not* that it was

intending to target additional material. The legislature merely intended to prohibit minors from subverting the statute by lifting the material off the blinder racks to view the covers. With the twin protections of physical segregation *and* coverage of the bottom two-thirds of the material, a mischievous minor cannot physically access the material to lift it off the blinder rack or view the harmful material from afar by peeking into the "adults only" section. As this interpretation is both the least intrusive on the First Amendment and the most consistent with the history and language of the statute, the "display" provision of Ark. Code Ann. § 5-68-502(1)(A) should be interpreted to require both segregation and cover of the lower two-thirds of material with harmful covers but it would not be applicable to material with benign covers. Thus, in my view, books and magazines that have contents containing materials harmful to minors but which have no such materials on their binders or covers are not being "displayed" under the statute if they are simply shelved in bookcases or on bookshelves.

DICKEY, C.J., and BROWN, J., join.

Phyllis GINSBURG *v.* George GINSBURG, Mildred R. Baron, William Mac Ginsburg, and A.G. Edwards & Sons, Inc.

04-62 195 S.W.3d 898

Supreme Court of Arkansas
Opinion delivered October 21, 2004

Slagle & Gist, by: *Richard L. Slagle* and *Morse U. Gist, Jr.*, for appellant.

J. Sky Tapp, for appellees.

DONALD L. CORBIN, Justice. Appellant Phyllis Ginsburg appeals the order of the Garland County Circuit Court finding that funds placed by her late husband, Al Ginsburg, into a transfer-on-death (TOD) account were the sole and separate property of the decedent and that, therefore, the funds now belonged to his three children, Appellees George Ginsburg, Mildred R. Baron, and William Mac Ginsburg, as the named beneficiaries of the TOD account. For her sole point on appeal, Appellant contends that the trial court erred in this ruling. This is the second appeal of this matter to this court. *See Ginsburg v. Ginsburg*, 353 Ark. 816, 120 S.W.3d 567 (2003). Accordingly, our jurisdiction of this appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(7). We find no error and affirm.

The record reflects that Appellant and the decedent were married on May 9, 1987, and separated on May 14, 2000. On June 2, 2000, Appellant filed for divorce, and on June 6, the decedent was served with the divorce complaint and summons. On June 19, the decedent established a TOD account with Appellee A.G. Edwards & Sons, Inc., which provided that the proceeds of the account would be divided upon the decedent's death and paid equally to Appellees, his children by a former wife. In August 2001, Appellant and the decedent began living together again. During November of that year, the decedent became ill, and Appellant cared for him. The decedent died intestate on November 13, 2001. The divorce proceedings were never finalized prior to the decedent's death.

Upon the decedent's death, Appellant opened his estate and obtained an appointment as administratrix. Appellant then filed a petition to set aside the decedent's placement of the TOD funds as a fraudulent transfer, pursuant to Ark. Code Ann. § 28-49-109 (Repl. 2004), and obtained a temporary restraining order preventing A.G. Edwards from disbursing the TOD account to Appellees. At the time of the decedent's death, the TOD account had a market value of $243,083 and a position value of $177,258.

In January 2002, Appellant filed a motion for summary judgment, arguing that the TOD account should be brought into the estate on two grounds: (1) that the transfer was fraudulent and (2) that the transfer was meant to deprive her of the rights and benefits arising from her marriage with the decedent. The trial court granted Appellant's motion. This court reversed on the ground that there were remaining issues of fact as to whether the TOD was separate property under Ark. Code Ann. § 9-11-505 (Repl. 2002), and, if not, whether the account was purchased for the purpose of fraudulently depriving Appellant of her interest in the property. This court held: "If the TOD account was owned by both the decedent and [Appellant], then she can claim her dower rights in the property. If the account is considered separate property owned by the decedent, then the property will pass to the beneficiaries." *Ginsburg*, 353 Ark. at 827, 120 S.W.3d at 574.

Following this court's mandate, the trial court held a hearing on October 17, 2003. Appellant was the sole witness called on her behalf, while Appellees relied on the affidavit of Appellee Mildred Baron, which was presented to the court prior to the first appeal. At the conclusion of the hearing on this issue, the trial court ruled that there was not sufficient proof to support Appellant's claim that the TOD funds were marital property. To the contrary, the trial court found that the statements made by Appellee Baron in her affidavit had not been refuted by Appellant. Thereafter, in an order entered on October 21, 2003, the trial court found that the TOD account was owned by the decedent and was his sole and separate property. The court found further that there was no evidence of fraudulent conduct on the part of the decedent. Accordingly, the trial court ruled that the TOD was now the property of the Appellees, as the named beneficiaries. Appellant now appeals this ruling.

■ We review probate proceedings *de novo*, but we will not reverse the decision of the circuit court unless it is clearly erroneous. *McAdams v. McAdams*, 353 Ark. 494, 109 S.W.3d 649 (2003); *Dillard v. Nix*, 345 Ark. 215, 45 S.W.3d 359 (2001). We will not set aside the circuit court's findings of fact, whether based on oral or documentary evidence, unless they are clearly erroneous or clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a); *Butt v. Evans Law Firm, P.A.*, 351 Ark. 566, 98 S.W.3d 1 (2003). Moreover, in reviewing the proceedings, we give due regard to the opportunity of the circuit court to judge the credibility of the witnesses. *Id.* With this standard in mind, we turn

to the merits of Appellant's argument that the trial court erred in finding that the TOD account was the sole and separate property of the decedent.

TOD accounts are governed by the Uniform TOD Security Registration Act, Ark. Code Ann. §§ 28-14-101 to -112 (Repl. 2004). Pursuant to section 28-14-106, the designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death; thus, a registration of a security in beneficiary form may be cancelled or changed at any time by the owner without the consent of the beneficiary. A TOD account resulting from a registration in beneficiary form "is effective by reason of the contract regarding the registration between the owner and the registering entity and this chapter and is not testamentary." Section 28-14-109(a). Thus, pursuant to section 28-14-107, TOD accounts are payable to the beneficiary or beneficiaries upon the death of the owner; they do not become assets of the owner's estate unless no designated beneficiary survives the death of the owner. In the present case, the named beneficiaries, Appellees, all survived the death of their father, the owner of the TOD account.

The issue in this appeal is whether the TOD account and the funds used to purchase it were the sole and separate property of the decedent. If so, the decedent had the authority, pursuant to section 9-11-505, to establish the account and name his three children as its beneficiaries. Section 9-11-505 provides:

> (a) The real and personal property which any married person now owns, or has had conveyed to him or her by any person in good faith and without prejudice to existing creditors, *which is acquired as sole and separate property*, which comes to him or her by gift, bequest, descent, grant, or conveyance from any person, which he or she has acquired by trade, business, labor, or services carried on or performed on his or her sole or separate account, *which a married person in this state holds or owns at the time of the marriage*, and *the rents, issues, and proceeds of all such property shall, notwithstanding the marriage, be and remain his or her sole and separate property.*
>
> (b) *The separate property may be used, collected, and invested by him or her, in his or her own name, and shall not be subject to the interference or control of his or her spouse* nor shall it be liable for the spouse's debts, except as may have been contracted for the support of the spouse, or support of the children of the marriage by the spouse or his or her agent. [Emphasis added.]

Under this provision, property is separate property, and not marital, if it is acquired as sole and separate property and is held or owned at the time of the marriage.

The record demonstrates the following undisputed facts. The funds used by the decedent to purchase the TOD account were gained as a result of the sale of the decedent's business, Mid-American Motors. Mid-American Motors was purchased by the decedent prior to his marriage to Appellant and was owned solely by him. Appellant worked as a secretary at Mid-American Motors both prior to and during her marriage to the decedent, and she was compensated for her employment. Appellant never had any authorization to sign checks on behalf of Mid-American Motors. The decedent kept a separate checking account in his sole and separate name, and Appellant had no authorization to use that account. When the decedent sold Mid-American Motors, the check for the purchase price was made out solely to him.

Prior to the first appeal of this matter, Appellees offered the affidavit of Appellee Mildred Baron as proof that the TOD account was the decedent's own separate property. Her affidavit, which this court discussed in *Ginsburg I*, provided the following information:

> [M]y father and Phyllis kept everything separate, including bank accounts. My father never put her name on any deeds, or titles to property, or ever gave her any interest in any of his business interests, and she certainly never had access to any of my father's accounts, even though she did work at Mid-American Motors for a time during their marriage.
>
> As far as the money that was placed in the A.G. EDWARDS account, I personally know this money came from an account in his name alone. He wanted it placed into three (3) separate accounts for myself and my two (2) brothers, in equal shares, upon the death of our father. Phyllis knew about this and never did anything to controvert it or question it until after the death of our father. I certainly know that from the time she filed the divorce, some time in the first part of June, 2000, that they discussed back and forth, reconciling and getting back together and then splitting again, but at no time did she ever question what he had done with the funds placed in the A.G. EDWARDS account and frankly, I genuinely believe that the only reason she is doing this is because her lawyers have told her she might have a chance to get it.

> I absolutely know and would have testified at the trial and will testify in this hearing, when it is held, the funds my father put in the A.G. EDWARDS account were his alone. He had never commingled those funds with her funds or put them in their joint names, and those funds came specifically from assets and business interests my father had well before his marriage to Phyllis. . . .
>
> I can also absolutely state that Dad had earmarked the money he put in this account for us three (3) children, and Phyllis had always known of that fact and spoke of it openly with family members, including me. While she tried to get Dad to include her on this money on many occasions, both before and after the filing of the divorce, he would never agree to give her that money and specifically told her that he owed this to his children.

Despite the compelling nature of the undisputed facts and the evidence given by Appellee Mildred Baron, Appellant argues that the trial court erred in finding that the TOD account was the sole and separate property of the decedent. She argues that although the decedent may have been careful not to give her any ownership interest outright, the business was marital property because the majority of the mortgage payments for the business were paid during their marriage. She argues further that her interest in the property is evident from the facts that (1) both she and the decedent signed a line of credit with the Chrysler Credit Corporation for the business; (2) both she and the decedent signed a promissory note to finance other real property; and (3) she and the decedent filed joint tax returns.

Appellant makes no convincing argument as to how these facts demonstrate her property interest in the TOD account. Moreover, she has failed to cite convincing legal authority to support her argument. This court has repeatedly stated that it does not consider assignments of error that are unsupported by convincing argument or sufficient legal authority. *See, e.g, Omni Holding & Dev. Corp. v. 3D.S.A., Inc.*, 356 Ark. 440, 156 S.W.3d 228 (2004); *City of Benton v. Arkansas Soil & Water Conserv. Comm'n*, 345 Ark. 249, 45 S.W.3d 805 (2001). This alone is sufficient reason not to address this issue. *Id.*

Notwithstanding, we conclude that the trial court did not clearly err in finding that the TOD account was the sole and separate property of the decedent. The funds used to purchase the account were gained as the result of the sale of the decedent's

business, a business which he had acquired before his marriage to Appellant and continued to hold as his separate property during the course of the marriage. Appellant admittedly had no ownership interest in the business, and she was never authorized to write checks on behalf of the business. When the business was sold, the proceeds were paid by a check payable solely to the decedent.

There was no commingling of any funds between Appellant and the decedent once they were married. Indeed, the decedent kept a separate checking account of which Appellant was not authorized to use. It is of no consequence that the mortgage on the business was paid during the course of their marriage, as there is no evidence that the mortgage payments were made from marital funds. From the record before us, it is just as likely as not that the mortgage payments were made from the decedent's separate checking account or from the proceeds of the business itself. Moreover, it is of no consequence that Appellant worked at Mid-American Motors during the time of their marriage, because the evidence shows that she was separately compensated for her work.

[redacted] As for the documents offered by her below, namely, the line of credit with Chrysler, the promissory note used to finance other real property, and the joint tax return, Appellant has presented no authority or convincing argument as to how these documents serve as indicia of her ownership interest in Mid-American Motors. Accordingly, we conclude that Appellant has not met her burden of showing that the trial court clearly erred in finding that the TOD account was the sole and separate property of the decedent, and we affirm the trial court's judgment awarding the TOD funds to Appellees.

Gaye WARR *v.* Kathleen C. WILLIAMSON
and Richard D. Kennedy

03-1474 195 S.W.3d 903

Supreme Court of Arkansas
Opinion delivered October 21, 2004

The Brad Hendricks Law Firm, by: *Phyllis B. Edding*, for appellant.

Watts, Donovan & Tilley, by: *Jim Tilley* and *Christina Rose Conrad*, for appellees.

JIM HANNAH, Justice. Gaye N. Warr appeals an order of the Pope County Circuit Court awarding Kathleen Williamson costs under Ark. R. Civ. P. 68 (2003). Warr alleges that Williamson's one dollar offer of judgment under Rule 68 was not a *bona fide* offer and so could not trigger an award of costs under Rule 68. We reverse the circuit court and hold that the offer of one dollar was not a *bona fide* or good faith offer as required to trigger an award of costs under Rule 68. We also hold that because the law on what sort of offer is required to trigger costs under Rule 68 was not settled at the time Williamson made the offer of judgment, sanctions under Ark. R. Civ. P. 11 (2003) were not proper, and we affirm the circuit court's denial of sanctions.

Facts

On July 26, 2000, Warr was a passenger in a car on Interstate 40 that was struck from behind. Warr filed a complaint against Williamson and Richard D. Kennedy on April 11, 2001, based in negligence. She alleged that Williamson was driving a car that struck a car driven by Kennedy, and that "one or both" of the cars struck the vehicle in which she was riding. By way of an Offer of Judgment dated August 6, 2001, Williamson offered to have judgment entered against her in the "total sum of $1.00" in settlement of the lawsuit. The offer was never accepted by Warr, and the case went to trial on June 3, 2003. At trial, the jury returned a verdict finding Williamson zero percent at fault and Kennedy 100 percent at fault. The judgment states, "IT IS THEREFORE CONSIDERED, ORDERED AND AD-

JUDGED that the Complaint of Gaye N. Warr against Kathleen C. Williamson is hereby dismissed with prejudice." After entry of the judgment, Williamson brought a motion for costs under Rule 68. Warr responded to the motion for costs by arguing that the "Arkansas courts have clearly held that a *bona fide* offer must be made for Rule 68 to apply." Warr further argued that the offer of one dollar was a "bogus offer" and an "attempt to circumvent and abuse the purposes of Rule 68 . . . ." Warr also argued that costs were discretionary and not mandatory. The motion for costs was granted in an order entered October 15, 2003.

Warr brought a motion for sanctions under Ark. R. Civ. P. 11, arguing that the motion for costs under Rule 68 was "not well grounded in the law or a good faith argument to change the law." The motion for sanctions was denied in an order entered October 15, 2003. In her Notice of Appeal, Warr states that she is appealing from the order granting costs and the order denying sanctions.

Rule 68

At issue is Ark. R. Civ. P. 68 and whether a one dollar offer of judgment will serve to trigger a right to costs under Ark. R. Civ. P. 68. Rule 68 provides in pertinent part:

> *At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued.* If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. *If the judgment exclusive of interest from the date of offer finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.*

(Emphasis added). Rule 68 does not define what constitutes an offer under the Rule beyond that it must be "money or property." Certainly one dollar is money, albeit not much. The purpose of Rule 68 is to provide a defendant the means to compel a plaintiff to consider anew the merit of his or her claim at the time the offer is made and whether continued litigation is appropriate. *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000). Rule 68 encourages early settlement

of claims and protects the party who is willing to settle from expenses and costs which will subsequently accrue. *Bell v. Bershears*, 351 Ark. 260, 92 S.W.3d 32 (2002); *see also Jones, supra.* Obviously, if Rule 68 is to serve its stated purpose, it must require that an offer be extended which is sufficient to compel a plaintiff to reassess the likelihood of success on the merits of the claim. *See, e.g., Jones, supra.*

In *Darragh Poultry & Livestock Equipment Co. v. Piney Creek Sales, Inc.*, 294 Ark. 427, 431, 743 S.W.2d 804 (1988),[1] this court stated, "Under Rule 68 a trial judge has no discretion but must order the offeree to pay the authorized costs incurred after the making of a *bona fide* offer, if the judgment, exclusive of interest, is not more favorable than the offer." Similarly, in *Hankins v. Deptartment of Finance and Administration,* 330 Ark. 492, 497, 954 S.W.2d 259 (1997), this court cited *Darragh, supra*, in stating, "We recognize that Ark. R. Civ. P. 68 requires the trial judge to order an offeree to pay the authorized costs after the making of a *bona fide* offer, if the judgment, exclusive of interest, is not more favorable than the offer." Thus, while in both opinions this court used the term "*bona fide* offer," neither opinion discussed why that term was used or exactly what sort of offer is required to trigger an award of costs under Rule 68. However, while not precisely on point, the discussion in *Jones, supra,* is helpful. In *Jones* this court cited *Darragh* and stated:

> The purpose of Rule 68 is to provide a means by which a defendant can compel the plaintiff realistically to reassess his claim and thereby, perhaps, persuade plaintiff to settle. *See Darragh Poultry & Livestock Equipment Co. v. Piney Creek Sales, Inc.*, 294 Ark. 427, 743 S.W.2d 804 (1988).
>
> The chancellor denied cross-appellants' motion for costs based on their October 1997 offer of judgment. *Cross-appellants made a*

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[1] In *Darragh Poultry & Livestock Equipment Co. v. Piney Creek Sales, Inc.*, 294 Ark: 427, 743 S.W.2d 804 (1988), this court considered whether a defendant who obtains a judgment by a defense verdict at trial may collect costs under Ark. R. Civ. P. 68, even though the Rule provides that costs are awarded when the offeree's judgment "is not more favorable than the offer" that the offeror made. In that case, this court declined to follow the reasoning in *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981), where the United States Supreme Court held that a victorious defendant is not entitled to recover costs incurred after the making of the offer under Fed. R. Civ. P. 68. *Delta, supra.* Neither party has asked this court to reconsider our decision in *Darragh, supra.*

> *settlement offer of "one-third of one-fourth of the net value of the estate of Frances Abraham," which was no greater than the minimum amount that cross-appellees were to inherit* under Frances Abraham's last will executed in 1987. The three appellants were to inherit one-fourth of Frances Abraham's estate under the 1987 will. *Rule 68 is not applicable where a defendant makes an offer of settlement that is no greater than the minimum amount that the plaintiff can recover. The trial court was correct in its ruling.*

Jones, 341 Ark. at 81-2 (emphasis added). In *Jones, supra*, this court affirmed the court of appeals decision in *Jones v. Abraham*, 67 Ark. App. 304, 318, 999 S.W.2d 698 (1999), wherein the court of appeals in citing to *Darragh, supra,* stated, "Offers of judgment made pursuant to Rule 68 are effective only if they are *bona fide* offers." "[T]he settled meaning of *bona fide* is synonymous with its literal translation, 'good faith,' and is so familiar that the average person could not be misled." *4000 Asher, Inc. v. State*, 290 Ark. 8, 14, 716 S.W.2d 190 (1986).

Rule 68 offers a defendant the opportunity to make a good faith offer of judgment to encourage the plaintiff to settle the case and to acquire protection against expenses and costs accruing after the offer is made. To obtain the protection and benefit of Rule 68, a defendant must make a good faith offer, or in other words, an offer sufficient to compel the plaintiff to reassess his or her case. It is difficult to imagine any circumstances under which an offer of one dollar would compel a plaintiff to seriously consider settling a case. For example, Warr paid far in excess of one dollar in filing fees just to bring the lawsuit. It is apparent that the offer of one dollar was made in an attempt to entitle Williamson to costs under Rule 68 on technical grounds should the jury return a defense verdict.

It should be noted that Rule 68 applies to offers made "with costs then accrued." Clearly, even though parties to a lawsuit will certainly value any given case differently, the Rule contemplates that an offer triggering an award of costs under Rule 68 would at the least take costs into account. This court has stated that Rule 68 has real meaning, and as an example noted how the Rule is to be given effect as shown by the fact it allows the trial judge no discretion in granting fees where a party meets the requirements of the rule. *Darragh, supra.* An offer of one dollar simply would not compel Warr to reassess the likelihood of success and consider whether accepting the offer would be best. The offer

was not made in good faith under Rule 68. The circuit court is reversed on the award of fees under Rule 68 because Williamson failed to make a valid offer of judgment under Rule 68.

Rule 11 Sanctions

This court recently discussed Ark. R. Civ. P. 11 sanctions:

> The primary purpose of Rule 11 sanctions is to deter future litigation abuse, and the award of attorney's fees is but one of several methods of achieving this goal. *See Crockett & Brown, P.A. v. Wilson,* 321 Ark. 150, 901 S.W.2d 826 (1995). When a trial court determines that a violation of Rule 11 has occurred, the Rule makes sanctions mandatory. *Id.* The moving party has the burden to prove a violation of Rule 11. *Bratton v. Gunn,* 300 Ark. 140, 777 S.W.2d 219 (1989). The imposition of sanctions pursuant to Rule 11 is a serious matter to be handled with circumspection, and the trial court's decision is due substantial deference. *Williams v. Martin,* 335 Ark. 163, 980 S.W.2d 248 (1998); *Crockett & Brown, supra.*

Pomtree v. State Farm Mut. Auto. Ins., 353 Ark. 657, 666, 121 S.W.3d 147 (2003). Warr argues that the circuit court abused its discretion in denying her motion for Rule 11 sanctions because the offer of one dollar was "clearly in violation of the purpose and intent of Rule 68." Warr further argues that filing the motion for costs was an "abuse of the rules of civil procedure and the judicial system."

This court further stated in *Pomtree, supra*:

> The essential issue is whether the attorney who signed the pleading or other document fulfilled his or her 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 in the pleading and the complexity of the issues raised. *Id.* The moving party establishes a violation of Rule 11 when it is patently clear that the nonmoving party's claim had no chance of success.

Pomtree, 353 Ark. at 667.

We cannot say that the motion was made for an improper purpose or that a reasonable inquiry into the issue of what offer is required to trigger an award of costs under Rule 68 at the time the offer was made would have shown that it was

implausible. At the time the Rule 68 offer was made, there was no decision of this court on point discussing what sort of offer triggers an award of costs under Rule 68. We therefore affirm the circuit court's denial of the motion for sanctions, although on a basis different than that relied upon by the circuit court. We will affirm the lower court when it has reached the right result even though it was based on the wrong reason. *HRR Arkansas, Inc. v. River City Contractors, Inc.*, 350 Ark. 420, 87 S.W.3d 232 (2002).

GLAZE and IMBER, JJ., concurring.

ANNABELLE CLINTON IMBER, Justice, concurring. I concur with the majority that Williamson's one-dollar offer of judgment under Ark. R. Civ. P. 68 (2004) was not a good faith, *bona fide* offer as required by our case law. Notwithstanding my agreement with the majority, I feel compelled to point out that the one-dollar offer of judgment would not be an issue if it were not for our court's interpretation of Rule 68 in *Darragh Poultry & Livestock Equipment Co. v. Piney Creek Sales, Inc.*, 294 Ark. 427, 743 S.W.2d 804 (1988). As the majority correctly notes, neither party has asked us to reconsider our decision in *Darragh*. However, I agree with the United States Supreme Court in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), that a prevailing defendant should not be entitled to recover costs incurred under Rule 68.

Rule 68 of the Arkansas Rules of Civil Procedure states in part:

> [A] party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued . . . [I]f the judgment . . . *finally obtained by the offeree* is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer . . . For purposes of this rule, the term "costs" is defined as reasonable litigation expenses, excluding attorney's fees.

Ark. R. Civ. P. 68 (2004)(emphasis added). In refusing to apply Rule 68 to a prevailing defendant, *Delta Air Lines* prevented frivolous settlement offers, such as the one-dollar offer here. In *Darragh*, however, this court declined to follow *Delta Air Lines*, but instead ruled that a prevailing defendant can still recover costs under Rule 68. As a result, we abandoned an opportunity to prevent the very issue on

appeal; rather, our holding in *Darragh* extended Rule 68 beyond judgments obtained by the offeree to encompass judgments obtained by the offeror. In so holding, this court instituted a *bona fide* offer requirement. Such a requirement now forces our court to become involved in determining what is, or is not, a *bona fide* offer when awarding a prevailing defendant costs under Rule 68. *Darragh Poultry & Livestock Equipment Co., supra.* In this case, it is not difficult to determine that a one-dollar offer is not *bona fide* offer, but what amount of money makes an offer *bona fide*? For example, is a $200,000 offer always a *bona fide* offer in a case where millions of dollars are at stake? By following the federal interpretation of Rule 68, this court would eliminate the need to determine whether there has been a *bona fide* offer because a prevailing defendant cannot benefit from the rule.

In addition, a literal interpretation of Rule 68 eliminates any *bona fide* offer requirement when a judgment is obtained by the offeree; that is, when there is a judgment in favor of the plaintiff. As noted in *Delta Air Lines*, if the plaintiff rejects a realistic offer made by the defendant, then under Rule 68, the defendant will receive costs should the plaintiff gamble and receive a judgment less than or equal to the amount offered. *Delta Air Lines v. August*, 450 U.S. at 355-356. Under the plain language of the rule, an offeror will only receive costs when there is a realistic offer made to a plaintiff who prevails:

> But the plain language of the Rule makes it unnecessary to read a reasonableness requirement into the Rule. A literal interpretation totally avoids the problem of sham offers, because such an offer will serve no purpose, and a defendant will be encouraged to make only realistic settlement offers.

Id. Furthermore, as pointed out by the Supreme Court "[if] interpreted to require that the plaintiff secure at least some relief, the rule would insure that token offers will not be made because nothing would be gained by them." *Id.* (Fn. 15)(citing Note, *Rule 68: A "New" Tool for Litigation,* 1978 DUKE L. J. 889, 895 (1978)).

Moreover, this court's interpretation of Rule 68 in *Darragh* circumvents the intent and application of Ark. R. Civ. P. 54. As recognized by the majority, the purpose of Rule 68 is to provide a defendant the means to compel a plaintiff to reassess the merits of the case at the time the offer is made and determine whether continued litigation is appropriate. *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000). Under Rule 68, a trial court has no

discretion in awarding costs if the, "judgment. . . obtained by the offeree is not more favorable than the offer." Ark. R. Civ. P. 68. In contrast, Rule 54(d) gives the trial court discretion in awarding costs to the prevailing party.[1] Our precedent interpreting Rule 68 enables a prevailing defendant who has made an offer to mandatorily recover costs, and, as a result, we have lessened the trial court's discretionary authority to award costs to a prevailing party under Rule 54(d). As the Supreme Court noted in *Delta Air Lines,* the general rule of discretion established in Rule 54(d) is best protected by limiting the application of Rule 68 "only to offers made by the defendant and only to judgments obtained by the plaintiff." *Delta Air Lines, Inc. v. August,* 450 U.S. at 352. The scope of Rule 68 is set forth succinctly by the Supreme Court in *Delta:*

> Rule 68 could conceivably alter the Rule 54(d) presumption in favor of the prevailing party after three different kinds of judgments are entered: (1) a judgment in favor of the defendant; (2) a judgment in favor of the plaintiff but for an amount less than the defendant's settlement offer; or (3) a judgment for the plaintiff for an amount greater than the settlement offer. The question presented by this case is which of these three situations is described by the words "judgment finally obtained by the offeree . . . not more favorable than the offer." Obviously those words do not encompass the third situation– a judgment in favor of the offeree that is *more favorable* than the offer. Those words just as clearly do encompass the second, for there can be no doubt that a judgment in favor of the plaintiff has been "obtained by the offeree." But inasmuch as the words "judgment . . . obtained by the offeree" — rather than words like "any judgment" — would not normally be read by a lawyer to describe a judgment in favor of the other party, the plain language of Rule 68 confines its effect to the second type of case — one in which the plaintiff has obtained a judgment for an amount less favorable than the defendant's settlement offer.

Delta Air Lines, Inc. v. August, 450 U.S. at 351.

GLAZE, J., joins.

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[1] Ark. R. Civ. P. 54(d)(1) (2004) provides that "[c]osts shall be allowed to the prevailing party if the court so directs, unless a statute or rule makes the award mandatory."

Jabree Montrey BRYANT *v.* STATE of Arkansas

CA 04-722 195 S.W.3d 924

Supreme Court of Arkansas
Opinion delivered October 21, 2004

James Law Firm, by: *William O. "Bill" James, Jr.*, for appellant.

No response.

PER CURIAM. On September 9, 2004, this court issued a per curiam order remanding to the circuit court the issue of whether an attorney was at fault in failing to appeal the interlocutory

order in timely fashion which denied the motion to transfer this matter to juvenile court. The circuit court has now filed Findings of Fact in which it recites the dates of the order denying transferral, the substitution of counsel for Bryant, and the belated notice of appeal. The Findings of Fact also included discussions between Bryant and current counsel, Bill James, about the feasibility of an appeal.

The pertinent statute, Ark. Code Ann. § 9-27-318(l) (Supp. 2003), contemplates an appeal from transfer orders or the denial of the same. Our case law provides that the time to appeal the grant or denial of a transfer order is at the time of the order and an appeal of that issue after the judgment of conviction is untimely. *See, e.g., Otis v. State*, 355 Ark. 590, 142 S.W.3d 615 (2004). We conclude that the time to appeal the order denying transfer was within thirty days of entry of that order, which was September 22, 2003. That was not done.

We remand this matter to the circuit court for determination of these facts:

- Did Bryant request either Mark Leverett or Bill James to file an appeal on his behalf before October 22, 2003, which was the deadline for the notice of appeal?
- If such a request was made to either attorney, does that attorney admit fault for not timely filing the notice of appeal?
- If an attorney was so requested and the attorney does not admit fault, does the circuit court find fault with that attorney for failure to file the appeal in timely fashion?

Jerry HERRON *v.* STATE of Arkansas

CR 04-938 195 S.W.3d 910

Supreme Court of Arkansas
Opinion delivered October 21, 2004

Dennis R. Morlock, for appellant.

No response.

PER CURIAM. Dennis R. Molock, attorney for Appellant Jerry Herron, has filed a motion to withdraw from representing Appellant in his appeal. The motion reflects that Appellant was charged with capital murder in the Arkansas County Circuit Court. He was found to be indigent, and Mr. Molock, a part-time public defender, was appointed to represent him. Appellant was ultimately convicted of first-degree murder and sentenced to life imprisonment. A notice of appeal was timely filed with the circuit clerk, and the record on appeal has been lodged with this court.

Mr. Molock now asks this court to be relieved as counsel for Appellant, on the ground that he is currently representing eighty-eight felony defendants at the trial level. As such, he states that it is difficult for him to devote the time necessary to prepare the abstract and brief in Appellant's case.

We grant the motion to withdraw, and we appoint William O. James to represent Appellant. Our clerk is directed to set a new briefing schedule for the appeal.

It is so ordered.

Heather Patrice HOGROBROOKS *v.*
BOARD of LAW EXAMINERS

03-1414 195 S.W.3d 925

Supreme Court of Arkansas
Opinion delivered October 21, 2004

Appellant, pro se.

W. Frank Morledge, P.A. , for appellee.

PER CURIAM. Appellant Heather Patrice Hogrobrooks appeals a decision by Appellee State Board of Law Examiners denying her reinstatement to the Arkansas Bar. On February 24, 2004, Hogrobrooks attempted to file her brief in the matter. The brief tendered was not accepted for filing due to incorrect page numbering. Hogrobrooks filed a motion for rule on the clerk to accept her nonconforming brief. On April 15, 2004, this court issued a per curiam opinion denying appellant's motion for rule on clerk with directions to file a conforming brief within ten days of the date of the *per curiam. Hogrobrooks v. Board of Law Examiners*, 357 Ark. 36, 159 S.W.3d 285 (2004). Hogrobrooks filed a second brief with this court on April 26, 2004.

The court is unable to determine whether the brief filed on February 24, 2004, contained the following defects, therefore instead of dismissing the appeal, the court gives Hogrobrooks ten days to correct these areas of nonconformance: (1) Rule

4-1(a) *Briefs — Size — Paper — Type* regarding size of print and double-spacing; (2) Rule 4-2(a)(2) *Informational Statement* regarding Rule 1-2(c); (3) Rule 4-2(a)(5) *Abstract* regarding page references to the record; (4) Rule 4-2(a)(6) *Statement of the Case* regarding page references to the abstract and addendum; and (5) Rule 4-2(a)(8) *Addendum* regarding a clear reference to the record.

A model appellant's brief may be viewed on the Arkansas Judiciary website under court forms at http://courts.state.ar.us. The model brief's addendum is not available on this website, but may be reviewed in the Arkansas Supreme Court Library.

Should a conforming brief not be filed by Ms. Hogrobrooks within fifteen days of the date of this *per curiam* order, her appeal will be dismissed with prejudice.

GLAZE, J., dissents. I would dismiss appeal, because counsel has already had an opportunity to comply with Rule 4-2(b)(3), and has failed to cure the deficiencies contained in her brief. Therefore, I would affirm for noncompliance with the court's rules. *See also* Rule 4-1.

James Lee JACKSON *v.* STATE of Arkansas

CR 04-854 195 S.W.3d 926

Supreme Court of Arkansas
Opinion delivered October 21, 2004

William M. Howard, for appellant's counsel.

No response.

PER CURIAM. William M. Howard, Jr. appears by motion in this appeal seeking to have Joseph P. Mazzanti III, a public defender, relieved of the responsibility of representing appellant, and to be substituted as counsel on the appeal. We cannot determine from the motion whether appellant has been consulted regarding the change in counsel, that he desires to be represented by different counsel in general, and by Howard in particular, and the motion does not state the reasons for the attempted withdrawal as required by our rules of procedure and case law. We deny the motion without prejudice to it being refiled.

Rule 16 of the Arkansas Rules of Appellate Procedure—Criminal states that trial counsel, whether retained or court

appointed, shall continue to represent a convicted defendant throughout any appeal unless permitted by either the trial court or the appellate court to withdraw "in the interest of justice or for other sufficient cause." The rule goes on to state that, after the notice of appeal of a judgment of conviction has been filed, the appellate court shall have exclusive jurisdiction to relieve counsel and appoint new counsel. Ark. R. App. P.—Criminal 16(a).

If Mazzanti is a full-time, state-salaried public defender and he is provided with a state-funded secretary, he is entitled to be relieved as counsel for appellant's appeal for good cause shown, in light of the fact that he would not be compensated by the Arkansas Public Defender Commission for work performed on the appeal, and he is ineligible for compensation by this court. *See Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000); Ark. Code Ann. § 19-4-1604(b)(2) (Supp. 2003). However, Rule 16 clearly states that there is no automatic right of withdrawal for trial counsel once a criminal defendant has been convicted. Instead, an attorney who wishes to withdraw from a case must obtain permission from the court to withdraw by means of a petition to withdraw containing a statement of reasons for withdrawing. If the interest of justice or other sufficient cause is demonstrated, the motion will be granted, and, at that time, Howard's motion to substitute will be considered.

Robert LEFEVER *v.* STATE of Arkansas

CR 04-1028 195 S.W.3d 928

Supreme Court of Arkansas
Opinion delivered October 21, 2004

Cindy M. Baker, for appellant.

No response.

PER CURIAM. Robert Lefever, by and through his attorney, has filed a motion for a rule on the clerk.

His attorney, Cindy M. Baker, admits in her motion that the record was tendered late due to a mistake on her part.

We find that such an error, admittedly made by the attorney for a criminal defendant, is good cause to grant the motion. *See In Re: Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (*per curiam*).

The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Keela McGAHEY *v.* STATE of Arkansas

CR 04-1041 195 S.W.3d 922

Supreme Court of Arkansas
Opinion delivered October 21, 2004

Hubert W. Alexander, for appellant.

No response.

PER CURIAM. Appellant, Keela McGahey, by her attorney, Hubert W. Alexander, has filed a motion for rule on clerk, asking this court to grant time to obtain the trial transcript from the court reporter.

On March 7, 2003, the Desha County Circuit Court convicted appellant of manufacturing methamphetamine and possession of drug paraphernalia used to manufacture methamphetamine and sentenced her to 180 months' and 300 months' imprisonment to run concurrently in the Arkansas Department of Correction. At trial, appellant was represented by Mr. Jimmy Doyle. On April 7, 2003, a notice of appeal was timely filed.

On May 15, 2003, the court reporter forwarded a letter to Mr. Doyle, outlining the parties' conversation regarding payment of the record. On June 20, 2003, the court reporter again forwarded a letter to Mr. Doyle, notifying him that the time for filing the record had passed. The court reporter also noted the possibility of appellant being declared indigent.

Mr. Doyle sent a letter dated February 9, 2004, to appellant, requesting that she sign an affidavit to receive the record as a pauper. Appellant signed and returned the affidavit to Mr. Doyle on February 18, 2004.

In her motion before us, appellant states that the failure to obtain and file the record is through no fault of her own, and she requests that we grant her motion for rule on the clerk. She has also retained Mr. Hubert W. Alexander to represent her in her appeal and requests that Mr. Alexander be substituted as the attorney of record.

We recently clarified the treatment of motions for rule on clerk and motions for belated appeals in *Barnett v. State*, 358 Ark. 358, 190 S.W.3d 909 (2004) (citing *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004)), where we stated:

> Where an appeal is not timely perfected, either the party or attorney filing the appeal is at fault, or there is good reason that the

> appeal was not timely perfected. The party or attorney filing the appeal is therefore faced with two options. First, where the party or attorney filing the appeal is at fault, fault should be admitted by affidavit filed with the motion or in the motion itself. There is no advantage in declining to admit fault where fault exists. Second, where the party or attorney believes that there is good reason the appeal was not perfected, the case for good reason can be made in the motion, and this court will decide whether good reason is present.

Id.

While we no longer require an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where he has erred and is responsible for the failure to perfect the appeal. *See id.* However, where a motion seeking relief from failure to perfect an appeal is filed and it is not plain from the motion, affidavits, and record whether there is attorney error, the clerk of this court will be ordered to accept the notice of appeal or record, and the appeal will proceed without delay. *See id.* At that time, the matter of attorney error will be remanded to the trial court to make findings of fact. *See id.* Upon receipt of the findings by this court, it will render a decision on attorney error. *See id.*

In the present case, the motion and accompanying record fail to reveal plainly whether there was an attorney's error on Mr. Doyle's part.[1] For that reason, we direct the clerk to accept the appeal, and we remand the matter of attorney error to the circuit court to make findings of fact. Therefore, the present motion for rule on the clerk is granted.

Appellant's motion to substitute counsel is granted. The clerk shall establish a briefing schedule.

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[1] We note that more than eighteen months have passed since the entry of the judgment in this case. We distinguished our rules in *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004), where we stated that if the issue of failure to perfect an appeal involves a *notice of appeal,* then relief must be sought under Ark. R. App. P.—Crim. 2. If the issue of failure to perfect an appeal involves *docketing the record,* then relief must be sought under Ark. Sup. Ct. R. 2-2. Because the present appeal involves the docketing of the record, rather than the filing of a notice of appeal, then the eighteen-month time limit under Ark. R. App. P.—Crim. 2 does not apply.

Torry Dontae TIMMONS *v.* STATE of Arkansas

CR 04-1048 195 S.W.3d 927

Supreme Court of Arkansas
Opinion delivered October 21, 2004

Steve J. Jackson, for appellant.

No response.

PER CURIAM. Appellant Torry Dontae Timmons, by and through his attorney, has filed a motion for rule on clerk. His attorney, Steve J. Jackson, 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.

Robbyn TUMEY *v.* Charlie DANIELS, Secretary of State; State Board of Election Commissioner; Benton County Board of Election Commissioners; and Timothy Chad Hutchinson

04-885 196 S.W.3d 479

Supreme Court of Arkansas
Opinion delivered October 26, 2004

Daily & Woods, PLLC, by: *Mark Horoda*, for appellant.

Quattlebaum, Grooms, Tull & Burrow, by: *E. B. Chiles, IV*, for appellee Timothy Chad Hutchinson.

Mike Beebe, Att'y Gen., by: *Colette D. Honorable*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. This appeal involves a challenge to a candidate's eligibility to run for state office. Appellant Robbyn Tumey is the Democratic Party's candidate for the office of House Representative, District 95. Appellee Timothy Chad Hutchinson is the Republican Party's candidate for the same office. In August 2004, Tumey filed suit in the Pulaski County Circuit Court seeking a judgment declaring Hutchinson ineligible to run for that office, because he allegedly did not meet the one-year residency requirement. Tumey also sought a writ of mandamus directing Appellees, Arkansas Secretary of State Charlie Daniels, the State Board of Election Commissioners, and the Benton County Board of Election Commissioners,[1] to remove Hutchinson's name from the ballot for the November 2, 2004 General Election. Hutchinson moved to dismiss Tumey's complaint on the ground that she had not complied with certain provisions of Ark. Code Ann. § 7-5-801 (Repl. 2000). The trial court granted Hutchinson's motion, and this appeal followed. For reversal, Tumey argues that her suit is governed by Ark. Code Ann. § 7-5-207(b) (Repl. 2000), and that the trial court erred in dismissing her complaint. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(4). We reverse and remand.

Tumey asserts that her complaint is a challenge to Hutchinson's eligibility to have his name placed on the general-election ballot, not a challenge to his certification as the Republican Party's nominee. She asserts that this is clear from the face of her complaint, which alleges that Hutchinson is ineligible because he has not fulfilled the one-year residency requirement of Article 5, § 4, of the Arkansas Constitution. She contends that her suit was filed in accordance with section 7-5-207(b), which provides:

> (b) No person's name shall be printed upon the ballot as a candidate for any public office in this state at any election unless the person is qualified and eligible at the time of filing as a candidate for

[1] The state and county Appellees have elected not to file briefs on appeal.

> the office to hold the public office for which he is a candidate, except if a person is not qualified to hold the office at the time of filing because of age alone, the name of the person shall be printed on the ballot as a candidate for the office if the person will qualify to hold the office at the time prescribed by law for taking office.

Tumey asserts that as a taxpayer and resident of Benton County, she may avail herself of this provision at any time prior to the general election.

Hutchinson asserts that Tumey's complaint is a challenge to his certification as the Republican nominee. He thus asserts that her suit is an election contest governed by section 7-5-801, which provides:

> (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.
>
> (b) The action shall be brought in the circuit court of the county in which the certification of nomination or certificate of vote is made when a county or city or township office, including the office of county delegate or county committeeman, is involved, and, except as provided in this subchapter, within any county in the circuit or district wherein any of the wrongful acts occurred when any circuit or district office is involved, and, except as provided in this subchapter, in the Pulaski County Circuit Court when the office of United States Senator or any state office is involved.
>
> (c) If there are two (2) or more counties in the district where the action is brought and when fraud is alleged in the complaint, answer, or cross-complaint, the circuit court may hear testimony in any county in the district.
>
> (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.
>
> (e) The complaint shall be answered within twenty (20) days.

Hutchinson asserts that Tumey failed to comply with subsection (d), because her complaint was not verified by affidavit, nor was it filed within twenty days of the date of the certification of his nomination.

During the proceedings below, Hutchinson relied on this court's holding in *Valley v. Bogard*, 342 Ark. 336, 28 S.W.3d 269 (2000), to support his argument that Tumey's suit is an election contest that had to be brought in compliance with section 7-5-801. *Valley* involved a pre-primary eligibility challenge brought by Arnell Willis, a candidate for State Representative, District 99, in the Democratic primary, against J.F. Valley, another Democratic candidate for the same office. Willis argued that Valley was not eligible for the office because he had not resided in District 99 for a year prior to the election. The trial court agreed with Willis and entered an order finding that Valley did not meet the residency qualifications. On appeal, Valley argued that the trial court lacked jurisdiction over Willis's suit because it was an election contest that should have been brought under section 7-5-801. This court rejected that argument and held that section 7-5-801 was not applicable to pre-primary eligibility challenges:

> The statute that Valley cites and relies on, § 7-5-801(d), provides a right of action to contest the certification of the nomination or the certificate of vote *after* the election. The twenty-day period, however, is not applicable to an action brought before a primary election to determine the eligibility of a candidate. *Jacobs v. Yates*, 342 Ark. 243, 27 S.W.3d 734 (2000). Specifically, the certification discussed in the statute refers to the certification of a candidate following the primary election as a nominee to the general election, not the certification of the qualifications of a candidate before the primary election. *Id.*

Id. at 340, 28 S.W.3d at 271.

The trial court in the present case ruled that the last sentence in the foregoing quote supported its conclusion that section 7-5-801 was applicable, because it viewed Tumey's suit as a "post-primary election, pre-general election challenge to the 'certification of nomination' of the defendant Hutchinson[.]" The trial court then found that Tumey's complaint did not comply with subsection (d), because it was not verified by her affidavit. The trial court also found that Tumey should have filed her complaint in the Benton County Circuit Court, pursuant to section 7-5-801(b). The trial court made no ruling on the timeliness of her complaint, as it limited its ruling to the face of Tumey's complaint, pursuant to Ark. R. Civ. P. 12(b)(6), and the complaint did not reflect the date of certification. The trial court then dismissed Tumey's complaint and made no ruling on the merits of Hutchinson's eligibility. This appeal followed.

The issue in this case is whether Tumey's complaint is an election contest controlled by section 7-5-801 or an eligibility challenge controlled by section 7-5-207(b). For the reasons outlined below, we conclude that her suit is governed by section 7-5-207(b).

Section 7-5-207(b) provides a means for a voter to raise a pre-election attack on a candidate's eligibility to stand for election and for removal of that ineligible candidate's name from the ballot. *See Helton v. Jacobs*, 346 Ark. 344, 57 S.W.3d 180 (2001); *Tittle v. Woodruff*, 322 Ark. 153, 907 S.W.2d 734 (1995); *State v. Craighead County Bd. of Election Comm'rs*, 300 Ark. 405, 779 S.W.2d 169 (1989). "That statute created a right in the people to the proper administration of election laws by prohibiting the inclusion of ineligible candidates on the ballot[.]" *Id.* at 411, 779 S.W.2d at 172. This court has consistently recognized that the proper procedure to enforce section 7-5-207(b) is an action for mandamus and declaratory relief, which provides prompt consideration of determining a candidate's eligibility and, if determined ineligible, the removal of the candidate's name before the election. *See, e.g., Helton*, 346 Ark. 344, 57 S.W.3d 180; *Valley*, 342 Ark. 336, 28 S.W.3d 269; *Jacobs v. Yates*, 342 Ark. 243, 27 S.W.3d 734 (2000); *Tittle*, 322 Ark. 153, 907 S.W.2d 734; *Craighead County Bd. of Election Comm'rs*, 300 Ark. 405, 779 S.W.2d 169. A voter may avail himself or herself of this right at any time prior to the general election; however, once the election takes place, the issue of a candidate's eligibility under section 7-5-207(b) becomes moot. *See Benton v. Bradley*, 344 Ark. 24, 37 S.W.3d 640 (2001); *Jenkins v. Bogard*, 335 Ark. 334, 980 S.W.2d 270 (1998); *Craighead County Bd. of Election Comm'rs*, 300 Ark. 405, 779 S.W.2d 169.

In contrast to the right provided in section 7-5-207(b), section 7-5-801 provides a right of action to "any candidate to contest the certification of nomination or the certificate of vote as made by the appropriate officials in any election." This right is a "post-election contest between two *competing* candidates." *Helton*, 346 Ark. at 350, 57 S.W.3d at 184 (emphasis added) (quoting *Jacobs*, 342 Ark. at 250, 27 S.W.3d at 738). A complaint brought by a candidate pursuant to section 7-5-801 must be filed within twenty days of the date of the certification complained of, and this filing deadline is both mandatory and jurisdictional. *Willis v. King*, 352 Ark. 55, 98 S.W.3d 427 (2003); *McCastlain v. Elmore*, 340 Ark. 365, 10 S.W.3d 835 (2000).

An election contest under section 7-5-801 may be instituted by a competing candidate after either a primary or general election. In the case of a primary election, the candidate bringing the suit will necessarily be a member of the same party, seeking the same nomination. This court held as much in *Storey v. Looney*, 165 Ark. 455, 265 S.W. 51 (1924):

> The question necessarily presents itself in the beginning, whether or not appellant is in an attitude to contest the certificate of nomination awarded to appellee. Appellant's contention being that there was no valid nomination at all, *he is not a claimant himself for the nomination*, and all that can be done by the court is to cancel the certificate of nomination awarded to appellee. *This is therefore not really a contest for nomination as contemplated and authorized by statute. In order to make a contest for the nomination, appellant must show that he is entitled to the nomination himself, which he fails to do.* The statute (Crawford & Moses' Digest, § 3772) declares that a right of action is conferred "on any candidate to contest the certificate of nomination or the certification of vote as made by the county central committee." *This confines the right of contest to a candidate at the primary election, and to one who claims to be the rightful nominee.* He must show that he is the nominee instead of the contestee, and he fails to show a cause of action unless he so states in his complaint.

Id. at 458, 265 S.W. at 52 (citation omitted) (emphasis added). Pursuant to this holding, Tumey could not have brought a challenge under section 7-5-801 to Hutchinson's certification of nomination, because she was not a competing candidate in the Republican primary and thus cannot claim to be the rightful nominee. Accordingly, section 7-5-801 is not applicable to this case, and the trial court erred in concluding otherwise.

The trial court's reliance on this court's holding in *Valley*, 342 Ark. 336, 28 S.W.3d 269, was thus misplaced. As stated above, *Valley* involved a pre-primary eligibility challenge. Section 7-5-801 obviously does not apply in such a case, as there is no "certification of nomination" or "certificate of vote" to contest. Notwithstanding, Valley argued that it was applicable and that Willis therefore had only twenty days from the date of certification to file his challenge. Because the suit was filed *before* the primary election, however, the only "certification" that Valley could have been referring to was that done by the Democratic Party, certifying him as being qualified to seek the nomination. Thus, this

court's holding that section 7-5-801 was not applicable to such a pre-primary party certification was a correct interpretation of the law and did not expand the types of contests that may be brought under that provision. This court's holding did not mandate, implicitly or otherwise, that all eligibility challenges brought after a primary election are necessarily contests to the nominee's certification. The bottom line is that the right provided in section 7-5-801 is only available to a competing candidate who claims to be the rightful nominee or victor.

As an alternative means of affirming the trial court's ruling, Hutchinson argues that the trial court lacked jurisdiction to hear Tumey's complaint. He contends that pursuant to Ark. Code Ann. § 7-5-805 (Supp. 2003), Tumey should have filed her complaint with the Arkansas State Claims Commission. That section provides in relevant part:

> (b)(1)(A) Any action to contest eligibility, qualification, or election to serve as a member of the House of Representatives shall be initiated by filing a complaint with the Arkansas State Claims Commission.
>
> (B) This procedure shall apply to House of Representatives election contests pursuant to Arkansas Constitution, Article 5, § 11, to contests of eligibility pursuant to Arkansas Constitution, Article 5, § 9, and to actions for expulsion pursuant to Arkansas Constitution, Article 5, § 12, except that a member of the House of Representatives shall be automatically suspended from the legislative process if a representative under felony criminal indictment is subsequently found guilty or pleads guilty.

On its face, this section clearly provides for *post-election* contests to a person's eligibility or qualification *to serve* as a member of the General Assembly. *See also Valley*, 342 Ark. 336, 28 S.W.3d 269. Moreover, such a contest is limited to actions brought under the three enumerated constitutional provisions. Tumey's complaint is a pre-election challenge to a candidate's failure to meet the residency requirement of Article 5, § 4. Accordingly, the Claims Commission has no jurisdiction over this suit.

In sum, Tumey's complaint seeks a writ of mandamus and a judgment declaring that Hutchinson is not eligible for the position he seeks, House Representative, District 95, because he has not met the constitutionally proscribed residency requirement.

Her suit is the type specifically authorized by section 7-5-207(b). The trial court thus erred in dismissing the complaint based on certain provisions under section 7-5-801. We thus reverse the trial court's dismissal of the complaint and remand for a determination of the merits of Tumey's suit. While we are mindful of the trial court's predicament in having to decide this case in the eleventh hour, we are confident that the trial court will make every effort to resolve this matter in a timely fashion.

Reversed and remanded. The mandate in this case shall issue immediately.

GLAZE, J., concurs.

THORNTON, J., dissents.

DICKEY, C.J., not participating.

TOM GLAZE, Justice, concurring. I fully agree with the result reached in the majority opinion. The questions raised in this election case have long been settled by this court. The trial court simply misconstrued and mistakenly applied Ark. Code Ann. § 7-5-801 (Repl. 2000), which clearly provides for an "Election Contest," which has been defined as an adversarial proceeding between a successful candidate and an unsuccessful candidate. *See Rubens v. HodgesMcClendon v. McKeown*, 230 Ark. 521, 323 S.W.2d 542 (1959). In other words, § 7-5-801, *et seq.*, provides the statutory procedure for a losing candidate to follow after an election where wrongful acts allegedly occurred during the election. That post-election procedure is commenced by the losing candidate by filing a verified complaint within twenty days from the date the election results are certified. This § 7-5-801 procedure providing for election contests is simply not applicable in the present case. Instead, Ark. Code Ann. § 7-5-207 (Repl. 2000) is the statutory procedure which appellant was required to follow.

Section 7-5-207(b) is set out in the Arkansas Election Code and provides for a "Preelection Proceeding" and for procedures required when preparing for a scheduled election. Such preelection procedures include the providing of ballots, and, where necessary, the removal of a person's name from the ballot if the person is not qualified or eligible at the time of filing as a candidate for the office for which he filed.

As the majority points out, this court has adopted a procedure whereby a voter may raise a preelection attack[1] on a candidate's eligibility to stand for election and for removal of the ineligible candidate's name from the ballot. *See State v. Craighead County Bd. of Election Comm'rs*, 300 Ark. 405, 779 S.W.2d 169 (1989). Here, when Hutchinson was certified as a party nominee, Tumey availed herself of the preelection statutory law to remove Hutchinson's name from the forthcoming General Election ballot.

The trial court here clearly had subject-matter jurisdiction to address Tumey's petition for mandamus and declaratory judgment in this election case, and the court's venue was also properly in Pulaski County. *See Valley v. Bogard*, 342 Ark. 336, 128 S.W.3d 269 (2000). The trial court in part relied on *Valley* as support when dismissing this election case based on jurisdiction and venue grounds. However, the lower court failed to properly recognize the distinction between the statutory election procedures involving election contests and the provisions allowing a person to remove the name of a candidate who fails to possess the qualifications required of the office he or she seeks.

Here, the trial court and parties did their best to expedite the election case, but I suggest the parties should have moved to offer evidence on Hutchinson's residency issue, and, if the motion were denied by the trial court, the parties could have proffered what evidence and testimony each had bearing on the fact issue. As matters now stand, this case must be reversed and remanded for a hearing with only a few days prior to the November 2 General Election. Consequently, the situation may be that a timely final decision cannot be rendered.

I respond to the dissenting opinion, which seems to say that this court waited too long to overturn the May 27, 2004, certification or the trial court's order of August 13, 2004. The dissent submits that this matter languished in this court until this date. The dissent is seriously mistaken. The time line of this case is as follows:

> 8/6/04 Tumey filed her petition for mandamus and declaratory judgment, challenging Hutchinson's residency qualifications as candidate for State Representative, District 95.

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[1] A complainant in an eligibility challenge may be any citizen, voter, candidate or other interested party. *Jacobs v. Yates*, 342 Ark. 243, 27 S.W.3d 734 (2000).

8/13/04 Hutchinson moved to dismiss, and, among other things, alleged that the trial court lacked jurisdiction and venue.

8/20/04 Tumey filed her timely notice of appeal from the trial court's 8/13/04 order. She filed the record with this court and petitioned for an expedited appeal.

8/25/04 Hutchinson filed his response.

9/14/04 Appellees Secretary of State and State Board of Election Commissioners stated that they would not file a brief.

9/19/04 Hutchinson filed his brief.

10/5/04 Tumey filed a reply.

10/7/04 Tumey moved to substitute her brief.

10/14/04 We granted Tumey's motion.

10/21/04 This court was in Fort Smith to hold court, but this case was expected and was to be submitted the next Thursday, 10/28/04.

10/26/04 Opinion was delivered. Although the case was ordinarily scheduled for decision conference on 10/28/04, this court took submission of the case and delivered its opinion this date.

If there was any serious delay in this case, it was because no record was made or proffered regarding the only factual issue in the case: whether Hutchinson, at the time of the November 2, 2004, General Election, will have been a "resident" (domicile) for one year in the State Representative District 95 to which he may be elected. *See Valley*, 342 Ark. at 344-345.

In sum, time is running in this matter, but the parties and this court have expeditiously worked to get the case decided. I am sure the parties and the trial court will continue to do their utmost to resolve this matter. Election cases always present time problems. It is the "nature of the beast." Since my tenure on this court, this court has earnestly attempted to work through these time problems so that a timely decision can be made before the date of an election. On rare occasions, the court has rendered what turned out to be an advisory opinion because the election case was not

decided prior to the election. This case may still be resolved before November 2, but, if not, this court made an earnest effort to conclude it.

RAY THORNTON, Justice, dissenting. I would conclude that the Benton County Election Commission, the Secretary of State, and the Republican Party have a right to have their certified candidate appear on the general election ballot. I also note that in the event Mr. Hutchinson is the winner of that election, his qualification to serve District 95 as its representative becomes a matter for determination by the House of Representatives. *See* Ark. Const. Art. 5, § 11, cl. 1. The trial court found that Ms. Tumey has not brought an appropriate pre-election or post-election challenge to the right of a political party to certify a candidate to the general election ballot.

This appeal presents two issues. First, does Timothy Chad Hutchinson qualify as a resident of District 95 eligible for election to serve in the Arkansas House of Representatives? My answer to this question is that there is no evidence before us to resolve this issue, and that there is not enough time before the November 2nd election for this question to be scheduled for hearing, decided by the trial court, and reviewed by this court on appeal.

Secondly, do the Benton County Election Commission, the State Election Commissions, and the Secretary of State have an interest in causing the elected and certified candidate of the Republican Party to be included on the ballot of next week's general election when the certification of that candidate was not challenged within twenty days of certification, as provided by Ark. Code Ann. § 7-5-801(d) (Supp. 2003). My answer is yes. The Republican Party has a right to have its certified candidate appear on the general election ballot. In my opinion, the clock has already run on the timely exercise of judicial authority to deprive the citizens of District 95 from the opportunity to choose between the Democratic and Republican candidates.

Hutchinson was certified as the winner of the May 18, 2004, preferential primary by the Board of Election Commissioners on May 27, 2004, and by the Secretary of State on July 2, 2004. Ms. Tumey filed her complaint challenging Hutchinson's qualifications on August 6, 2004. The responsive pleadings by Hutchinson, the Secretary of State, and the Board of Election Commissioners were filed on or before August 12, 2004, and various motions were filed on August 13, 2004. The trial court also held a hearing on

August 13, 2004, and entered an order dismissing the case pursuant to a motion under the Arkansas Rules of Civil Procedure 12(b)(6) on the grounds, *inter alia*, that the Complaint was not verified. A timely notice of appeal was filed on August 20, 2004, and the matter languished in this court until this date.

I believe this court waited too long to overturn the May 27, 2004, certification or the trial court's order of August 13, 2004. For that reason, I respectfully dissent.

FARM CREDIT MIDSOUTH, PCA, Farm Credit Midsouth, FLCA *v.* REECE CONTRACTING, INC., Reece's Arkansas Pride Catfish, James A. Reece, Barbara E. Reece, Kyle Allen Reece, Rhonda Reece, James T. Reece, and Fidelity National Bank

04-121 196 S.W.3d 488

Supreme Court of Arkansas
Opinion delivered October 28, 2004

Barrett &Deacon, by: *Ralph W. Waddell, D.P. Marshall, Jr.*, and *Leigh M. Chiles*, for appellant.

W. Frank Morledge, P.A.,.for appellee.

JIM HANNAH, Justice. Farm Credit Midsouth, PCA, appeals from an October 28, 2003, judgment on the counterclaim of Fidelity National Bank entered in the St. Francis County Circuit Court. Farm Credit asserts that the circuit court erred in finding that Fidelity perfected a security interest in certain heavy equipment that

entitled Fidelity to the proceeds of the sale of the equipment. We hold that Fidelity failed to perfect a security interest. This case is reversed and remanded for further consideration consistent with this opinion. We have jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(b)(1)(5) and (6).

Facts

This case involves a dispute over the proceeds from the sale of heavy equipment. The equipment was sold pursuant to a court order in a foreclosure and replevin action filed by Farm Credit against Reece Contracting, Inc., and several individuals in the Reece family. Reece Contracting defaulted on a number of promissory notes held by Farm Credit and one promissory note held by Fidelity. At the time Farm Credit filed its Complaint in Foreclosure and for Replevin, on June 12, 2001, Reece Contracting had accumulated about $2,600,000 in debt with Farm Credit, which Farm Credit alleged was secured by various collateral including the heavy equipment at issue and sold in this case. About two weeks before Farm Credit filed its complaint, Reece Contracting borrowed $439,380.34 from Fidelity National Bank, and Fidelity alleges that the five pieces of heavy equipment sold at auction were pledged as collateral on its promissory note.[1] Fidelity was brought into this case by the First Amendment to Complaint in Foreclosure and for Replevin filed December 12, 2001, because Farm Credit learned that Fidelity might claim a right to certain heavy equipment.

Under a foreclosure decree entered April 24, 2002, collateral, including the subject heavy equipment, was ordered sold. The heavy equipment that both Farm Credit and Fidelity claim a right to included one hydraulic excavator and four forty-ton articulated dump trucks. At auction, these five pieces of equipment brought $221,000, and the dispute in this case is over who has the right to the $221,000.

Farm Credit stipulated that it held no perfected security interest in the five pieces of equipment, but alleged it had a right to the equipment because it had a prior superior claim on the equipment. Farm Credit's loans utilizing the five pieces of equipment as collateral predated Fidelity's loan. Fidelity, on the other

[1] The five pieces of equipment pledged as collateral to the Farm Credit and Fidelity notes were owned by James A. Reece and Barbara E. Reece.

hand, argued that although its loan was issued later in time, its right to the equipment trumped Farm Credit's claim because Fidelity held a perfected security interest in the five pieces of equipment.

The circuit court entered a judgment in favor of Fidelity, concluding in relevant part:

> 8. That, the security interest of Fidelity in the equipment was perfected by filing Financing Statements covering the equipment both with the Arkansas Secretary of State and with the Circuit Court Clerk of St. Francis County, Arkansas;
>
> 9. That, the security interests of Fidelity in the equipment was a good and valid security interest, fully enforceable, and superior to any interest of Farm Credit in the equipment;

Standard of Review

The counterclaim at issue in this appeal was tried to the bench on April 22, 2003. Post-trial briefs were filed by both parties, and a decision was then made by the circuit court. The decision is set out in the October 28, 2003, judgement, which incorporates an August 29, 2003, letter opinion.

With respect to matters tried with the circuit court sitting as the trier of fact, this court in *Chavers v. Epsco, Inc.*, 352 Ark. 65, 98 S.W.3d 520 (2003), recently stated:

> 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).

Chavers, 352 Ark. at 69-70.

Perfected Security Interest

The Security Agreement section of Fidelity's Promissory Note and Security Agreement to Fidelity provides that the loan is

secured by property set out on an "ATTACHED LIST." The subject five pieces of heavy equipment sold are the first five items on the "ATTACHED LIST." A "THIRD PARTY AGREEMENT" was included as part of the Promissory Note and Security Agreement and provided that while Barbara E. Reece was not personally liable to repay the loan, she did grant a security interest in the property on the "ATTACHED LIST."

Farm Credit admits it does not have a perfected security interest. Fidelity alleges that it has a perfected security interest in the equipment. "A perfected security interest prevails over a non-perfected security interest, even if the perfecting party had notice of the prior interest when he took his security interest." *In re Ace Management, LLC.,* 271 B.R. 134, 152 (E.D. Ark. 2001). Therefore, if Fidelity's security interest was a perfected interest, it would prevail over Farm Credit's interest.

"Under Article 9 of the UCC, two documents are needed to create a perfected security interest in a debtor's collateral: a 'security agreement' giving the creditor an interest in the collateral and a filed 'financing statement' providing notice to other creditors that a security is claimed in the collateral." *In re Outboard Marine Corp.*, 300 B.R. 308, 319 (N. D. Ill. 2003). In the case before us, we have both a security agreement and a financing statement. The financing statement was filed with the Secretary of State's office and the St. Francis County Clerk's Office. However, Farm Credit alleges there is no perfected security interest because Barbara E. Reece did not sign the financing statement.

According to the security agreement, Barbara E. Reece held a personal interest in the subject five pieces of equipment. A financing statement must include the name of the debtor and be signed by the debtor. *In re Answerfone*, 48 B.R. 24 (E.D. Ark. 1985); *see also* Ark. Code Ann. § 4-9-402 (Supp. 1997). The financing statement is signed by James A. Reece on behalf of Reece Contracting, Inc. Barbara's name is not on the financing statement, nor is her signature on the financing statement.[2]

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[2] We note that Barbara E. Reece's signature appears on the "ATTACHED LIST" to the Security Agreement, and that a copy of the "ATTACHED LIST" is appended to the filed Financing Statement. However, appending the "ATTACHED LIST" containing Barbara E.

Although as stated in the security agreement, Barbara was not personally liable on the loan, she did pledge her interest in the equipment as collateral in which she held a personal interest. Because Barbara pledged collateral, she is a debtor under Arkansas secured transactions law. Ark. Code Ann. § 4-9-105(1)(d) (Supp. 1997); *see also Davison v. Citizens Bank of Nevada Missouri*, 738 F.2d 931 (8th Cir. 1984). Thus, for purposes of determining whether the security interest was perfected, Barbara is a debtor.

"The purpose of a financing statement is to alert third parties to the existence of a security interest in property held by a debtor." *Fifth Third Bank v. Comark, Inc.*, 794 N.E.2d 433, 436 (Ind. 2003). In other words, a person should be able to review the filed financing statements and be put on notice of the existence of a security interest in a debtor's property. To achieve this required notice, a financing statement must provide the name of the debtor and be signed by the debtor. *In re Wallace*, 61 B.R. 54 (W.D. Ark. 1986). Arkansas Code Section 4-9-402(1) (Supp. 1997) provides in pertinent part: "A financing statement is sufficient if it gives the names of the debtor and the secured party, and is signed by the debtor. . . ." In Arkansas, financing statements are indexed by the name of the debtor. *Wallace, supra.* Therefore, it is clear that the debtor's name must appear on the financing statement. Additionally, it is required that the debtor sign the financing statement. *Id.*

Barbara's name does not appear on the financing statement. She did not sign it. The financing statement was therefore insufficient. A search of the financing statements would not put an interested person on notice of the security interest.

Lien Creditor

Farm Credit asks this court to determine in the first instance whether it enjoys the status of lien creditor and on that basis whether it or Fidelity is entitled to the proceeds of the sale. Because the circuit court erroneously found Fidelity had a perfected security interest, the question of which party prevailed in the absence of the perfected security interest was not decided by the circuit court. With certain exceptions not relevant to this

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Reece's signature to the Financing Statement did not result in her appearing as a debtor in the index to the Financing Statements so as to allow an interested party to locate the pledge of her interest in the equipment.

discussion, this court has appellate jurisdiction only, which means that it has jurisdiction to review an order or decree of an inferior court. *Lewellen v. Sup. Ct. Comm. on Prof. Conduct*, 353 Ark. 641, 110 S.W.3d 263 (2003). There is no circuit court order for this court to review on Farm Credit's status with respect to Fidelity now that this court has declared that Fidelity has no perfected security interest.

Accordingly, we reverse and remand for further proceedings.

Raymond KING *v.* STATE of Arkansas

CR 04-1023 196 S.W.3d 486

Supreme Court of Arkansas
Opinion delivered October 28, 2004

Susan D. Korsnes, for appellant.

No response.

PER CURIAM. Raymond King, by his attorney, Susan D. Korsnes, has filed a motion for belated appeal.

On April 22, 2004, the circuit court entered a judgment and commitment order convicting King of theft of property and sentencing him to thirty years' imprisonment. On May 10, 2004, Ms. Korsnes filed a petition for King's post-conviction relief under Ark. R. Crim. P. 37.1. The circuit court denied that petition by order filed June 7, 2004. King then filed his notice of appeal on June 23, 2004, from both the judgment and commitment order and the order denying post-conviction relief. On September 20, 2004, the record in the matter was tendered to this court's clerk.

Ms. Korsnes now claims that she believed the notice of appeal was timely pursuant to Ark. R. App. P.—Crim. 2(a)(4) which provides, in pertinent part:

> (a) *Notice of Appeal.* Within thirty (30) days from
>
> . . . .
>
> (4) the date of entry of an order denying a petition for postconviction relief under Ark. R. Crim. P. 37, the person desiring to appeal the judgment or order or both shall file with the trial court a notice of appeal identifying the parties taking the appeal and the judgment or order or both being appealed. . . .

This court recently clarified its treatment of motions for rule on clerk and motions for belated appeals in *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). There we said:

> . . . Where an appeal is not timely perfected, either the party or attorney filing the appeal is at fault, or there is good reason that the appeal was not timely perfected. The party or attorney filing the appeal is therefore faced with two options. First, where the party or attorney filing the appeal is at fault, fault should be admitted by affidavit filed with the motion or in the motion itself. There is no advantage in declining to admit fault where fault exists. Second,

> where the party or attorney believes that there is good reason the appeal was not perfected, the case for good reason can be made in the motion, and this court will decide whether good reason is present.

356 Ark. at 116, 146 S.W.3d at 891 (footnote omitted). While this court no longer requires an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where he or she has erred and is responsible for the failure to perfect the appeal. *See id.* When it is plain from the motion, affidavits, and record that relief is proper under either rule based on error or good reason, the relief will be granted. *See id.* If there is attorney error, a copy of the opinion will be forwarded to the Committee on Professional Conduct. *See id.*

It is plain from her motion that there was error on Ms. Korsnes's part. The language of Arkansas Rule Appellate Procedure—Criminal 2(a)(4) is clear. "[T]he person desiring to appeal the judgment or order or both" clearly contemplates an appeal from an entry of judgment and an order denying a Rule 37 motion within thirty days of the judgment. It does not extend the time for appealing a judgment beyond that time period. Ms. Korsnes's interpretation is not reasonable as it ignores the context of Ark. R. App. P.—Crim. 2(a)(4) and would allow appeals from judgments several months after the judgment was entered. Pursuant to *McDonald v. State, supra,* we grant King's motion for belated appeal and forward a copy of this opinion to the Committee on Professional Conduct.

Timothy Chad HUTCHINSON *v.*
The Honorable Timothy D. FOX,
Circuit Court of Pulaski County, Arkansas;
Robbyn Tumey; Charlie Daniels, Secretary of State;
State Board of Election Commissioners; and
Benton County Board of Election Commissioners

04-1159 196 S.W.3d 492

Supreme Court of Arkansas
Opinion delivered October 29, 2004

[redacted]

Emmett Bower Chiles and *Brandon B. Cate*, for petitioner.

Timothy G. Gauger, for appellee The Honorable Timothy D. Fox.

PER CURIAM. Emergency Petition for a Writ of Certiorari or, in the alternative, for Writ of Prohibition and Emergency Petition for Stay is denied.

THORNTON, J., dissents.

DICKEY, C.J., not participating.

RAY THORNTON, Justice, dissenting. The Arkansas Constitution provides for the separation of powers into a Legislative Department, an Executive Department, and a Judicial Department, and states that "no person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted." Ark. Const. Art. 4, § 2, cl. 1. The Constitution also provides that within the Legislative Department, "[e]ach house shall appoint its own officers and shall be the *sole judge of the qualifications, returns, and elections of its own members.*" Ark. Const. Art. 5, § 11, cl. 1 (emphasis added).

We had steadfastly and properly refused to encroach upon the power of the legislature to be the sole judge of the qualifications, returns, and elections of members of the General Assembly, until the proceedings of this case. We have previously recognized

the power and authority of the House of Representatives under the Arkansas Constitution to be the sole judge of the qualifications and elections of it members. *Magnus v. Carr*, 350 Ark. 388, 86 S.W.3d 867 (2002). As I pointed out in my dissent to the court's order remanding this case to the trial court, *Tumey v. Daniels*, 359 Ark. 256, 196 S.W.3d 479 (2004), I believe that the clock has already run on the timely exercise of judicial authority to deprive the citizens of District 95 from the opportunity to choose between the Democratic and Republican candidates. I reiterate that we should not have remanded this case to the trial court with so short a length of time to render a decision.

It is axiomatic that a *pre-election* challenge under Ark. Code Ann. § 7-5-207 must be brought *before* an election. *See generally State v. Craighead County Bd. Election Comm'rs*, 300 Ark. 405, 779 S.W.2d 169 (1989). In my opinion, the advent of early voting, especially as evidenced in this election, has changed the concept of when an election begins. We are not dealing with absentee ballots. These are ballots, cast by persons waiting in line at polling places, and are not different from the ballots cast on November 2, 2004. The hours of this election have been established as beginning on the first day of early voting, October 18, 2004, and ending when the polls close on November 2, 2004. All ballots, both early and those cast on November 2, 2004, will not be counted until after the polls close on November 2, 2004. Today's majority could have the effect of not counting the votes of thousands of citizens who had followed the law in voting as authorized by statute. Ark. Code Ann. § 7-5-418 (Supp. 2003).

This election, in my opinion, has already begun and our authority to determine the issue of what name appears on a ballot is limited by the Arkansas Constitution's grant of authority to the House of Representatives to, "be the sole judge of the qualifications, returns, and elections of its members. If, as the majority concludes, that is not the law then it should be the law. The Legislative Department may make it so.

For these reasons, I respectfully dissent.

John M. BURNETT *v.* SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

04-137 197 S.W.3d 458

Supreme Court of Arkansas
Opinion delivered November 4, 2004

Williams & Anderson PLC, by: *Peter G. Kumpe*, *David M. Powell*, and *Sarah M. Priebe*, for appellant.

Stark Ligon, Executive Director and *Nancie M. Givens*, Deputy Director for appellee.

BETTY C. DICKEY, Chief Justice. Attorney John M. Burnett appeals the Supreme Court Committee on Professional Conduct's denial of his motion to dismiss the complaint against him.

Burnett contends that the Committee erred in denying his motion to dismiss because the principles of *res judicata* and double jeopardy apply to proceedings before the Committee. The Committee's denial of Burnett's motion to dismiss is not a final appealable order, as required by Section 12 of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law and therefore, we do not address the merits. The appeal is dismissed.

Facts

Sometime in 2000, the Supreme Court Committee on Professional Conduct ("the Committee") filed a complaint against attorney John M. Burnett, based upon the affidavits of Kimberly Canova, a Fayetteville attorney, Christine Bohannon, the deputy clerk of the Carroll County clerk's office ("the clerk's office"), and Ramona Wilson, the Carroll County Circuit Clerk. The complaint alleged that Burnett violated Rules 3.3(a)(1), 4.1, and 8.4(c) of the Model Rules of Professional Conduct.

The first count of the complaint alleged that Burnett placed a fraudulent file mark on an answer in violation of Model Rule 3.3(a)(1) which requires that a lawyer not knowingly make a false statement of material fact or law to a tribunal. The second count alleged that he falsely advised opposing counsel, Kimberly Canova, that he had filed a timely answer in the divorce proceeding of *Moyer v. Moyer,* in violation of Rule 4.1(a) which requires that a lawyer not knowingly make a false statement of material fact or law to a third person. The final count accused Burnett of violating Rule 8.4(c) which requires that a lawyer not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation: (1) by checking out the circuit clerk's file in the *Moyer* case and returning it with a pleading which had not been previously in the file and which bore a false file-mark; (2) by placing a file-mark on an answer that he prepared for Mr. Moyer which was not authentic; and, (3) by falsely advising Canova that he filed a timely answer on behalf of Mr. Moyer.

Burnett responded to the complaint by saying: (1) his secretary filed the answer in the *Moyer* case on June 28, 2000; (2) during the first week of July he received a motion for default judgment with a certificate of service dated June 14, 2000, the day after the divorce complaint was filed; and, (3) he called Canova and faxed a copy of the answer to her and she apologized for the confusion, stating that she must have misplaced the answer.

On March 20, 2001, after investigating the allegations, the Committee determined that Burnett "has not been found to have violated any rule of professional conduct in this matter, and, therefore, disciplinary action is not warranted."

On September 17, 2002, the Committee filed a second complaint against Burnett based upon a second affidavit of Ramona Wilson. The second complaint was based upon the same factual conduct as the first and contained three allegations, two of which were the same allegations as contained in the first complaint. First, the new complaint alleged that Burnett violated Rule 3.3(a)(1) by falsely stating in the motion to strike that he had timely filed an answer on behalf of Mr. Moyer with the Carroll County Clerk's office. Second, the complaint stated that Burnett violated Model Rule 8.1(a) by making a false statement of material fact before the Committee on Professional Conduct advising the Committee that the file-mark on the answer in the Moyer case was authentic, and that he had filed an answer in the Carroll County Clerk's office on June 28, 2000. The third and final allegation of the complaint accused Burnett of tampering with the Circuit Clerk's *Moyer* case file, in violation of Rule 8.4(c) by placing in the file a pleading upon which he had placed a fictitious file-mark.

Burnett responded to the second complaint by attaching the affidavit of his secretary who stated that she filed the answer in the *Moyer* case on June 28, 2000. In addition, Burnett attached the affidavit of his law clerk who testified that he remembered the *Moyer* answer being filed on June 28, 2000, and who also testified that he told the secretary to take the original answer to the clerk's office and make copies.

Burnett then moved to dismiss the second complaint because it was based upon the same set of factual allegations as the first and *res judicata* prevented those causes of action from being relitigated.

Stark Ligon, the Executive Director of the Committee, responded to Burnett's motion by stating that the Committee is not bound by the rules of the court and is not required to strictly adhere to the rules of evidence or the rules of procedure, because attorney discipline proceedings are *sui generis*. Ligon added that because there was no Arkansas case law dealing with the application of *res judicata* in a disciplinary proceeding, the Committee, not the Executive Director's office, would have to decide whether or not Burnett's motion to dismiss should be granted.

On January 6, 2004, the Committee denied Burnett's motion to dismiss without addressing the merits of the motion. On January 22, 2004, Burnett filed a notice of appeal. On January 26, 2004, the Committee issued an order continuing the hearing scheduled for February 20, 2004, until such time as this court could rule upon Burnett's appeal in this matter.

Jurisdiction

Although neither party raises the issue, it is well-settled that it is the duty of this court to determine that it has jurisdiction. *Farrell v. Farrell*, 359 Ark. 1, 193 S.W.3d 734 (2004); *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002); *Haase v. Starnes*, 337 Ark. 193, 987 S.W.2d 704 (1999). The Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law ("the Procedures") establish the procedure for appeals from a decision of the Supreme Court Committee on Professional Conduct. Section 12(A) of the Procedures allows appeals to be taken from "any action by a panel taken at a public hearing," as long as a notice of appeal is filed with the Office of Professional Conduct within thirty days after the filing of the panel's written action with the Clerk. The Procedures clearly mandate that an appeal be taken only after *a public hearing*. In the present case, Burnett is not appealing an action by a panel taken at a public hearing; instead, he is challenging the Committee's order denying his motion to dismiss.

Furthermore, Section 12(C) of the Procedures provides that notice and perfection of an appeal shall be in accordance with the Rules of Appellate Procedure–Civil and Rules of the Arkansas Supreme Court governing appeals in civil matters. As the Committee's denial of Burnett's motion to dismiss was not an action taken at a pubic hearing, it is not a final order, as required by Ark. R. App. P.—Civ. 2(a)(1). Thus, we do not have jurisdiction to hear this case, and we dismiss the appeal without prejudice.

Appeal dismissed.

Amanda TROUT *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

04-207 197 S.W.3d 486

Supreme Court of Arkansas
Opinion delivered November 4, 2004

Barbara A. Ketring-Beunch, for appellant.

Gray Allen Turner, for appellee.

TOM GLAZE, Justice. This case involves an order of the trial court terminating appellant Amanda Trout's parental rights with respect to her two children, Dakota and Winter Trout.[1] After a series of hearings, the trial court determined that Amanda was an unfit parent for a variety of reasons, including her failure to comply with the court's directions regarding family and marital counseling, anger management therapy, and other matters. The court of appeals reversed the trial court's decision, *see Trout v. Arkansas Dep't of Human Servs.*, 84 Ark. App. 446, 146 S.W.3d 895 (2004), and the Arkansas Department of Human Services ("ADHS") petitioned for review from that decision, which we granted. Upon a petition for review, we consider a case as though it had originally been filed in this court. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001).

We begin by noting that, when the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. *Bearden v. Arkansas Dep't of Human Servs.*, 340 Ark. 615, 12 S.W.3d 208 (2000). Termination of parental rights is an extreme remedy in derogation of the natural rights of the parents. *Id.* Nevertheless, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Crawford v. Arkansas Dep't of Human Servs.*, 330 Ark. 152, 951 S.W.2d 310 (1997). Parental rights must give way to the best interest of the child when the natural parents seriously fail to provide reasonable care for their minor children. *J.T. v. Arkansas Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997). On appellate review, this court gives a high degree of deference to the trial court, which is in a far superior position to observe the parties before it. *Dinkins, supra*; *Davis v. Office of Child Support Enforcement*, 341 Ark. 349, 20 S.W.3d 273 (2000).

With these standards in mind, we turn to the facts of this case. The present case began in 1999, when ADHS filed a petition for emergency custody against Andrew and Christine Trout, the parents of Jonathyn Trout, who was born on April 6, 1997. That

[1] The trial court's order also terminated the rights of Amanda's ex-husband, Andrew Trout, regarding Winter; however, Andrew has not appealed, and the only part of the trial court's termination order before us is that portion dealing with Amanda and her two children.

petition alleged that Jonathyn was dependent-neglected, primarily due to environmental neglect. The trial court declared Jonathyn dependent-neglected at an adjudication hearing held April 6, 1999, and ordered a plan of reunification. After that adjudication, Christine and Andrew divorced, and Andrew married appellant Amanda Trout. On May 21, 1999, Amanda gave birth to a son and named him Dakota Trout; however, Andrew was not Dakota's biological father.

Following a number of permanency planning hearings with respect to Jonathyn, the trial court eventually authorized ADHS to proceed with the filing of a petition for termination of Andrew's parental rights, although ADHS was also ordered to continue to provide reunification services until a hearing could be held on the petition. On August 14, 2000, ADHS filed a petition for termination of Andrew's parental rights with respect to Jonathyn. At a hearing, the court was not persuaded that Andrew's parental rights should be terminated. Therefore, the court authorized a gradual plan of reunification where Jonathyn would be permitted increased visitation into Andrew and Amanda's home, with a full return of custody to take place on January 1, 2001.

In December of 2000, however, ADHS filed a petition for emergency custody against Amanda and Andrew with respect to Dakota, alleging that Dakota was at risk of being sexually abused by Amanda. At the same time, ADHS filed a motion for *ex parte* emergency change of custody with respect to Jonathyn, alleging the same danger of sexual abuse. After hearing evidence on the allegations, the trial court declared that it was not convinced or persuaded that Jonathyn had been sexually abused. The court dismissed the petitions for emergency custody regarding Dakota and Jonathyn, and entered an order returning the boys to Amanda's custody on March 2, 2001.

Dakota and Jonathyn returned to live with Amanda in early March 2001. On March 15, 2001, Andrew slapped Jonathyn so hard he left red discolorations and finger marks on the boy's face. On March 27, 2001, Andrew and Amanda became embroiled in a screaming, cursing fight in the parking lot of the Wal-Mart where Andrew worked; Amanda left then-four-year-old Jonathyn at Wal-Mart with Andrew with no way for them to return home other than walking. After this incident, ADHS filed a petition

seeking anadjudication that Dakota was dependent-neglected.[2] Following an adjudication hearing held on that petition on May 24, 2001, the trial court entered an order finding that Andrew's striking of Jonathyn constituted excessive physical discipline and abuse. The court further found that Dakota was at risk of harm from Andrew, based on the excessive discipline Andrew used on Jonathyn. The court also found that Andrew and Amanda's fight at Wal-Mart constituted emotional abuse, and in addition, it further found that Andrew and Amanda had engaged in physical altercations in front of the children at home.

Based on the evidence and testimony, the court found that neither Amanda nor Andrew was a fit and proper parent. In support of this conclusion, the court pointed to the Trouts' psychological evaluations, Andrew's violence towards his son and his "threatening and violent behavior in the past," and the fact that Andrew "has engaged in highly inappropriate activities, such as having sexual relations with a woman not his wife while his wife was in the same bed." Given the "highly chaotic lifestyle and lack [of a] wholesome nourishing environment that children need," the court found Dakota to be dependent-neglected. The court found both boys to be in need of ADHS's services, and placed Jonathyn and Dakota in ADHS custody. The court also ordered individual and family therapy for Andrew and Amanda, including marital counseling and anger management therapy. Nevertheless, the goal of the case was determined to be reunification.

At a permanency planning hearing on July 12, 2001, ADHS family service worker Jaime Penn testified that ADHS had a permanency plan for Dakota of adoption, but wanted to make that concurrent to the goal of continued reunification efforts. Penn further stated that the Trouts had moved into a new home, but that Amanda was not working; Amanda was, however, taking classes at Pulaski Technical College. Amanda gave birth to Winter Trout on September 6, 2001.

The court held another permanency planning hearing on December 11, 2001. In an order entered after that hearing, the court found that Amanda was still not complying with the court's

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[2] Police were requested to conduct a child-welfare check after receiving a report that Amanda had thrown Jonathyn out of the car. Although that claim was ultimately never substantiated, Amanda and Andrew were arrested on outstanding warrants on March 27, 2001. At that time, both Jonathyn and Dakota were taken into ADHS custody.

orders regarding the case plan; she had not participated in her counseling sessions, and she was living in hotels because she had not paid the utilities at her home. The court noted that she was unemployed and was still married to Andrew, "a man who has had his parental rights terminated as to three of his children, in part due to his abuse of one of Mrs. Trout's children." The court stated that it would not return Dakota to Amanda so long as Andrew was in the home.

The next hearing was held on January 22, 2002. At that time, Dakota was still in foster care, and Amanda was still unemployed, although she had obtained a divorce from Andrew. The court's order stated that Amanda had complied with some, but not all of the court's orders, and that she had been to some of her therapy sessions and had visited Dakota regularly. The court ordered Amanda to continue with individual therapy and to complete her anger management courses. The court declined to return Dakota to Amanda's custody, however, deferring that decision until the permanency planning hearing scheduled for March 19, 2002.

At the March 19, 2002, hearing, the court found that Amanda had been in her home with the utilities turned back on since the last hearing, but remained unemployed. Jaime Penn testified that she believed Amanda was not having contact with Andrew, and that Amanda was trying to comply with the case plan and court orders. Penn stated that her home visit showed Amanda's home to be appropriate, and that she saw no reason why Dakota could not start weekend visitations with Amanda. The court agreed that Dakota could have weekend visits with Amanda for four weeks, noting that "if everything goes well, Dakota may be returned to the mother."

However, at a May 15, 2002, hearing, Jaime Penn testified that ADHS had received complaints from Dakota's daycare that Dakota had returned to daycare wearing dirty clothes after his weekend visits with Amanda; Penn also said that Dakota was so dirty that the daycare had to give him a bath. Penn also noted that Dakota had scars on his knees and a cut on his ear; Penn related that Dakota had told her that Andrew pushed him down and pulled his ear. Penn further stated that she had conducted a home visit, and there was an odor in the house, trash in the kitchen, and a litter box in the living room. Penn also noted that there were still some of Andrew's clothes in the closet. However, Amanda denied that Andrew lived with her and claimed that she only saw him about

once a week. She further claimed that a male friend was living with her to help with some of her bills. After the ADHS home visit, Winter was placed into foster care on May 20, 2002.

On July 9, 2002, ADHS filed a petition for termination of parental rights with respect to Dakota, asserting that Amanda had continued to have frequent contact with Andrew. In addition, Amanda had continued to maintain contact with Andrew, and Andrew had physically abused Dakota on his visits to Amanda's home. An amended petition for termination alleged that Amanda was not willing or capable of protecting her children from Andrew. A termination hearing was held on August 27, 2002, at which time Sharon Dollarhide, who had Dakota in her daycare, testified that Dakota came back from a weekend visit in the same clothes he had on the Friday before; he also had a dirty diaper and dirt under his fingernails. Jaime Penn testified that, in June of 2002, Amanda had been in a car accident and had lost her unborn baby; Amanda was with Andrew at the time of the accident, and Andrew was driving. For her part, Amanda testified that she had bought a trailer with the settlement arising out of the accident, and that she had about $6,000 left over from the settlement money. She denied that Andrew had been in her home, and claimed she did not know where he lived.

In a September 23, 2002, order following the August hearing, the trial court continued its finding that Amanda was an unfit parent. In particular, the court pointed to evidence that, after weekend visits between Dakota and Amanda, Dakota was returned to his daycare "in an unacceptably filthy condition," crediting Dollarhide's testimony about how dirty Dakota was when he was returned to daycare. In addition, the court noted that the environmental conditions inside Amanda's home had deteriorated, and that, although Amanda was unemployed and had no electricity, she had nevertheless purchased dog food "with money that could be better used." The court specifically found Amanda's testimony to be lacking in credibility, stating that although the obituary for Amanda's baby listed Andrew as the father, Amanda claimed she had not been involved with Andrew. The court stated that her testimony was "incredulous at best, perjury at worst." The court's order then scheduled a permanency planning hearing for October 22, 2002, and a termination hearing for November 7, 2002.

The court heard testimony at the October hearing that Amanda was living in her new trailer in North Little Rock; Jaime Penn testified that it was one of the best homes that Amanda had

been in, and that it was neat and clean. Amanda testified that all of her bills were paid, that she owed nothing on the trailer, and had paid her rent six months in advance, but she could not find a job. She denied that Andrew had been to her house. At the conclusion of the hearing, the court opined that Amanda had not "achieved a sufficient period of stability at this point to warrant a return" of the children. The court also denied increased visitation due to the possibility that Amanda's parental rights would be terminated at the next hearing. The order entered after this hearing reflected that the court found that "no compelling reasons exist to continue the goal of reunification. The parents have not been making diligent efforts to comply [with] either the case plan or prior court orders, and continue to be unstable. Amanda Trout continues to be unemployed and has not participated in counseling arranged by the Department of Human Services."

At the November 7, 2002, hearing, ADHS supervisor Caroline Banks testified that she had overheard Amanda asking for a phone number so she could call and cancel her therapy appointment. Banks also testified that, on a home visit earlier in the year, Amanda's house was cold, filled with trash, and smelled like rotting food. Also at that hearing, Lily Owens, an adoption specialist for ADHS, testified that there were available families willing to adopt Dakota and Winter, and that the likelihood was very great that they would be adopted.

Amanda testified that she had started working at Waffle House the Sunday before the hearing, and had started a job-training program through Arkansas Rehabilitation Services that Monday. However, she said that the job and the training program interfered with each other, so she might have to quit the job-training program. She claimed that she had corrected the conditions that had caused her children to be taken away from her: she had divorced Andrew, moved into a nicer place, and started counseling and a job-placement program. She claimed that she would continue with her therapy, keep a job and a stable household, and would take parenting and stress-management classes if she could keep her children.

Nevertheless, the trial court found that Amanda had not had a sufficient period of stability to indicate that there was a reasonable likelihood that she would be able to get Dakota and Winter back in her home in the foreseeable future. The court noted that it did not have to "give a lot of weight to eleventh-hour improvements," and that those improvements should be considered "to

determine if they are good faith efforts or just an effort to try to keep the court from making a critical decision." Noting that it had to consider things from the child's perspective, the court found that it was contrary to Dakota's best interests to return him to Amanda's custody. In addition, the court found that Amanda did not have a sufficient track record to prove that she was making a turn for the better, and the court stated its belief that she was still an unfit mother. Given the limited likelihood of reunification with Amanda, the court terminated her parental rights with respect to Dakota. In addition, the court determined that there was little likelihood that continued services to the family would result in a successful reunification of Winter and Amanda.

In its order terminating Amanda's parental rights, the court stated that, despite the numerous opportunities and various forms of assistance and therapy Amanda had been offered, "she continues to be unfit to be a parent to Dakota and Winter. Despite years of counseling, and other services provided by ADHS, there is a little likelihood that Amanda Trout will ever be ready to be reunited with her children, and provide the home life and parenting they need." The court therefore ordered that Amanda's parental rights be terminated.

On appeal, Amanda raises two points: 1) the trial court's decision to terminate her parental rights was not supported by the evidence; and 2) the court erred in terminating her rights as to Winter because the child had not been out of her home for a period of one year as provided in Ark. Code Ann. § 9-27-341. The question this court must answer is whether the trial court clearly erred in finding that there was clear and convincing evidence of facts warranting termination of parental rights. *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992). In resolving this question, we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id.* Here, the trial court terminated Amanda's parental rights pursuant to Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(*a*) and (ix)(*a*)(*3*)-(*4*) (Repl. 2002). The relevant subsections of the statute provide as follows:

> (3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:
>
> (A) That it is in the best interest of the juvenile, including consideration of the following factors:

(i) The likelihood that the juvenile will be adopted if the termination petition is granted; and

(ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by continuing contact with the parent, parents, or putative parent or parents;

(B) Of one (1) or more of the following grounds:

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

* * * *

(ix)(*a*) The parent is found by a court of competent jurisdiction, including the juvenile division of circuit court, to:

(*3*) Have subjected the child to aggravated circumstances; [or]

(*4*) Have had his [or her] parental rights involuntarily terminated as to a sibling of the child[.]

Ark. Code Ann. § 9-27-303(6) (Repl. 2002) provides, in turn, that the phrase "[a]ggravated circumstances" means that "a child has been abandoned, chronically abused, subjected to extreme or repeated cruelty, or sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification[.]"

Amanda concedes that this court must give great deference to the trial court, but claims that the court here was biased against her from the first hearing because it could not separate the cases involving her stepchild, Jonathyn, from the cases involving her biological children.[3] She argues that the problems with her old

[3] To the extent that Amanda argues that the trial court was biased against her, there is no indication in the record that she ever made such an argument to the trial court or asked the trial court to recuse. In the absence of such efforts, this court will not consider the argument on appeal. *See Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001).

housing and her former husband were resolved by the time of the final hearings, and she contends it was wrong of the court to disregard the progress she had made. Finally, she asserts that the court should have given her a few more months in order to have an opportunity to comply with all the orders. She urges that there would have been no danger to the children because they were in foster care at the time.

However, to agree with Amanda's claims that the court should have given her more time to comply with its orders would be to ignore the fact that she had consistently failed to comply with the court's orders over the course of nearly two years. Throughout the course of this case, Amanda maintained contact with Andrew, who, from all the evidence, was clearly abusive and violent. She failed to find employment until the week of the November hearing, nearly two years after her case had come to the court's attention. She persistently failed to complete court-ordered courses of counseling and therapy. The fact that she had purchased a trailer and had paid the rent on the lot for six months was indeed a positive development, but she stated that she had paid for these things with money from the car-wreck settlement, and did not indicate where or whether she would be able to find money after those funds ran out. In sum, the trial court was justified in concluding that there was little likelihood that she would ever be ready to be reunited with her children.

In considering this case, we must note the purpose of the termination-of-parental-rights statutes: Ark. Code Ann. § 9-27-341(a)(3) (Repl. 2002) provides as follows:

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

In *Dinkins v. Arkansas Department of Human Services*, *supra*, this court noted that, where the mother had been receiving services for two years and had still not managed to consistently comply with her case plan, the termination of parental rights was appropriate to effectuate the intent of the statute. *Dinkins*, 344 Ark. at 214-15. There, this court gave due deference to the trial court, which had "heard and observed [the] witnesses first-hand." *Id.* at 215.

Similarly, in *Jefferson v. Arkansas Department of Human Services*, 356 Ark. 647, 158 S.W.3d 129 (2004), this court upheld the trial court's termination of parental rights where the mother had been evicted from her home, was frequently unemployed, was forced to rely on relatives for assistance, was inconsistent in attending therapy sessions, and failed to follow the court's orders. Given these facts, this court held that the mother "manifested an incapacity or indifference to correct the conditions that led to [the child's] removal from her home." *Jefferson*, 356 Ark. at 664.

In the present case, as in *Dinkins*, the trial court had been in a position to observe Amanda since 2000. During that time, Amanda repeatedly failed to comply with the court's orders, including orders that she get counseling and protect the children from Andrew. The court consistently expressed difficulty with believing Amanda's testimony, and it was appropriate for the judge to consider the history of Amanda's appearances before him in determining whether she could be trusted to continue making positive steps. Given the court's experience with Amanda and her case, the court concluded that it was unlikely that she would do so. Further, as in *Jefferson*, Amanda's persistent failure to comply with the court's orders demonstrated that she was either incapable of correcting the problems or indifferent to the need to do so.

Our court of appeals has held that there are "no case[s] in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as when the interests of minor children are involved." *See Arkansas Dep't of Human Servs. v. Couch*, 38 Ark. App. 165, 832 S.W.2d 265 (1992); *In Re Adoption of Milam*, 27 Ark. App. 100, 766 S.W.2d 944 (1989). We therefore affirm the trial court's decision to terminate Amanda's parental rights with respect to Dakota.

In her second point on appeal, Amanda argues that it was inappropriate for the trial court to terminate her rights as to Winter, as the younger child had only been out of her custody for five months. She further argues that the evidence was insufficient to remove Winter, and that there would have been no danger to Winter if the child had been left in Amanda's care. Amanda claims that her children were removed "because of a couple of complaints that the children were dirty and the Department['s suspicion] that Winter's father was still in the picture."

Amanda's assertion here amounts to a gross oversimplification of the facts of this case. The trial court had before it a

record spanning nearly two years in which Amanda did little to disassociate herself from a violent, abusive man until the very end, when it became apparent that her rights might be terminated. In addition, the case began with allegations of serious abuse, when Andrew struck Jonathyn across the face hard enough to leave marks; although Amanda herself was not accused of abusing her children, there was proof that she failed to prevent Andrew from abusing them. Her failure to protect her children from Andrew, coupled with her persistent failure to discontinue seeing Andrew, was part of the trial court's reasoning for terminating her parental rights.

This brings us to the heart of Amanda's argument in her second point on appeal, wherein she claims it was error to terminate her rights as to Winter. Although it is true that Winter had only been out of Amanda's home for five months, § 9-27-341 provides that an order terminating parental rights must be based upon one of several grounds, one of which is the twelve-month continuation of the child out of the home. *See* § 9-27-341(a)(3)(B)(i)(*a*). However, termination is also appropriate when the trial court finds that the parent has subjected the child to aggravated circumstances, *see* § 9-27-341(a)(3)(B)(ix)(*a*)(*3*), or when the parent has had his or her parental rights involuntarily terminated as to a sibling of the child. *See* § 9-27-341(a)(3)(B)(ix)(*a*)(*4*). As noted above, aggravated circumstances exist when, among other things, a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification.

Either or both of these provisions apply to the instant case. Amanda's parental rights were terminated with respect to Dakota, Winter's sibling, and, as discussed above, the trial court properly determined that there was little likelihood that continued services would result in reunification. As we did in *Dinkins*, we must point out that this case has gone on for more than two years. The emergency clause preceding the 1997 amendments to the Juvenile Code stated one of the purposes of our statutes is to "insure the best interests of Arkansas' children in achieving a safe and permanent home." The court's review and conclusion of this case is long overdue, especially in light of the convincing evidence that Amanda failed to remedy the serious problems that caused her children to be removed from her custody and placed with ADHS years ago. Thus, because the trial court's order terminating Aman-

da's parental rights is not clearly erroneous, we affirm. The court of appeals' decision is reversed on petition for review.

Anarian Chad JACKSON *v.* STATE of Arkansas

CR 03-800 197 S.W.3d 468

Supreme Court of Arkansas
Opinion delivered November 4, 2004

[Rehearing denied December 9, 2004.]

Jeremy B. Lowrey; and *Hampton & Larkowski*, by: *Jerry Larkowski*, for appellant.

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

ROBERT L. BROWN, Justice. The appellant, Anarian Chad Jackson, appeals from his conviction for first-degree murder and his sentence of life imprisonment. We affirm the conviction and sentence.

The facts gleaned from the testimony at trial are these. On January 5, 2001, a witness observed Charles Raynor as he was shot to death in his front yard in Little Rock. The same witness had observed two men approach the victim from behind, at which time Raynor fell to the ground. When he tried to get up, Raynor

was shot again. The State's Chief Medical Examiner, Dr. William Sturner, testified at trial that Raynor was killed by a gunshot wound to the head.

Also at trial, the State presented testimony from Chris Bush, who had already pled guilty to first-degree murder for Raynor's murder and had received a sentence of forty years' imprisonment. Bush testified that Jackson had previously told him that Raynor "was talking about [Jackson] to little girls and stuff" and saying "things about [Jackson]," and that Jackson did not like it. Bush stated that the day of the murder, he and Jackson were being driven around by "Little Mark," a friend, when they saw Raynor standing in his front yard. Bush testified that he had a .357 revolver with him, and that Jackson was carrying a .40 caliber semi-automatic gun.

Bush testified that Jackson told Little Mark to park around the corner from the house, and that Bush and Jackson then got out of the car, went down the alley, and walked along the side of the house to where Raynor was standing. Bush said that Jackson started shooting first and that he himself shot about five times and then ran back to the car. He further testified that Jackson finished shooting and came running behind him. Bush admitted that when the police found him, he had the .40 caliber gun which was used to kill Raynor with him, which he had obtained from a "dope house."

The State also presented testimony from Officer Todd Hurd, a gang-intelligence detective with the Little Rock Police Department, who testified that Jackson was classified as both a "slinger" and a "banger." He defined the terms in front of the jury as follows:

> "Slinger" is a street term, or "slanger" as it's commonly referred to, is a person who deals dope. They're slinging dope on the streets. And a "banger" is a person that's referred — a gang member that is referred to as really being into the gang rivalries if you will; shooting at, having conflict with other gangs and other gang members.

He further stated that Jackson was a leader of the West Side Posse, also known as the West Side Piru, a gang in Little Rock, and that Raynor was a member of the Monroe Street Hustlers, another gang in the Little Rock area. He said that as a leader of the West Side Posse, Jackson would be the main authority figure over younger gang members, like Chris Bush, who would have been below Jackson in the gang's hierarchy.

Ronald Andrejack, a State Crime Lab firearms-and-tool-mark examiner, testified that four .40-caliber casings, which were

found at the scene of Raynor's death, were all fired from the .40-caliber weapon that was retrieved and that a piece of copper jacket from a .38-caliber bullet taken from Raynor's body could have been fired by a .357 Magnum, but not the .40-caliber pistol that fired the casings.

Two other witnesses for the State were treated as hostile witnesses. Markevious King and Rodrick Pennington testified that they did not remember giving statements to Detective Stuart Sullivan of the Little Rock Police Department. When they testified they were unable to remember their statements, the State sought and obtained from the circuit court the permission to introduce into evidence transcripts of both witnesses' testimony before a federal grand jury. King's testimony affirmed a statement he had given to Detective Sullivan in which he named the members of the West Side Posse and discussed times when Jackson gave guns to other gang members and to him and directed them to seek out members of the Monroe Street Hustlers. Pennington's grand-jury testimony affirmed his statement to Detective Sullivan that Jackson had rewarded Bush for shooting Raynor by giving him a car.

Takesha Griffin, Jackson's first cousin, was also called to testify by the State and was treated as a hostile witness. She denied that she gave a statement to police regarding Jackson's involvement in Raynor's death. She stated that she was high on crack at the time of the statement and that she was kept at the Little Rock Police Department for five or six days. She added that she was willing to say or do anything to leave the department. Her testimony before the federal grand jury was also introduced into evidence. The State then called Detective Eric Knowles of the Little Rock Police Department, who took Ms. Griffin's statement. He testified that her statement was taken under oath, which was administered by a deputy prosecutor. An audio tape of Ms. Griffin's statement was admitted into evidence and played for the jury. In that statement, Ms. Griffin testified that Jackson admitted killing Raynor with Bush, because Raynor had supposedly tried to kill Jackson at least four times. She further stated that she had heard on the street that Jackson and Raynor had wanted the same girl. In addition, she told the detective that Jackson told her he had "a .44" and that Bush had "the .357" at the time of the shooting.[1]

[1] Ms. Griffin refers to a ".44" caliber, but throughout the rest of the State's case the gun is referred to as a ".40" caliber.

Detective Knowles testified that Ms. Griffin was not under arrest at the time of her statement and was free to leave and that she appeared very friendly and cooperative the entire time. Detective John White, of the Little Rock Police Department, who was also present at the time of Ms. Griffin's statement, testified that he observed no symptoms of drug withdrawal at the time of her statement. Finally, Detective Sullivan testified that after Jackson was Mirandized, he admitted to being the "top guy" in the West Side Posse. Jackson was convicted of murder and sentenced as already noted in this opinion.

I. Gang Expert

Jackson argues, as his first point on appeal, that the prosecutor's introduction of testimony from Officer Todd Hurd, the purported gang expert, amounted to no more than a character assassination. He claims specifically that the testimony fails to meet the reliability standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and that its admissibility violated his rights to due process and a fair trial. He contends that the State should have been required to present testimony from an expert with sociological or other comparable training and education that would provide some assurance of both unbiased and well-grounded conclusions, after employing valid data-gathering techniques. Jackson further maintains that Officer Hurd's testimony was based on rumor and hearsay and should have been excluded as improper, highly prejudicial character evidence that compromised the reliability of the jury's fact finding. He concludes that his Sixth and Fourteenth Amendment rights were violated.

a. Standard of Review

In *Brunson v. State*, 349 Ark. 300, 79 S.W.3d 304 (2002), this court summarized its standard of review for the qualification of experts:

> Whether a witness qualifies as an expert in a particular field is a matter within the trial court's discretion, and we will not reverse such a decision absent an abuse of that discretion. Rule 702 of the Arkansas Rules on Evidence entitled "Testimony of Experts" 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." We have said that if some reasonable basis exists demonstrating that the witness has knowledge of the subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony.

349 Ark. at 309, 79 S.W.3d at 309 (internal citations omitted).

b. Reliability under Daubert *and* Kumho Tire

Jackson maintains that while this court has previously addressed the admissibility of gang-expert testimony under the rubrics of relevance and prejudice, such evidence has never been evaluated by this court for its reliability under *Daubert.*

Jackson is correct that this court has not previously evaluated a gang expert's reliability under *Daubert.* In *Farm Bureau Mut. Ins. Co. v. Foote,* 341 Ark. 105, 14 S.W.3d 512 (2000), we adopted the holding of the United States Supreme Court in *Daubert* and the inquiry to be conducted by a trial court. We concluded, in accordance with *Daubert,* that the trial judge, when presented with a proffer of expert scientific evidence, must initially decide if the reasoning behind the evidence is scientifically valid and can be applied to the facts of the case. We noted several criteria to be used by the judge in making that decision.

This court later observed that Arkansas Rule of Evidence 702's requirements apply equally to all types of expert testimony and not simply to scientific expert testimony, citing to *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999). *See Coca-Cola Bottling Co. v. Gill,* 352 Ark. 240, 100 S.W.3d 715 (2003). In *Kumho Tire,* the United States Supreme Court concluded that the trial court's general "gatekeeping" obligation, as prescribed under *Daubert,* applies to all expert testimony when assessing the reliability of that testimony. The Court added that in assessing reliability, the trial court may, at its discretion, consider the *Daubert* factors to the extent relevant. The standard of review would be abuse of discretion.

In the instant case, we conclude that it was not necessary for the circuit court to engage in a *Daubert* or *Kumho Tire* analysis of the particular questions relating to reliability outlined in Jackson's brief.[2] As the Ninth Circuit Court of Appeals observed in a similar

[2] Jackson outlines the following questions in his brief:

case involving testimony by a police gang expert, the *Daubert* factors are simply inapplicable to this kind of testimony which is based on the experiences and the knowledge garnered by the expert. *See United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000).

Accordingly, we agree with *Kumho Tire* that whether a trial court relies on the specific factors outlined in *Daubert* is within the circuit court's discretion and depends on the facts of the case. In the case before us, the circuit court did not employ the *Daubert* criteria, but Officer Hurd testified that he had been working in the gang intelligence unit of the Little Rock Police Department since 1995 and had personally interviewed over 300 gang members. He added that he had personally documented gang tattooing and graffiti and was personally familiar with the locations of the gangs and their rivalries. He had also been qualified as a gang expert in other courts of law. Because Officer Hurd's testimony was premised upon his personal experiences in dealing with gangs over a number of years, it differs from expert testimony which rests purely on a scientific foundation. We conclude that the circuit court did not abuse its discretion in failing to conduct a *Daubert* analysis to determine the reliability of Officer Hurd's testimony. Moreover, the circuit court did not abuse its discretion by ruling that the testimony was reliable based on Officer Hurd's knowledge and experiences.

c. Prejudicial Nature

Jackson goes further, however, and urges that even if Officer Hurd's knowledge and experience render his testimony reliable, his testimony should not have been permitted because it consisted of hearsay and inadmissible evidence regarding Jackson's character, particularly as it related to his reference to Jackson as a "slinger" and a "banger." He maintains that this testimony violated his right

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1. Whether a "theory or technique . . . can be (and has been) tested";

2. Whether it "has been subjected to peer review and publication";

3. Whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation";

4. Whether the theory or technique enjoys " 'a general acceptance' " within a " 'relevant scientific community.[' "]

to a fair and impartial trial by jury under the Sixth and Fourteenth Amendments. Indeed, he claims that his trial was tainted at the outset by the "slinger" and "banger" references.

This court has previously recognized the utility of testimony by a gang expert. In *Johninson v. State*, 317 Ark. 431, 878 S.W.2d 727 (1994), we observed that where the relevance of such testimony has been demonstrated, expert testimony on the membership, organization, purposes, and conduct of particular street gangs may be admissible. Having said that, this court went further in *Johninson* and affirmed the circuit court's denial of the defendant's proffered testimony from a gang expert. We noted that "[t]he broad overview of the urban gang subculture that the prospective expert witness provided . . . had no direct, particular reference to the victim and his associate." 317 Ark. at 439, 878 S.W.2d at 731. Hence, the reason we concluded the gang testimony was not relevant in that instance was it made no reference to the parties in that case.

This court has observed that evidence of other crimes, wrongs, or acts may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See, e.g., Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004). *See also* Ark. R. Evid. 404(b). The admission or rejection of evidence under Rule 404(b) is committed to the sound discretion of the trial court, and this court will not reverse absent a showing of manifest abuse of that discretion. *See id.* As this court recently said in *Morris v. State*, 358 Ark. 455, 193 S.W.3d 243 (2004), any circumstance that ties a defendant to the crime or raises a possible motive for the crime is independently relevant and admissible as evidence. The fact that the two gangs at issue had been in a strong rivalry and had been going "back and forth" over females, as testified to by Officer Hurd, certainly seems relevant to Jackson's motive in killing Raynor. Nevertheless, Officer Hurd's testimony that Jackson was a "slinger" and a "banger" undoubtedly was harmful to Jackson. The question, though, is whether this unfair prejudice outweighs the probative nature of his testimony. *See* Ark. R. Evid. 403; *Branstetter v. State*, 346 Ark. 62, 57 S.W.3d 105 (2001).

Other jurisdictions have reached different results in comparable situations. *See State v. Agotte*, 146 N.H. 544, 776 A.2d 715 (2001) (testimony in arson prosecution that defendant had reported a prior fire with insinuations in argument that defendant stated the prior fire was used to establish propensity and deemed

extremely prejudicial); *People v. Ellis*, 315 Ill. App. 3d 1108, 735 N.E.2d 736 (2000) (evidence defendant was gang member is relevant to show common design, purpose, or motive where victim was rival gang member and was shot to death while selling drugs); *State v. Torres*, 47 Conn. App. 149, 702 A.2d 142 (1997) (evidence defendant was member and leader of gang was relevant in his conspiracy-to-commit-murder trial for shooting death of rival gang member; prejudice did not outweigh probative value); *People v. Mason*, 274 Ill. App. 3d 715, 653 N.E.2d 1371 (1995) (testimony defendant was a regent and a regent was responsible for selling drugs and hiding weapons inflamed jury against defendant and was irrelevant); *Commonwealth v. Scarfo*, 416 Pa. Super. 329, 611 A.2d 242 (1992) (repeated comments by prosecutor to the jury that defendants were "made" members of the Mafia, which meant they had been involved in killings, was not merely testimony to establish motive but so tainted the jury that it could not render a fair verdict; this was reversible error); *Perryman v. State*, 798 S.W.2d 326 (Tex. Ct. App. 1990) (expert testimony that defendant was an experienced rapist in a rape trial was inflammatory and prejudicial and this clearly outweighed any probative value); *People v. Washington*, 127 Ill. App. 3d 365, 468 N.E.2d 1285 (1984) (investigator's comment to trial court at sentencing hearing that defendant was a gang leader based on information from an unnamed informant was hearsay and unreliable and warranted a new sentencing hearing).

We conclude that it was an abuse of discretion for the circuit court to allow Officer Hurd to testify that Jackson was a "slinger" and a "banger." Nonetheless, we also conclude that duplicate testimony was presented to the jury through federal grand-jury transcripts that clearly established that Jackson was indeed a "banger," that is, someone involved in gang killings. King testified before the federal grand jury that in the year 2000, Jackson gave multiple orders to West Side Posse gang members to shoot members of the Monroe Street Hustlers. Pennington testified before the federal grand jury that Jackson awarded points for head shots of rival gang members, ordered four shootings, and gave two rewards to two gang members for shootings, including the car to Bush.

Markevious King also testified before the federal grand jury that Jackson was the leader of the West Side Posse and that King started selling cocaine for the gang at age fourteen. Takesha Griffin testified before the federal grand jury that Jackson called himself

the leader of the West Side Posse, and in answer to a question by a member of the grand jury, agreed that the gang was involved in drugs. Transcripts of this grand-jury testimony were admitted into evidence. In addition, Chris Bush testified that one of the guns used in the killing came from a West Side Posse "dope house." All of this evidence is cumulative to Todd Hurd's description of Jackson as a "slinger."

Accordingly, we hold that any error occasioned by the circuit court's allowance of Officer Hurd's reference to Jackson as a slinger or banger was rendered harmless beyond a reasonable doubt by the admission of subsequent testimony. *See, e.g., Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000) (no prejudice results where evidence erroneously admitted was merely cumulative); *Criddle v. State*, 338 Ark. 744, 1 S.W.3d 436 (1999) (under *Chapman v. California*, 386 U.S. 18 (1967), the rule is when a constitutional issue is involved, but evidence of guilt is overwhelming and the error slight, we can declare the constitutional error harmless so long as it is harmless beyond a reasonable doubt).

II. Pennington Grand-Jury Transcript

Jackson claims, as his next point, that the admission of Rodrick Pennington's grand-jury testimony at the jury trial violated Arkansas Rules of Evidence 801 and 802, as well as the Confrontation Clause of the Sixth Amendment of the United States Constitution. He maintains that this is because there was no underlying foundation laid for Pennington's knowledge about Jackson's gang activities and, as a result, his testimony is hearsay and inadmissible under Rule 802. Jackson further contends that Pennington's grand-jury statements were highly prejudicial, both because of their unsubstantiated references to other gang shootings set in motion by him and for the claim that Jackson rewarded Bush with a car for shooting Raynor.

The State responds that Jackson did not object based on hearsay until after Pennington's grand-jury testimony was already admitted into evidence. It further asserts that Jackson did not make any argument below that the evidence at issue was secondary hearsay, as he does now on appeal. For these reasons, the State claims that Jackson did not object at the first opportunity and, in addition, has changed his grounds for objection on appeal. Thus, the State maintains his argument is not preserved for appellate review. The State further submits that the grand-jury testimony was properly admitted as substantive evidence.

a. Preservation

We conclude that the hearsay issue is preserved for our review. At the close of the State's redirect examination of Pennington, the prosecutor sought to admit Pennington's grand-jury testimony and stated that he would substitute a redacted copy of it. Upon giving defense counsel Pennington's redacted grand-jury testimony on the morning of December 12, 2002, the prosecutor noted that while he did not believe defense counsel had any objections to its content, "[w]e provided it to him for review as the Court directed, and so I guess it's up to him to make his objections to that." The circuit court agreed, saying: "He can do that, and co-counsel might can assist him while he's focusing on those things to make sure that we get as specific as we can be on all of those." It was not until some time later, when the State was about to rest, that defense counsel made a hearsay objection to Pennington's grand-jury testimony. At that time, defense counsel raised the "outstanding hearsay objection on Rodrick Pennington." Defense counsel argued that the State had failed to establish a foundation for certain statements made in Pennington's testimony before the federal grand jury. The circuit court overruled the objection.

Our review of the record demonstrates that the circuit court certainly planned on entertaining objections to the redacted version of the grand-jury testimony following its original admission. Because it appears that Jackson's counsel objected in a timely fashion with the concurrence of the trial judge and prosecutor after receiving the State's redacted version, we conclude that the issue is preserved for review.

The State further objects to the hearsay issue on the basis that Jackson has changed his argument on appeal. According to the State, no objection to secondary hearsay was made at trial. It is elementary that an appellant cannot change his argument on appeal and that he is limited to the scope and nature of the argument made below. *See Hunter v. State*, 330 Ark. 198, 952 S.W.2d 145 (1997). We disagree that Jackson has changed his argument. It appears to this court that Jackson maintained both at trial and now on appeal that no foundation was laid as to how Pennington got the information about Jackson to which he testified, even though he uses the terms classic hearsay and secondary hearsay interchangeably. Hence, we conclude the issue was preserved.

Turning to the merits, Arkansas Rule of Evidence 801(d)(1) defines one type of statement that is not hearsay:

> (d) *Statements Which Are Not Hearsay.* A statement is not hearsay if:
>
> (1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and, if offered in a criminal proceeding, was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a disposition [deposition], or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving him[.]

Ark. R. Evid. 801(d)(1).

In the case before us, Pennington testified at Jackson's trial and was subject to cross-examination by Jackson's counsel concerning his grand-jury statements. Clearly, his grand-jury testimony was inconsistent with his testimony at Jackson's trial, because at the trial, he denied ever giving a statement to police officers or having any knowledge of events which he had previously discussed with those same officers. Because his grand-jury testimony belied his lack of knowledge of events and because it was given under oath and was subject to the penalty of perjury at another proceeding and because Pennington was subject to cross-examination at Jackson's trial, we hold that his grand-jury testimony did not qualify as hearsay under Rule 801(d)(1).

III. Confrontation Clause

Jackson next urges that the out-of-court statements that Pennington and Markevious King made to the grand jury, as well as the statements made by Ms. Griffin to the grand jury and her sworn statement to the police, all of which were admitted at trial, lacked any indicia of reliability and failed to fall within the exception to the hearsay rule that would have made their admissibility constitutionally permissible. He urges this court to overturn its prior decision in *Jones v. State*, 283 Ark. 308, 675 S.W.2d 825 (1984), based on the United States Supreme Court's decision in *Lilly v. Virginia*, 527 U.S. 116 (1999). He argues that there is no

distinction between the statements admissible under *Jones* and under Arkansas Rule of Evidence 801(d)(1) and those found inherently unreliable in *Lilly*. He goes further and maintains that while Pennington, Markevious King, and Ms. Griffin were available for cross-examination, that examination is not meaningful when the declarants are now professing no knowledge of the events to which the prior statement alluded. Jackson asserts that the prejudice is clear and that without the statements in question, there was no corroboration of Bush's accomplice testimony.

Jackson's argument is not well-taken. In *Jones v. State, supra,* this court examined Jones's argument that the transcript of one of the State's witness's prior testimony was not admissible. In that case, Jones and Dennis Williams were jointly charged with burglary and aggravated robbery. Williams was tried and convicted first, and he testified at his own trial. When called to testify at Jones's trial by the State, he refused to testify against Jones. The circuit court permitted the State to introduce the transcript of Williams's earlier testimony. On appeal, Jones argued that Williams's prior testimony was inadmissible. This court disagreed and affirmed the ruling of the circuit court. We noted that since the General Assembly had adopted the Uniform Rules of Evidence, "such prior sworn statements are now admissible as substantive evidence in criminal cases." 283 Ark. at 311, 675 S.W.2d at 826. We further observed that Rule 801(d)(1) required the declarant to be subject to cross-examination at the *later* trial, as Williams was, and that his testimony be inconsistent with his earlier testimony. The court then noted its agreement with the view taken by the federal courts that the trial court has considerable discretion in determining whether testimony is "inconsistent" with prior statements, and that inconsistency is not limited to diametrically-opposed answers, "but may be found in evasive answers, inability to recall, silence, or changes of position." *Id.*, 675 S.W.2d at 827 (quoting *United States v. Russell*, 712 F.2d 1256 (8th Cir. 1983)).

This court does not lightly overrule cases and applies a strong presumption in favor of the validity of its prior decisions. *See, e.g., Echols v. State*, 354 Ark. 414, 125 S.W.3d 153 (2003). Further, as a matter of public policy, this court has said that it is necessary to uphold its prior decisions unless a great injury or injustice will result. *See id.* We have also made it clear that it is the appellant's burden to show that this court's refusal to overrule a prior decision will result in great injustice or great injury. *See Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558 (2003). In the instant case, Jackson

requests the court to overrule *Jones v. State, supra,* in light of the United States Supreme Court's decision in *Lilly v. Virginia, supra.* We decline to do so, because the *Lilly* case is distinguishable.

In *Lilly*, the Court discussed an accused's rights under the Confrontation Clause. During Lilly's trial, his brother Mark, a participant in the crimes charged, was called to testify by the Commonwealth of Virginia. Mark invoked his Fifth Amendment privilege against self-incrimination at trial, and the Commonwealth offered into evidence statements Mark had made to police following his arrest. The statements were admitted, and Lilly was convicted. The Virginia Supreme Court affirmed his conviction, holding "that Mark's statements were declarations of an unavailable witness against penal interest; that the statements' reliability was established by other evidence; and therefore, that they fell within an exception to the Virginia hearsay rule." 527 U.S. at 122. The Virginia Supreme Court further ruled that where the hearsay has sufficient guarantees of reliability so as to come within an exception to the hearsay rule, the Confrontation Clause is satisfied.

The United States Supreme Court disagreed. It announced that the "decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Id.* at 134. The Court alluded to its prior holding that to be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* at 138 (quoting *Idaho v. Wright*, 497 U.S. 805, 822 (1990)). The Court specifically rejected the Commonwealth's proffered basis of reliability, which was that Mark had been informed of his *Miranda* rights and that Mark knew he was exposing himself to criminal liability if he perjured himself. The Court said: "It is abundantly clear that neither the words that Mark spoke nor the setting in which he was questioned provides any basis for concluding that his comments regarding petitioner's guilt were so reliable that there was no need to subject them to adversarial testing in a trial setting." *Id.* at 139. The Court concluded that the admission of Mark's untested statement to police officers violated Lilly's rights under the Confrontation Clause.

Again, the *Lilly* case is easily distinguishable. At issue there was an unsworn statement that was given to police officers

while Mark was in custody. In the instant case, each of the witnesses' grand-jury testimony was given under oath and, thus, had the indicia of reliability required under *Lilly*. In addition, Ms. Griffin's statement to police officers was also given under oath. Moreover, Jackson was able to cross-examine the State's witnesses during his trial. Despite the fact that the witnesses claimed to have no memory of the events previously testified to, Jackson was able to confront them. Hence, his rights under the Confrontation Clause were not impaired. For these reasons, we decline Jackson's invitation to overturn *Jones v. State, supra.*

IV. Model Accomplice Instructions

Jackson next advances the argument that the circuit court erred in rejecting his proposed limiting instructions relating to the designation of Bush as an accomplice. He asserts that when the circuit court so designated Bush, thus requiring corroborative evidence, that designation, together with AMI Crim. 2d 401, made Jackson strictly liable for the actions of Bush. Jackson concludes that the failure to give his proposed limiting instruction resulted in a deprivation of his fundamental right to trial by jury.

Jackson proffered the following instruction:

> The designation of Chris Bush as an accomplice is an evidentiary ruling only and does not in any way relieve you of your responsibility to determine independently whether the State has proved beyond a reasonable doubt that Anarian Jackson was an accomplice of Chris Bush.

That proffered instruction was refused by the circuit court.

The Jackson jury was, however, instructed as follows, in accord with AMI Crim. 2d 401:

> In this case, the State does not contend that Anarian Chad Jackson acted alone in the commission of the offense of Murder in the First Degree. A person is criminally responsible for the conduct of another person when he is an accomplice in the commission of the offense.
>
> An accomplice is one who directly participates in the commission of an offense or who, with the purpose of promoting or facilitating the commission of an offense:

> Solicits, aides (sic), encourages or coerces the other person to commit the offense; or
>
> Aids, agrees to aid, or attempts to aid the other person in planning or committing the offense.
>
> A person acts with purpose with respect to his conduct, or a result thereof, when it is his conscious object to engage in conduct of that nature or to cause such a result.

Jackson claims that it is the second sentence of this instruction, given together with the declaration that Bush was an accomplice, which renders Jackson strictly liable for Bush's actions. That is incorrect.

It appears that Jackson is misreading the model instruction given, although, admittedly, his argument is somewhat unclear. He apparently reads the second sentence of AMI Crim. 2d 401 to say: "[Jackson] is criminally responsible for the conduct of [Bush] when [Bush] is an accomplice in the commission of the offense." It is clear to us, however, that the sentence should be read: "[Jackson] is criminally responsible for the conduct of [Bush] when [Jackson] is an accomplice to the commission of the offense."

In addition to AMI Crim. 2d 401, AMI Crim. 2d 404 was given, which provides, in part, that if the jury finds that Jackson was only present while a crime was being committed, and did not have a legal duty to act, then he is not an accomplice. We have no doubt that the jury was fully instructed that it was its task to determine whether Jackson was an accomplice. That determination was not preordained by virtue of the instructions given.

This court has made it perfectly clear that non-model jury instructions are to be given only when the circuit court finds that the model instructions do not accurately state the law or do not contain a necessary instruction on the subject at hand. *See, e.g., Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994). Here, the model jury instruction accurately states the law. *See Calloway v. State*, 330 Ark. 143, 953 S.W.2d 571 (1997) (rejecting appellant's "mere presence" proffered instruction and holding that AMI Crim. 2d 401 accurately and completely reflects the law of accomplice liability). We hold that the circuit court did not err in rejecting Jackson's proposed instruction.

V. Accomplice As Accessory After the Fact

Jackson argues next that AMI Crim. 2d 401 defines accomplice as "one who directly participates in the commission of an offense" and that this omits any scienter requirement. He claims, moreover, the model instruction places no time limitation on the requisite "purpose" set out in the second half of the sentence in the model instruction.

We disagree. It is boilerplate law in Arkansas and memorialized in our model instruction that to be an accomplice, one has to participate directly in the commission of the offense or with the purpose of facilitating or promoting the commission of the offense, solicit, aid, encourage, or coerce its accomplishment. Jackson argues certain hypothetical situations that are not relevant to this case or persuasive. His first hypothetical concerns a situation where a driver of a car removes robbers from the scene without knowing that a robbery had occurred. Those facts are far afield from the case at hand. Jackson's second scenario concerns a person who arrives after a murder and assists in cleaning up the crime scene. That scenario also is not relevant to the case presently before us.

To repeat, this court has held that a model jury instruction *shall* be used unless the circuit court concludes that it does not accurately state the law. *See Moore v. State*, 317 Ark. 630, 882 S.W.2d 667 (1994). Because Jackson has failed to demonstrate that the model instructions given do not accurately state the law, the circuit court did not err in instructing the jury as it did.

VI. Improper Seizure and Suppression of Statements

For his final point, Jackson contends that the circuit court erred in ruling that his initial detention was a permissible seizure and supported by reasonable suspicion of criminal activity. This is especially so, he maintains, where the police officers did not know who Jackson was at the time he was stopped. Jackson asserts that his stop constituted a detention and that both the show of authority and the threat of force by a drug dog led to a seizure. He maintains that these circumstances, together with the clear intent of the police to detain him, led him to believe that he was not free to leave. In sum, he claims that he had a reasonable expectation of privacy and that there must be facts that give rise to an articulable or reasonable suspicion of criminal conduct for a permissible stop to transpire. He concludes that because the stop in his case constituted an unconstitutional seizure, his subsequent interrogation should be excluded on this basis.

In reviewing the denial of a motion to suppress a statement, this court has relied on the following standard of review:

> In reviewing the trial court's denial of a motion to suppress evidence, we conduct a *de novo* review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court and proper deference to the trial court's findings. *See Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003); *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003).

Romes v. State, 356 Ark. 26, 43, 144 S.W.3d 750, 761 (2004).

At the suppression hearing before the circuit court, Detective Kyle King of the Little Rock Police Department testified that he was working for the interdiction squad at the Greyhound Bus Station. Detective King stated that he was there along with Detective Mark Treece, who was present with a drug dog named Rex. Detective King testified that he knew Jackson used the bus station and that it was "highly probable" that they would see him there. Detective King testified that when Jackson got off the bus and saw Detective Treece and Rex, he appeared startled and seemed to hesitate. Detective King added that initially Jackson was carrying his black bag at his right side, but that as he stepped off the bus, he moved the bag to his left side, putting the bag "up real high as to keep the dog from smelling the bag." The detective then elaborated on this, stating that when Jackson carried his bag up high, it would have been about where the bag would be if it had had a shoulder strap attached to it. The detective further testified that as Jackson walked toward the bus station from the bus, he turned and looked back at Detective Treece and Rex before he went inside the station.

At that point, Detective King stated that he decided to speak with Jackson. He testified that he approached him, identified himself as a police officer, showed Jackson his badge, and asked if he could speak with him, to which Jackson responded "sure." Detective King testified that Jackson was very cooperative and, upon request, presented identification that he was "Brady McCoy." At that point, the detective stated, he knew that McCoy was an alias used by Jackson and that he knew Jackson used the bus station. Detective King was also aware that Jackson had several

outstanding felony warrants. He testified that prior to Jackson's giving him his identification, he did not recognize Jackson.

Detective King added that knowing Jackson could possibly be dangerous based on information he had been given, he asked Jackson if he was carrying any drugs or guns in his bag. According to the detective, Jackson responded "no." The detective then asked if he could search the black bag. Jackson agreed, and Detective King testified that Jackson began to search his own bag. The detective said that after telling Jackson that he wanted to search the bag himself, Jackson put the bag on the ground and stepped away from it. The detective stated that at this time, he tackled Jackson and placed him under arrest.[3]

Detective Treece also testified at the suppression hearing. He stated that he and Rex were standing just outside the door of the bus when Jackson came off the bus. He testified that Jackson appeared startled when he saw them, and that he stepped off the bus, picked his bag up high, and went around the door of the bus. Detective Treece testified that as Jackson went into the bus station, he glanced back at him and made eye contact. The detective further stated that Rex was not growling or barking when Jackson exited the bus. He stated that he was with Detective King when he asked Jackson for permission to search his bag, and that until Jackson was on the ground, he did not know who Jackson was.

The circuit court denied the suppression motion and ruled:

> I think given the fact that they'd been tipped off that he was coming in and the behavior that the officers noted would be sufficient given the — given those two things, the tip-off coupled with the behavior and the way that he held the bag. That would be sufficient to seek cooperation under rule two point two. And then the false identification would be sufficient to go further with an arrest at that point actually for obstructing governmental operations since they were already alerted to the name that — according to their testimony, this name Brady McCoy that was being used by the

[3] Rex later alerted to drugs inside Jackson's bag, but that is not pertinent for purposes of the present appeal, and in fact, was the subject of a separate appeal to the court of appeals. *See Jackson v. State*, 86 Ark.App. 39, 158 S.W.3d 715 (2004). In that case, the court of appeals suppressed the drugs. This court declined to review that decision by the court of appeals. The issue in the instant case is whether the stop was improper and whether his subsequent statement about his leadership in the gang should be suppressed.

> person that they were seeking. So, your motion to suppress the evidence and the statement will be denied.

Jackson filed a motion for reconsideration, and the circuit court denied that motion as well.

Jackson claims on appeal that he was confronted by plain-clothes policemen, one of whom had an apparent attack dog, and the officers did not simply ask questions, but also asked him for identification. This, he maintains, created an implicit threat of force and show of authority which gave him the impression that he was not free to leave and he was, in fact, "seized."

In *United States v. Drayton*, 536 U.S. 194 (2002), the United States Supreme Court observed that "[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." 536 U.S. at 200. The Court said that "[e]ven when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage — provided they do not induce cooperation by coercive means." *Id.* at 201. Importantly, "[i]f a reasonable person would feel free to terminate the encounter, then he or she has not been seized." *Id.*

This court has previously observed that not all personal conversation between policemen and citizens involves a "seizure" of a person under the Fourth Amendment. *See Thompson v. State*, 303 Ark. 407, 797 S.W.2d 450 (1990). Instead, we noted that a "seizure" occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. *See id.* That being said, this court has also previously held that where there was nothing in the police officer's testimony to support a belief that the police officer asked the appellant for identification in the course of a criminal investigation, Ark. R. Crim. P. 2.2 did not render the stop permissible. *See Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980). *See also* Ark. R. Crim. P. 2.2(a) ("A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request."). In short, it appears that our Rule 2.2(a) requires that police officers may only request informa-

tion in connection with an "investigation or prevention of crime" which appears to be more restrictive than the Court's holding in *United States v. Drayton, supra.*

In *Meadows*, police officers were at the Little Rock Airport in hope of spotting several white males reported to be transporting heroin. They observed the appellant and a companion walking through the concourse. Meadows and his friend walked past the officers and "started looking back, which aroused the officers' suspicion." 269 Ark. at 381, 602 S.W.2d at 637. One of the officers began to follow the men and while being followed, Meadows and his friend "kept looking back occasionally" and their pace quickened. *Id.*, 602 S.W.2d at 637. After being approached and asked by the police officer, Meadows presented him with identification. After releasing Meadows, word came back to the officers that there was a felony warrant out for Meadows, and he was arrested and heroin was found in his possession. One of the officers testified that he only followed Meadows, because he looked back in a suspicious manner. This court then reversed the circuit court's denial of the suppression motion and held that Rule 2.2(a) was inapposite because the stop was not part of an investigation or prevention of a crime.

In the instant case, Jackson appeared startled and hesitant when he got off the bus and saw the police dog. He immediately switched his bag to his other arm and lifted it up high. He then entered the bus station and turned to look back at the police officer and the dog. The police officers were at the bus station with the drug dog for drug interdiction. This was not a police stop where the person stopped was simply standing in the wrong place at the wrong time. *See Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998). Nor is it a case where the police officer was not investigating crime at the time of the stop. *See id.* Here, the police officers were at the bus station to investigate crime and specifically drug offenses. Detective King testified that the interdiction squad's purpose was to "attempt to slow down and stop the flow of drugs going through our city and to our city." They stopped Jackson as part of that investigation and asked for his I.D. Jackson cooperated.

Jackson's nervous demeanor and the fact that he shifted his bag away from the drug dog were objective reasons for the police officers to stop him and request his identification under Rule 2.2, even though they did not know at that point who Jackson was. *See* Ark. Code Ann. § 16-81-203(1), (13) (1987). In sum, these facts distinguish this case from *Meadows v. State, supra.*

We do not agree with Jackson that the police officers had to be investigating him for a specific crime in order to stop him and ask that he identify himself.

We hold that the stop and request for identification did not constitute an impermissible seizure. To the extent *Jackson v. State*, 86 Ark. App. 39, 158 S.W.3d 715 (2004), is inconsistent with this opinion, we overrule it.

A search of the record has been conducted pursuant to Supreme Court Rule 4-3(h), and no reversible error has been found.

Affirmed.

HANNAH, J., dissents.

JIM HANNAH, Justice, dissenting. I respectfully dissent. I disagree with the majority's holding that "any error occasioned by the circuit court's allowance of Officer Hurd's testimony to Jackson as a slinger or banger was rendered harmless beyond a reasonable doubt by the admissibility of subsequent testimony." The State sought to prove that Jackson was a gang member who, consistent with the character traits of gang members, shot his rival gang member Raynor. To show this character trait, the State put on Officer Hurd, an expert in gang behavior, who first defines the terms "slinger" and "banger." Next, when asked whether Jackson is classified as a slinger or a banger, Officer Hurd replies: "Chad *is both. He's done both.*" Defense counsel objected. The circuit court concluded that Officer Hurd:

> has the right to testify as an expert that he knows of his own personal knowledge from whatever the thing is because he's already been qualified as both a slinger and a banger. So as far as that goes, I'm going to overrule that . . . Now, I really don't want to get into any of the other crimes.

* * *

It appears that the circuit court recognized that testimony concerning other crimes would be prejudicial to Jackson. The circuit court did not allow testimony concerning other crimes, yet it did allow Officer Hurd's classification of Jackson as a slinger and a banger, a classification which refers to criminal activity. Further, the circuit court allowed Hurd to testify that Jackson had commit-

ted both types of criminal activity. Thus Hurd is allowed, by virtue of his own definition of the terms, to state that Jackson is a shooter and a drug dealer, in a case where Jackson is charged with shooting Raynor. I simply cannot agree with the majority's holding that this testimony, although admitted in error by the circuit court, is harmless beyond a reasonable doubt.

The majority dismisses Officer Hurd's testimony as merely cumulative because "duplicate testimony was presented to the jury through federal grand-jury transcripts that clearly established that Jackson was indeed a 'banger,' that is, someone involved in gang killings." Most troubling is the majority's rationale for concluding that Officer Hurd's reference to Jackson as a "slinger" was merely cumulative evidence. First, the majority states: "Markevious King also testified before the federal grand jury that Jackson was the leader of the West Side Posse and that King started selling cocaine for the gang at age fourteen." Apparently, the majority concludes that since Jackson and King were in the same gang, and King sold cocaine, then it follows that Jackson also sold cocaine. The relevant testimony of King is as follows:

> Chad Jackson, also known as "Dirty," has been WSP for three years and is the leader.
>
> In the Spring of 1998, King was jumped into the WSP.
>
> Q: How old were you when you first got involved with West Side?
>
> A: Around about twelve, eleven or twelve.
>
> Q: And were you involved in selling cocaine at that age?
>
> A: Not at that age. Around about like fourteen, that's when I — I mean, started selling cocaine.

King does not testify that Jackson sold cocaine. In addition, King does not testify that Jackson directed him to sell cocaine for the gang. The majority deems this testimony as cumulative, apparently assuming that the acts of one gang member may be used to establish that another member of the same gang has committed those same acts.

Next, the majority states: "Takesha Griffin testified before the federal grand jury that Jackson called himself the leader of the West Side Posse, and in answer to a question by a member of the grand jury, agreed that the gang was involved in drugs." The relevant testimony is as follows:

Q: . . . Was Chad a leader in the WSP, though, for everybody that was a part of it?

A: I mean, yeah, because that was because he called himself the leader.

* * *

Q: Do they just do drugs, or are they involved in anything other than the drugs?

A: Drugs.

Griffin answers "yes" to the question of whether the members of the West Side Posse "do drugs." She does not state that Jackson was a drug dealer.

Finally, the majority states that "Chris Bush testified that one of the guns used in the killing came from a West Side Posse 'dope house.'" The relevant testimony is as follows:

Q: Where did you get that gun from, Chris?

A: At the house we had.

Q: What do you mean?

A: We had a little dope house on 15th.

Q: A dope house?

A: Yeah.

Q: And who is "we"? When you say "we," whose house was that?

A: Just me and the little homeys in the hood.

Q: All right, meaning West Side?

A: Yeah.

Q: Did someone actually live there?

A: Yeah.

Q: What was his name?

A: I can't recall that name. He was a dope fiend.

Q: So that was just some place that y'all hung out.

A: Yes, sir.

* * *

Here, it appears that the majority has concluded that since Bush testified that one of the guns used in the killing came from a "dope house" and since members of the West Side Posse "hung out" at the "dope house," as a member of the West Side Posse, Jackson was a drug dealer. The evidence mentioned by the majority is not cumulative to Hurd's description of Jackson as a "slinger."

Further, I do not believe that Officer Hurd's "slinger" reference was relevant. The majority states that "[t]he fact that the two gangs at issue had been in a strong rivalry and had been going 'back and forth' over females . . . certainly seems relevant to Jackson's motive in killing Raynor." The majority fails to explain how Jackson's status as a drug dealer is relevant to Jackson's motive for killing Raynor, if that motive was related to their membership in rival gangs and their argument concerning certain women.

The "slinger" testimony was not relevant. However, it was highly prejudicial. What the State intended to do, through Officer Hurd's testimony, was introduce evidence of Jackson's bad character to prove conformity therewith, in the commission of the crime. This court has allowed the State to do so. I would not.

I would reverse and remand.

Leonard PORTER *v.* STATE of Arkansas

CR 04-43 197 S.W.3d 445

Supreme Court of Arkansas
Opinion delivered November 4, 2004

David L. Dunagin, for appellant.

Mike Beebe, Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen.

ANNABELLE CLINTON IMBER, Justice. Appellant Leonard Porter appeals from a conviction of aggravated robbery. He was sentenced to life imprisonment without parole; thus, this court's jurisdiction is proper pursuant to Ark. R. Sup. Ct. 1-2(a)(2). Two months before the trial, Mr. Porter was convicted of capital murder and aggravated robbery arising out of a completely different incident. During the voir-dire phase of the trial that is the subject of the current appeal, the jurors were each asked if they had any previous knowledge of or familiarity with Mr. Porter. Those jurors who

expressed any recognition were immediately summoned to the bench and further questioned outside the hearing of the other jurors. All jurors who were possibly tainted were eventually dismissed from service, and Mr. Porter voiced his approval of each juror selected. Despite these extensive precautions, Mr. Porter argues that the jury pool was contaminated by pre-trial publicity concerning his prior convictions of aggravated robbery and capital murder, and the trial court erred in denying his motion for a change of venue. We find no merit and affirm.

Mr. Porter's only argument on appeal is that the trial court erred in denying his motion for a change of venue. He claims that he was unable to have a fair trial in Sebastian County because the jury pool was tainted by knowledge of his previous convictions for aggravated robbery and capital murder. We review the denial of a motion for a change of venue for abuse of discretion. *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998). A change of venue should only be granted when it is clearly shown that a fair trial is not likely to be had in the county. *Baughman v. State*, 353 Ark. 1, 9, 110 S.W.3d 740, 745 (2003). A defendant is not entitled to jurors who are totally ignorant of the facts surrounding the case, as long as they can set aside any impression they have formed and render a verdict solely on the evidence at trial. *Id.*

In support of his argument that he should have been granted a change of venue, Mr. Porter cites two affidavits signed by members of the petit jury, stating that they felt the defendant could not receive a fair trial based on the negative talk and publicity throughout the county about his prior capital-murder conviction. These affidavits are simply not enough to suggest an abuse of discretion by the trial court. Affidavits that cite little or nothing beyond an affiant's own conviction that a fair trial is not possible are insufficient. *Noel v. State, supra.*

Furthermore, this court will not reverse a denial of a change-of-venue motion "if an examination of the jury selection shows that an impartial jury was selected and that each juror stated he or she could give the defendant a fair trial and follow the instructions of the court." *Noel v. State, supra*; *Robinson v. State*, 317 Ark. 407, 878 S.W.2d 405 (1994). Here, all the jurors selected specifically made such a pledge. In addition, the trial court took every precaution to ensure that the members chosen for the jury panel demonstrated absolutely no knowledge of Mr. Porter's previous convictions. Those potential jurors who had knowledge

of Mr. Porter's previous convictions were immediately brought up for a bench hearing to determine the scope of their knowledge, and all were ultimately dismissed. Moreover, as Mr. Porter "voiced his approval of each and every person selected to be seated on his jury," he cannot now challenge the impartiality of the jury. *See Ferguson v. State*, 343 Ark. 159, 179, 33 S.W.3d 115, 128 (2000).

We conclude that there was no abuse of discretion by the trial court in its ruling denying the change-of-venue motion.

In compliance with Ark. Sup. Ct. R. 4-3(h), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to appellant, and no prejudicial error has been found. *Doss v. State*, 351 Ark. 667, 97 S.W.3d 413 (2003).

Affirmed.

ARKANSAS HEARING INSTRUMENT DISPENSER BOARD
v. O. G. VANCE

03-1365 197 S.W.3d 495

Supreme Court of Arkansas
Opinion delivered November 4, 2004

Mike Beebe, Att'y Gen., by: *Warren T. Readnour*, Ass't Att'y Gen., for appellant.

Holly Lodge Meyer, for appellee.

RAY THORNTON, Justice. Appellant, Arkansas Hearing Instrument Dispenser Board ("Board"), appeals from a circuit court order reversing the findings of the Board and concluding that there was not substantial evidence to support the Board's findings of violations of two standards of conduct and that the disciplinary procedures violated the rights of appellee, O. G. Vance, to due process. We affirm the Board.

We review the Board's decision and not the decision of the circuit court. *Ford Motor Co. v. Arkansas Motor Vehicle Commissions*, 357 Ark. 125, 161 S.W.3d 788 (2004). We look to see if there is substantial evidence to support the finding of the board, giving the most probative weight to the evidence in favor of the board's determination and look to the entire record in this determination. *Id.* Substantial evidence means valid, legal, and persuasive evidence such that a reasonable person might accept it as adequate to support the conclusion. *Id.* The Board's decision must not be arbitrary, capricious, or characterized by an abuse of discretion. *Id.* When an agency's determination is supported by substantial evidence, the decision cannot be arbitrary or unreasonable. *Id.*

Under our standard of review, our inquiry is whether there was substantial evidence to support the findings below. The Board's findings of fact were:

> 1. On or about January 12, 1999, [O.G. Vance], a licensed Hearing Instrument Dispenser, sold programmable hearing aids to Mary Sue Carrington. In making the sale to Ms. Carrington, [Vance] represented that, in order to use a $300 coupon, she had to purchase the hearing instruments that day, January 12, 1999, rather than the next day, January 13, 1999, despite the fact that Ms.

Carrington had a coupon for $300 off any programmable hearing aid that was valid until January 13, 1999.

2. In the course of making the sale to Ms. Carrington described above, [Vance] represented to her that the computer programmable hearing instruments were much better than the other type of hearing aids and that the other types were inferior and becoming obsolete so that he would not be able to get parts for them in a few years. Ms. Carrington experienced numerous problems with the hearing instruments, and when the problems could not be corrected; [Vance] suggested fitting Ms. Carrington with non-computer programmable aids which he had previously represented to her as inferior and becoming obsolete.

In making its findings of fact, the Board relied on the following direct testimony of Ms. Carrington:

Q. Ma'am, did you have occasion to purchase a hearing instrument from Mr. O.G. Vance?

A. Yes, ma'am. After he made the evaluation, he said I had lost forty-three to forty-eight percent in each ear.

Q. Did this happen on or around January 12th of 1999?

A. January the 12th, yes.

Q. Okay. Tell me how you came to visit Mr. Vance's office that day.

A. I received a brochure in the mail making these offers with those coupons. And I felt since I needed one, I would go and have the — get the evaluation.

* * *

Q. And what was the substance of your conversation with [Mr. Vance's receptionist]?

A. Well, I showed her the coupon and told her that I had come in for the evaluation.

Q. Had you worn hearing aids before, ma'am?

A. No, ma'am.

Q. So, when you told [Mr. Vance's receptionist] that you wanted an evaluation, what did she — what action did she take?

A. Mr. Vance came forward and took me on back and made the evaluation.

* * *

And I just asked him after he made the evaluation if I could wait and think about it overnight and let him know the next day since the coupon was good through the 13th. And [he] said he needed to know that day. Well . . . he said, You saw the gentleman that stuck his head in the door. And he said, I need to know while he's still here. I said, but your coupon says good through the 13th, which is tomorrow. So that's — and in order to save the $300, I went ahead and had the impression made and made the down payment.

Mr. Vance claimed that he was offering Ms. Carrington an additional $300.00 by paying her sales tax if she agreed to purchase a hearing instrument on January 12th instead of January 13th. With regard to that claim, Ms. Carrington testified as follows:

Q. Ms. Carrington, did Mr. Vance explain to you why you could only get the sales tax discount on January 12th and not on January 13th?

A. No, he didn't.

Based upon the testimony of Ms. Carrington, we conclude that there was substantial evidence to support the Board's findings of fact that Mr. Vance, in making a sale to Ms. Carrington, represented that she had to purchase a hearing instrument on January 12th to receive the discount from the coupon that was valid until January 13th.

We now turn to an examination of the evidence in support of the Board's finding of fact relating to the greater reliability of programmable hearing instruments, the limited availability of repair parts for older instruments, and the evidence that Ms. Carrington experienced difficulty with her new hearing aids.

We do not look to see if the evidence would support any other finding, but only whether there is substantial evidence under the Administrative Procedure Act, Ark. Code Ann. § 25-15-201 *et*

seq., to support the board's finding. *Ark. Bd. of Exam'rs in Counseling v. Carlson*, 334 Ark. 614, 976 S.W.2d 934 (1998). We recognize that administrative agencies are more capable through specialization, insight through experience, and more flexible procedures than courts to determine and analyze legal issues affecting their agencies. *Ford Motor Co.*, *supra*. Furthermore, it is the prerogative of an agency to believe or disbelieve any witness and to decide what weight to give the evidence. *McQuay v. Ark. State Bd. of Architects*, 337 Ark. 339, 989 S.W.2d 466 (1999).

The Board heard testimony from Ms. Carrington about what transpired when she received her hearing instruments on February 5th. She stated that soon after she left Mr. Vance's office, she began feeling a pressure in her ear and that she had to return to Mr. Vance's office because of the pain the hearing instrument caused. She testified that the instruments were making a static popping sound. When Ms. Carrington returned to Mr. Vance's office, the receptionist trimmed the contours of the instruments slightly. Ms. Carrington testified that she continued to hear interference with the instrument and that the discomfort continued as well. Furthermore, when Ms. Carrington met with Mr. Vance on March 18, 1999, he told her that she should not switch to analog hearing aids because she would be displeased with those instruments and that they would not be produced much longer. Ms. Carrington testified that she continued to experience problems with her instruments, and after three trips to Mr. Vance's office within one week, she went to the South Arkansas Ear, Nose, and Throat Clinic on August 16, 1999. The doctor who examined her wrote a letter stating that the hearing instruments were causing three ulcers in her left ear and wrote two prescriptions. Upon review of the evidence presented to the Board, we cannot say that there was insufficient evidence upon which the Board could base its findings of fact. We conclude that the Board's findings of fact on this question are supported by substantial evidence.

We turn to the challenges based upon the constitutionality of the term, "unethical conduct," in Ark. Code Ann. § 17-84-101 (Supp. 1999) and the standards for disciplinary proceedings and sanctions under Ark. Code Ann. § 17-84-308 (Supp. 1999). First, Mr. Vance challenges the statutory use of "unethical conduct" as being void for vagueness by failing to give a reasonable person of ordinary intelligence notice as to what actions are prohibited. Secondly, he challenges Ark. Code Ann. § 17-84-308 as a due-

process violation for failing to give any guidance in the execution of discretionary powers delegated to the Board.

We review issues of statutory interpretation *de novo*, as it is for this court to determine statutory meaning. *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001). A statute is presumed to be constitutional and we will resolve any doubts about the statute in favor of constitutionality. *Night Clubs, Inc. v. Fort Smith Planning Comm'n*, 336 Ark. 130, 984 S.W.2d 418 (1999). When interpreting statutes, we will construe all statutes relevant to the subject matter and derive the meaning of an act from a holistic reading. *Doe v. Baum*, 348 Ark. 259, 72 S.W.3d 476 (2000); *see also Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558 (2003). When possible, we will construe a statute with a limiting interpretation to preserve the constitutionality of the statute. *See Hamilton v. Hamilton*, 317 Ark. 572, 879 S.W.2d 416 (1996).

When analyzing statutes for constitutionality, we presume the constitutionality of the statute and it is the burden of the party challenging the statute to show unconstitutionality. *Night Clubs, Inc., supra.* If we can construe a statute as constitutional, we will do so provided that such a construction does not contravene the intent of the legislature. *Cockrell v. Union Planters Bank*, 359 Ark. 8, 194 S.W.3d 178 (2004). A statute is void for vagueness under the due-process clause when it does not provide the person of ordinary intelligence a fair notice of what is prohibited under the statute when measured by common understanding or practice. *Night Clubs, Inc., supra.* Furthermore, when a statute merely regulates business activity, it will be given greater leeway in a constitutional analysis than one that affects a fundamental right. *Craft v. City of Fort Smith*, 335 Ark. 417, 984 S.W.2d 22 (1998).

Turning to the first constitutional challenge, Mr. Vance claims that the governing statutes are void for vagueness. Specifically, he alleges that "unethical conduct" is a phrase so vague that a person of ordinary intelligence would not have fair notice that action contemplated was against the statute. We disagree. Unethical conduct is defined in Ark. Code Ann. § 17-84-101(8) as:

> (8) "Unethical conduct" includes, but is not limited to:
>
> (A) Obtaining any fee or making any sale by fraud or misrepresentation;
>
> (B) Employing directly or indirectly any un-licensed person to perform any work covered by this chapter;

(C) Using or causing or promoting the use of any advertising matter, promotional literature, testimonial, guarantee, warranty, label, brand, insignia, or any other representation, however made, which is misleading or untruthful;

(D) Advertising a particular model, type, or kind of hearing instrument for sale when prospective purchasers responding to the advertisement can not purchase or are dissuaded from purchasing the advertised model, type, or kind if the purpose of the advertisement is to obtain prospects for the sale of a model, type, or kind other than advertised.

(E) Falsely representing that the services or advice of a person licensed to practice medicine will be used or made available in the selection, fitting, adjustment, maintenance or repair of hearing instruments or using words "doctor," "audiologist," or "clinic" or like word, abbreviations, or symbols which suggest the medical profession when such use is not accurate;

(F) Permitting another to use holder's license or internship or certificate;

(G) In any manner, making false representations concerning a competitor or his products, business methods, selling prices, value, credit terms, policies, services, reliability, ability to perform contracts, credit standing, integrity, or morals;

(H) In any manner, using, imitating, or simulating the trademark, trade name, corporate name, brand, model name, or number or label of any competitor, manufacturer, or product when it implies or represents a relationship that does not exist;

(I) Obtaining information concerning the business of a competitor by bribery of any employee or agent of the competitor, by the impersonation of one in authority, or by any other unfair or deceptive means; and

(J) Directly or indirectly giving or offering to give anything of value to any person who advises others in a professional

> capacity as an inducement to influence others to purchase products sold by a hearing instrument dispenser or to refrain from dealing with a competitor.

Ark. Code Ann. § 17-84-101(8).

These provisions make it clear that there is ample guidance for the reasonable person in determining whether a course of conduct is ethical or unethical under the governing statutes. We have held that a statute is not required to be precise to give notice as to what conduct is prohibited. *Davis v. Smith*, 266 Ark. 112, 583 S.W.2d 37 (1979) (citing *Jordan v. DeGeorge*, 341 U.S. 223 (1951)). We have previously stated that terms such as "unprofessional conduct" and "unethical conduct" are susceptible to a plain language understanding by a reasonable person. *Buhr v. Bd. of Chiropractic Examn'rs*, 261 Ark. 319, 547 S.W.2d 762 (1977). We have also noted that the term, "unprofessional conduct," is not void for vagueness because it fails to proscribe specific types of conduct. *See, e.g. Cambiano v. Neal*, 352 Ark. 691, 35 S.W.3d 792 (2000) Furthermore, this is a statute that regulates business conduct and not a fundamental right and, as such, is held to a more forgiving standard in constitutional challenges. *Craft, supra.*

Although Mr. Vance argues that the results of the Board's determination will impact more than just his professional life, he fails to cite any authority for holding a statute primarily concerned with regulating business activities as involving fundamental rights. We will not consider issues unsupported by citation to authority or convincing arguments. *Spears v. Spears*, 339 Ark. 162, 3 S.W.3d 691 (1999). Mr. Vance fails to offer any authority for his proposition that the statute regulates a fundamental right. Accordingly, we will not address the issue of whether a business activity or a fundamental right is being regulated. As a statute that regulates business activity, Ark. Code Ann. § 17-84-101 is given greater leeway in a constitutional challenge for vagueness. When coupled with our previous holdings that terms such as "unethical conduct" and "unprofessional conduct" are susceptible to a plain understanding by the reasonable person, and appellant's challenge fails. Thus, we conclude that Ark. Code Ann. § 17-84-101 is constitutional, giving ample guidance to the reasonable hearing instrument dispenser.

Appellant also challenges Ark. Code Ann. § 17-84-308 as a violation of due-process rights by granting unfettered and unregulated discretion to the Board in its disciplinary proceedings. This constitutional challenge is moot. Mootness occurs when a judicial decision would be of no practical effect on the legal controversy. *Eldridge v. Abramson*, 356 Ark. 358, 149 S.W.3d 882 (2004). In this case, while the Board did find Vance in violation of the prohibition against unethical conduct and such a finding was a punishment for the offense found, the Board chose not to impose a monetary sanction, suspend Vance's license, or revoke Vance's license. Vance's argument that the Board had been given unconstitutional discretion need not be reached since the Board did not impose one of the penalties that Vance claimed was subject to an unconstitutional grant of discretion. We note that the statute has since been amended by the legislature to provide a specific cap of $2,000.00 on any civil penalties assessed. The challenge to the breadth of discretion found in the earlier statute is moot.

We conclude that the Board's decision is supported by substantial evidence. Additionally, we conclude that the term, "unethical conduct," in Arkansas Code Annotated § 17-84-101 is not void for vagueness. Furthermore, because the Board failed to impose any monetary sanctions or to suspend or revoke Vance's license we find no merit in appellant's challenge to the level of discretion allowed in imposition of sanctions.

Circuit court reversed; Board affirmed.

Beverly MAXWELL *v.* STATE of Arkansas

CR 03-1220 197 S.W.3d 442

Supreme Court of Arkansas
Opinion delivered November 4, 2004

The Lisk Firm, by: *Lynn D. Lisk*, for appellant.

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

RAY THORNTON, Justice. Appellant, Beverly Maxwell, was convicted of attempting to obtain prescription drugs by fraud and sentenced to sixty months' probation. Appellant's conviction stems from an incident that occurred on February 26, 2002. On that day, the Harvest Foods pharmacy received a call from "Sylvia," an individual claiming to be a nurse from Dr. Patrick Osam's office. "Sylvia" called in a prescription for generic Darvocet

and Phenergan for appellant's daughter, Lashawna Maxwell. The pharmacist, Leo Kordsmeier, had previously received call-in prescriptions for Lashawna from "Sylvia," but they were normally received after hours. Appellant usually picked up the prescriptions.

In an effort to verify the prescriptions, Mr. Kordsmeier called Dr. Osam's office. Dr. Osam's office informed Mr. Kordsmeier that "Sylvia" was not employed by the office, and that they had not called in a prescription for Lashawna. In fact, according to Dr. Osam, on February 26, 2002, he was in Florida, and according to his records neither Lashawna Maxwell nor Beverly Maxwell were his patients at that time. After failing to validate the prescriptions, the police were notified. When appellant arrived at the pharmacy and requested a prescription for "Maxwell," she was arrested.

On May 17, 2002, the State filed a criminal information, charging appellant with criminal attempt to obtain drugs by fraud. In the information, the State also alleged that appellant had previously been convicted of four or more felonies.

On February 11, 2003, a bench trial was held in the Pulaski County Circuit Court. At the end of the State's case-in-chief, appellant's attorney moved for a directed verdict. The trial court denied appellant's motion. The motion was not renewed at the close of the evidence. After considering the evidence, the trial court concluded that appellant was guilty. On May 15, 2003, appellant was sentenced to sixty months probation. On May 22, 2003, the judgment and commitment order was filed.

On June 6, 2003, after retaining new counsel, appellant filed a motion seeking a new trial. In her motion, appellant argued that she deserved a new trial because her trial counsel was ineffective. Appellant argued that her trial counsel was ineffective because she failed to obtain complete discovery prior to trial and because she permitted appellant's son to testify at trial against appellant's wishes. No action was taken on appellant's motion, and after thirty days, appellant's motion was deemed denied.

On August 5, 2003, appellant filed her notice of appeal. Appellant raises two points for our consideration, and we affirm on both points.

In her second point on appeal, appellant argues that the evidence was insufficient to support her conviction. Although appellant raises this issue as her final point on appeal, double-

jeopardy considerations require us to consider a challenge to the sufficiency of the evidence before considering the other points that are raised. *Pratt v. State*, 359 Ark. 16, 194 S.W.3d 183 (2004).

Before considering the merits of appellant's challenge to the sufficiency of the evidence, we must first determine whether the issue was properly preserved for appellate review. A criminal defendant challenges the sufficiency of the evidence by raising a motion to dismiss or a motion requesting a directed verdict. Rule 33.1 of the Arkansas Rules of Criminal Procedure explains the procedure a criminal defendant must follow when making a proper motion for dismissal or directed verdict. The Rule in relevant part provides:

> (b) In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. The motion for dismissal shall state the specific grounds therefor. If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.
>
> (c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment.

Id.

Rule 33.1 is strictly construed. *Pratt, supra.* In accordance with this rule, we have held that to preserve a challenge to the sufficiency of the evidence in a bench trial a criminal defendant must make a motion for dismissal at the close of the evidence. *See McClina v. State*, 354 Ark. 384, 123 S.W.3d 883 (2003).

Mindful of the foregoing principles, we must now consider whether the motion made by appellant's attorney preserved for appeal the issue of the sufficiency of the evidence. At the close of the State's case-in-chief, appellant's attorney argued that the State had failed to meet its burden of proof and requested that the trial court dismiss the charge against appellant. The trial court denied appellant's motion, and appellant proceeded to present her case-in-chief. At the close of her case, the following colloquy occurred:

> Ms. Mosby [counsel for appellant]: We rest, your honor.
>
> Trial court: Anything further from the State?

MR. SMITH [prosecutor]: State has no rebuttal.

TRIAL COURT: Okay. I'm going to find the defendant guilty.

After reviewing the facts surrounding appellant's motion for dismissal, and the foregoing colloquy, we conclude that appellant failed to comply with the requirements of Rule 33.1 because she failed to make a renewed motion for dismissal at the close of the evidence. Because appellant failed to comply with Rule 33.1, appellant's sufficiency argument is not preserved for appeal.

Appellant next argues that she is entitled to a new trial because her trial attorney was ineffective. Appellant challenged the effectiveness of her attorney in a motion requesting a new trial. She argued that she was entitled to a new trial because her attorney failed to obtain and introduce certain evidence and because her attorney permitted her son to testify at trial against appellant's wishes. A hearing was not held to consider appellant's motion and an order was not entered granting or denying appellant's motion. Thus, pursuant to Rule 33.3, appellant's motion was deemed denied after thirty days.[1] In her notice of appeal, appellant stated that she was appealing from her conviction, sentence, and the denial of her motion requesting a new trial.

We have previously reviewed challenges to the effectiveness of a trial attorney in a direct appeal when such claims were raised in a posttrial motion requesting a new trial and a hearing to consider the issue was held. *See Missildine v. State*, 314 Ark. 500, 863 S.W.2d 813 (1993). Specifically, we have held that in the interest of judicial economy, we will review claims of ineffectiveness of counsel, provided that the allegation is raised before the

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[1] Rule 33.3 in relevant part provides:

(a) A person convicted of either a felony or misdemeanor may file a motion for new trial or any other application for relief.

* * *

(c) If the trial court neither grants nor denies a posttrial motion or application for relief within thirty (30) days after the date the motion or application is filed, the motion or application shall be deemed denied as of the 30th day.

Id.

trial court and all the facts and circumstances surrounding the claim have been fully developed. *Ratchford v. State*, 357 Ark. 27, 159 S.W.3d 304 (2004). The facts surrounding the claim must be fully developed, either during the trial or during hearings conducted by the trial court. *Id.* We have explained that the reason for this rule is that an evidentiary hearing and finding as to the competency of appellant's counsel by the trial court better equips the appellate court on review to examine in detail the sufficiency of the representation. *Id.* We have also noted that the trial court is in a better position to assess the quality of legal representation than we are on appeal. *Id.*

We have also explained that a "deemed denied" ruling on a posttrial motion for new trial is an insufficient order from which to raise on direct appeal a claim of ineffectiveness because such a ruling necessarily precludes any consideration by the trial court of the relevant facts pertaining to the claim. *Dodson v. State*, 326 Ark. 637, 934 S.W.2d 198 (1996); *see also Chavis v. State*, 328 Ark. 251, 942 S.W.2d 863 (1997).

In the case now before us, appellant has failed to present us with a sufficient order from which to consider her allegations of trial counsel's ineffectiveness. Specifically, appellant's ineffective assistance of counsel claims were not raised or developed during the trial. Additionally, the facts surrounding appellant's claims were not developed after the trial because a hearing was not held on appellant's posttrial motion.[2] Finally, because appellant's motion was deemed denied, there is no order in which the trial court evaluated counsel's effectiveness. Because we have been provided with nothing other than the bare allega-

[2] In the case now before us, appellant does not argue that the trial court erred when it failed to hold a hearing on her posttrial motion. However, with no citation to authority, appellant suggests that we could remand her case for an evidentiary hearing on her ineffective assistance of counsel claims. We do not consider claims that are not supported by citation to authority. *See Johnson v. State*, 358 Ark. 460, 193 S.W.3d 260 (2004). Nonetheless, to the extent that appellant is arguing that she is entitled to a hearing pursuant to Rule 33.3, we note that in previous cases we have concluded that there was no error committed when a trial court refused to hold a requested hearing on a posttrial motion. *See Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996) (holding that although Rule 36.22 [an earlier version of Rule 33.3], states that a hearing is required when it is requested, the rule provides for no sanction when a hearing is not afforded a party).

tions set out in appellant's motion requesting a new trial, we are unable to consider the merits of appellant's ineffective assistance of counsel claims.

Affirmed.

James Bradley CLARK *v.*
TRANSCONTINENTAL INSURANCE COMPANY,
Entergy Arkansas, Inc., Clements + Poellot/Associates, PLLC,
and Silverwood Products

04-63 197 S.W.3d 449

Supreme Court of Arkansas
Opinion delivered November 4, 2004

[Rehearing denied December 16, 2004.*]

* THORNTON, J., would grant rehearing.

Wilson, Engstrom, Corum & Coulter, by: *Nate Coulter*, and *Schilchter, Bogard & Denton*, by: *Richard J. Zalasky*, for appellant.

Friday, Eldredge & Clark, by: *Scott J. Lancaster*, for appellee Entergy Arkansas.

Wright, Lindsey & Jennings LLP, by: *Alston Jennings, Jr.*, for appellee Clements + Poellot/Assocs., PLLC.

JIM HANNAH, Justice. Appellant James Clark, an employee of CBM Construction, suffered serious injuries on January 12, 2000, during the construction of a building addition for Silverwood Products, Inc. (Silverwood), in Little Rock. Clark filed a negligence suit against appellees Entergy Arkansas, Inc., and Clements + Poellot/Associates, PLLC (Clements). The Pulaski County Circuit Court, Second Division, granted summary judgment in favor of the appellees. Clark appeals, arguing that the circuit court erred in

granting summary judgment in favor of Entergy because material issues of fact exist as to whether Entergy received notice that construction work would be performed within ten feet of its open supply line, whether Entergy breached a duty owed to Clark, and whether there was sufficient evidence submitted by Clark from which a reasonable fact finder could determine that Entergy's conduct proximately caused damages to Clark. He also argues that the circuit court erred in granting summary judgment in favor of Clements because a material issue of fact exists as to whether Clements breached its duty of care to provide reasonably safe plans for construction. Because we agree with Clark's contentions that material issues of fact exist in this case, we reverse and remand this case to the circuit court.

Facts

While working on the east elevation of the building, Clark was holding a twenty-foot length of structural steel approximately nineteen feet off the ground when he was shocked by an 8,000 volt power line that was later determined to be eight feet from him. Clark was moving steel into position when it either touched or came very close to an energized electrical power line.

In its contract with CBM, Silverwood provided an allowance of $13,187 for CBM to obtain "architectural-engineering drawings." CBM entered into an oral contract with Clements to obtain necessary construction plans. Clements prepared and sealed the construction plans that were furnished to the City of Little Rock (the City) and CBM. Clark contends that while the plan for the east elevation of the building addition showed a portion of the overhead power line, the distance was not scaled out, and there were no notations on the plan to advise CBM of the distance between the proposed east elevation and the power line. He also states that the plan did not advise CBM that any steps needed to be taken to insulate, isolate, or de-energize the line prior to construction.

The City sent a "route slip" to Entergy some time in May 1999, notifying Entergy of the proposed construction. The route slip was sent to Entergy before the building permit was issued for the project so Entergy could determine whether the proposed construction would have any impact on its electrical lines. Rex Lyons, an employee of the City's Building Inspector's Office, stated in an affidavit that at the time the route slip was forwarded to Entergy, the City had in its possession the plans or drawings for the proposed construction that were available for review. Lyons

further stated that the City does not send copies of the plans to the utilities with the route slip, nor does it send the utilities any other information regarding the project.

Clark brought a negligence action against Entergy and Clements. His claim against Entergy alleged that it negligently failed to insulate, isolate, or de-energize the overhead power line. His claim against Clements, as pertinent to this appeal, alleged that Clements negligently located the addition within seven feet of the power line, failed to notify Entergy of the project, and failed to specify that the power line be insulated, isolated, or de-energized before erection of the structural steel.

During discovery, Entergy, through Gary Bettis, its manager of area design, stated that the proximity of the power line to the building addition presented a safety hazard to workmen. He further stated that if Entergy had been notified that plans were available for review prior to construction, it would have taken steps to eliminate the safety hazard by de-energizing or isolating the line.

Chris Dimon, an architect for Clements, stated that he drew the plans for the Silverwood building addition. Dimon stated that he did not consider the location of the overhead power line to be a safety hazard. He further stated that he never contacted Entergy regarding the proposed construction project and that he did not know whether Entergy needed to be notified of the proposed construction given the location of the line.

Vince Poellot, a partner in the Clements firm, stated that at the time the firm sealed the plan, he knew the proximity of the open supply line to the eastward expansion. He also stated that he knew that a portion of the eastward expansion would be approximately nineteen feet high, but that he did not know the height of the overhead line off the ground. Poellot further stated that he submitted the plans to the City to obtain assistance in the review process, and that he never personally advised Silverwood not to include the eastward expansion of this warehouse due to the proximity of the open supply line.

Edward Prochaska, a registered professional engineer, stated that when a public utility is notified of a construction project and that plans or drawings are available for review, the utility is obligated to review the plans or drawings because a simple designation such as the designation identified in the route slip for the project in this case does not provide sufficient information to the

utility for it to determine whether the proposed construction presents safety or access issues that the utility needs to address. He stated that a review by Entergy of the plans showing the Silverwood addition would have revealed the safety hazard presented by the proximity of the overhead open electrical supply line. Finally, Prochaska stated that based on a review of the facts in this case, it was his opinion that Entergy failed to exercise ordinary or reasonable care and was negligent under the circumstances when it failed to review the plans or drawings related to the project after receiving notification from the City's Building Inspector's Office.

Gary McKibben, a licensed professional architect, stated that based on the facts in this case, Clements failed to apply its knowledge and use the skill and care ordinarily used by a reasonably well-qualified architect because Clements: (1) designed the east elevation of the building addition to be located within seven feet of an open or uninsulated electrical supply line without specifying the need to comply with §§ 11-5-301 *et seq.* of the Arkansas Code and without specifying that any steps be taken during construction to eliminate the extreme, unreasonable safety hazard created by its design; (2) failed to identify on the plans or drawings, or specify in construction notes, a construction limit defining the construction zone to eliminate the electrical hazard presented by the open supply line located within seven feet of the east elevation; (3) located the east elevation of the building addition within an implied utility easement for the overhead electrical supply line without obtaining approval or consent of Entergy; (4) failed to request that Entergy survey the site to determine the suitability of the proposed construction from a safety standpoint and failed to determine what steps needed to be taken to eliminate the electrical hazard created by the proposed design; and (5) failed to note on the plans or drawings or in construction notes that the overhead line was seven feet from part of the east elevation of the building addition, necessitating contact with Entergy prior to construction of the addition.

Brian Clark, foreman for the Silverwood addition project, stated that before he and his crew began working on the east elevation, he noticed the overhead electrical line that ran along the east side of the property. He stated that because he was aware of the Arkansas law that required Entergy to be contacted if construction work would be done within ten feet of an electrical power line, he asked Ron Boyeski, Vice President of CBM, on three different occasions prior to January 12, whether anything needed to be done

with the overhead electrical line. Brian Clark stated that three times Boyeski told him: "We had it checked out and it's safe to go" and "Do the job." Brian Clark stated that since Boyeski told him to proceed and since the construction documents did not instruct otherwise or state the distance between the east elevation and the overhead electrical line, he did not contact Entergy before beginning the work on the east elevation.

Summary Judgment

Summary judgment is to be granted by the circuit court only when it is clear that there are no genuine issues of material fact to be litigated. *U.S. Fid. & Guar. Co. v. Cont'l Cas. Co.*, 353 Ark. 834, 120 S.W.3d 556 (2003). 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 fact. *Id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

Entergy

An electric company has a duty to inspect and maintain its power lines in proper and safe working order. *Stacks v. Arkansas Power & Light Co.*, 299 Ark. 136, 771 S.W.2d 754 (1989). The threshold question is whether Entergy owed a duty to Clark. *See id.* Whether a duty is owed between the parties is a question of law. *Id.; Keck v. Am. Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983). "We have long recognized the rule that the very nature of the business of an electric company requires it to use a high degree of care in the erection, maintenance, operation, and inspection of equipment which is used in the transmission of its electric power, so as to prevent injury to one likely to come in contact with the power line." *Woodruff Elec. Coop. v. Daniel*, 251 Ark. 468, 473, 472 S.W.2d 919, 922 (1971). Further, we have stated:

> Different standards or degrees of care have been stated in several opinions of this court. These differing degrees of duty are recon-

ciled in *Arkansas Power & Light Co. v. Lum*, 222 Ark. 678, 262 S.W.2d 920 (1954), where the court quoted from *Morgan v. Cockrell*, 173 Ark. 910, 294 S.W. 44 (1927):

> It will be seen from these decisions that it has long been the settled law in this State that electric companies, in the stringing and maintaining of their wires in the streets of the cities to give service to the public, are only bound to the exercise of ordinary and reasonable care for the protection of all who have right to the use of the streets, such reasonable and ordinary care varying with the circumstances of each case, having in view the dangers to be avoided and the likelihood of injury therefrom, which may require a high or the highest degree of care under the particular circumstances.

Prior decisions involving actions against electric companies in Arkansas are fairly consistent in holding that it is the duty of those utilities to exercise ordinary and reasonable care in the erection and maintenance of power lines. It is at all times the duty of a company supplying electricity to use reasonable care depending upon the existing circumstances.

Stacks, 299 Ark. at 141-42, 771 S.W.2d at 757.

It is recognized generally as well as by the courts that electric utility companies, such as appellant, must meet the public demand for a ready and adequate supply of power. In doing so they are not insurers against accident or injury, and are not held liable for such as can not be reasonably foreseen. The duty imposed in such instances is well stated in Vol. 29 C.J.S., pages 573-4, under the general heading of electricity:

> "Electrical companies are not insurers of the safety of the public nor of those whose occupation is likely to bring them into dangerous contact with their appliances, and hence are not liable for injuries unless guilty of some wrongful act or omission. The failure of a power company to anticipate and guard against events which may reasonably be expected to happen is negligence, but a failure to anticipate events occurring only under unusual circumstances is not negligence. There can be no recovery against an electric company in the absence of a breach of some duty owing to the injured person."

Arkansas Power & Light v. Lum, 222 Ark. 678, 685-86, 262 S.W.2d 920, 924 (1953).

Entergy contends that it owed no duty to Clark because it was not given sufficient notice of the proposed construction. Further, Entergy contends that it was not required to review the construction plans because it did not receive notice pursuant to Ark. Code Ann. § 11-5-307 (Repl. 1996), which provides:

> (a)(1) When any person, firm, or corporation desires to temporarily carry on any function, activity, work, or operation in closer proximity to any energized overhead electrical line or conductor than permitted by this subchapter, the person or persons responsible for the work to be done shall promptly notify the Director of the Department of Labor and the operator or owner of the electrical lines in writing of the work to be performed and make appropriate arrangements with the operator of the electrical lines before proceeding with any work which would impair the clearances required by this subchapter.
>
> (2) The written notice shall be given to the owner or operator of the electrical lines by submitting notification to the manager of the nearest local office of the operator or owner of the electrical lines with a copy forwarded to the director.
>
> (b)(1) The work shall be performed only after satisfactory mutual arrangements have been negotiated between the owner and operator of the electrical lines and the person or persons responsible for the work to be done.
>
> (2) The owner or operator of the electrical lines shall commence work on the mutual arrangements as provided herein within three (3) working days of the mutual arrangement. Once initiated, the clearance work will continue without unreasonable interruption to complete.
>
> * * *

Entergy contends that our holding in *Lum, supra,* is controlling. In that case, an employee of the State Highway Department was electrocuted while working with a crew in replacing a bridge. While the dragline crew was attempting to place a heavy tile in position, the cable on the dragline made contact with a high voltage wire belonging to a public utility. The court stated the main allegation of negligence as follows:

> Did appellant know, or by the exercise of ordinary care and foresight should it have known that its wires were so located as to

> constitute a dangerous situation, and should it have anticipated that the bridge would at some time have to be repaired, and by the use of equipment such as was used here, and further that in the process of such a repair operation injury was likely to result because of contact with the wire in the manner it happened here?

Lum, 222 Ark. at 682, 262 S.W.2d at 922.

This court reversed the jury's finding of negligence because we determined that the electric company's failure to isolate the wire did not constitute negligence where the wire was sufficiently isolated. Entergy contends that *Lum* is factually analogous to the present case because both cases involve workers injured after coming into contact with an energized power line where the power company had not been notified prior to the work being done. We disagree. Entergy's reliance on *Lum* is misplaced because in the present case, Entergy was notified prior to the work being done.

Clark acknowledges that Entergy did not receive notice pursuant to § 11-5-307; however, he contends that "[t]he source and timing of notification is of no import," and that the route slip forwarded to Entergy was sufficient notice to give rise to a duty. The route slip, titled "Application for a Commercial Building Permit," noted that plans were available for review and that a response was needed by May 25, 1999. Entergy maintains that the route slip falls short of providing sufficient notice. Though we find no case directly on point, we find the *Stacks* case to be instructive.

In *Stacks*, the appellant filed a tort action against an electric company for injuries received when he came into contact with a sagging overhead power line while fishing on a pond. The former mayor of the town stated in an affidavit that he had requested the electric company to de-energize lines two or three years prior to the incident, and he stated that the electric company told him they had disconnected the power to the pump house on the pond. Two witnesses on behalf of the electric company filed affidavits in which they stated that the mayor had not requested them to de-energize the lines.

We reversed the trial court's grant of summary judgment in favor of the electric company, stating:

> The mayor's affidavit that a representative of the appellee told him the power to the pump house had been terminated created a factual

> situation on the issue of negligence and breach of duty to the appellant which required a determination by the trier of facts. The alleged statement by AP&L's representative was a sufficient allegation to present a genuine question as to whether the appellee had a duty to de-energize these lines. It will be up to the trier of facts to decide whether the occurrence was foreseeable and whether the negligence, if any, was a proximate cause of the appellant's injuries.

Stacks, 299 Ark. at 138, 771 S.W.2d at 755-56.

In the present case, Gary Bettis, Entergy's manager of area design, acknowledged that the proximity of the power line to the building addition presented a safety hazard to workmen. Further, Bettis stated that if Entergy had been notified that plans were available for review prior to construction, it would have taken steps to eliminate the safety hazard by de-energizing or isolating the line. Entergy does not dispute that it received notice that the plans were available for review prior to construction; rather, Entergy disputes Clark's contention that the notice was sufficient to give rise to a duty on Entergy's part. The issue of whether the notice was sufficient to give rise to a duty on Entergy's part is a question of law. We believe that the notice was sufficient to create a duty on Entergy's part. It will be up to the trier of fact to determine whether Entergy breached a duty to Clark, whether the occurrence was foreseeable and whether the negligence, if any, was a proximate cause of Clark's injuries.

Clements

Clark contends that Clements is liable for his injuries due to the architecture firm's negligence in design or failure to inform the contractor of construction risks in the plans or drawings. Specifically, he states that since the design and location of the east elevation created an unreasonable safety hazard for construction workers due to the proximity of the 8,000 volt line, Clements was obligated to take some action to protect him. Clark contends that Clements did not exercise reasonable care in preparing the drawings because Clements failed to delineate the proximity of the power line to the structure when the proximity was not readily determinable on the construction site due to the height of the 8,000 volt line.

Clements contends that it discharged its duty to exercise reasonable care in the preparation of the plans by producing accurate plans which allowed CBM to obtain the necessary permits

and construct the building. Further, Clements states that it had neither the duty nor the ability to (1) supervise the construction, (2) advise Entergy to de-energize the line at any particular time, (3) specify that any particular safety measures be followed, or (4) advise CBM of its own duty under the law.

Architects assume professional responsibility when sealing construction plans or drawings. *Arkansas Architectural Act, Rules & Regulations*, Chapter One, Section VII (D)(e)(4).

> In contracting for the provision of architectural services, an architect implies that he or she possesses and will exercise and apply skill, ability, judgment, and taste reasonably and without neglect. Further, one undertaking to furnish specifications and plans for a contractor to follow on a construction job implicitly warrants their sufficiency for the purpose in view. The skill and diligence which the architect is bound to exercise are that ordinarily required of architects, and the efficiency of an architect in the preparation of plans and specifications is tested by the rule of ordinary and reasonable skill usually exercised by one in that profession. . . .
>
> The duty of the architect also depends on the particular agreement entered into with the employer, . . . The architect's undertaking, however, in the absence of a special agreement, does not imply or guarantee a perfect plan or satisfactory result, and the architect is liable only for failure to exercise reasonable care and skill.
>
> The degree of skill and care which may be required of an architect in the preparation of plans is a question for the jury.

5 AM. JUR. 2D *Architects* § 10 (1995).

As previously noted, McKibben, a licensed architect, stated in an affidavit that based on his review of the documents, as well as his education, training, and experience in the field of architecture, Clements failed to apply the knowledge and skill ordinarily used by a reasonably well-qualified architect. Clements states that the affidavit of a "potential expert opining about what an architect should or should not have done cannot create a duty where the law imposes none." We disagree with Clements's contention that McKibben's affidavit creates a duty where the law imposes none. An architect has the duty of exercising reasonable care in the preparation of plans. It was McKibben's opinion that Clements failed to exercise reasonable care. McKibben's opinion

does not create a duty. What McKibben's affidavit does is allege facts which, if believed by the jury, would support a verdict in favor of Clark. *See Stacks,* 299 Ark. at 138, 771 S.W.2d at 755. Clements failed to provide evidence or authority to show that architects are not responsible for accurately depicting the location of power lines on plans. He also failed to provide evidence or authority to show that architects are not responsible for providing warnings on the plans of the need to avoid the hazard produced by the power line. We hold that a material issue of fact exists as to whether Clements is liable for Clark's injuries due to the architecture firm's negligence in design or failure to inform the contractor of construction risks in the plans or drawings.

Reversed and remanded.

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

RAY THORNTON, Justice, concurring and dissenting. I concur in the majority's conclusion that the summary judgment motion in favor of Clements + Poellot/Associates, PLLC ("Clements") should be reversed on a question of material fact. However, I dissent because I believe that there was a failure of adequate notice to Entergy Arkansas, Inc. ("Entergy") as a matter of law under Ark. Code Ann. § 11-5-307 (Repl. 2002).

Clements's contention that there was no duty attached to its drafting of the designs for this building was challenged by appellant through the testimony of Gary McKibben. This testimony created a question of material fact as to whether there was a duty for Clements. I concur that this is a question that should be decided by a finder of fact.

I cannot, however, agree with the majority that there is a question of material fact as to whether Entergy received notice. As the majority opinion recites, Entergy received only a routine routing slip that noted plans involving a building serviced by Entergy had been filed with the City of Little Rock. This routing slip contained minimal information, as it was only meant to let Entergy know that there might be construction on a building served by Entergy. The proposed plans were not included with this routing slip, as the building permit had not been issued at the time it was sent. Consequently, there was no notice of proximity to the transmission lines.

Our statute contains a positive duty to inform an electrical utility of any work to be done that will bring individuals withing ten feet of overhead power lines. Ark. Code Ann. § 11-5-307(a)(1). We interpret statutes using plain and ordinary language. *Cave City Nursing Home, Inc. v. Ark. Dept. of Human Servs.*, 351 Ark. 13, 89 S.W.3d 884 (2002). The statute places a duty upon the party that will be doing work or activity within ten feet of an overhead power line to contact the electrical utility to make such arrangements as are necessary to preserve the safety of all involved. Arkansas Code Annotated § 11-5-307 plainly states that the electrical utility "*shall* be informed." *Id.* (emphasis added). This is a mandatory provision. Appellant has conceded that there was no notice pursuant to this section of the code.

The failure to meet the mandatory requirements imposed by the legislature under our statutory scheme is a question of law and not of fact. Because we have a statute on point, I do not find appellant's argument that "the source and timing of notification is of no import" persuasive. The statute clearly imposes a duty to inform the electrical utility of actions and work that would bring individuals or items in closer proximity to overhead power lines than ten feet. Appellant concedes that this did not happen and that the mandatory requirements of Ark. Code Ann. § 11-5-307 were not met. It seems clear to me that, as a matter of law, Entergy was not put on notice by the responsible party.

The majority distinguishes *Arkansas Power & Light v. Lum*, 222 Ark. 678, 262 S.W.2d 920 (1953), on the basis that Entergy received notice of the construction. In *Lum*, we held that there would be no negligence on the part of an electrical company if there was no duty owed to the injured person and that the electrical company was not under a duty to insulate wires against the unusual or extraordinary occurrences. *Id.* Specifically, when an employee of the State Highway Department was electrocuted while repairing a bridge above overhead power lines, we held that the electrical company was not liable because of a failure of any positive duty. In this case, Entergy did not receive notice in accordance with the statutory requirements, as conceded by appellant. For that reason, I believe that *Lum*, *supra* is controlling and that absent the notice required under Ark. Code Ann. § 11-5-307, the motion for summary judgment in favor of Entergy should be affirmed because there is no allegation that the power lines were unsafely energized as to their normal function.

In summary, I join the majority in reversing the grant of summary judgment in favor of Clements on an issue of disputed material fact, but I dissent with respect to reversing the summary judgment in favor of Entergy because in my opinion there was a failure of notice as a matter of law.

I am authorized to state that Justice GLAZE and Justice CORBIN join in this opinion.

David HARRIS *v.* CITY of FORT SMITH, Arkansas

04-485 197 S.W.3d 461

Supreme Court of Arkansas
Opinion delivered November 4, 2004

Hodson, Woods & Snively, LLP, by: *Michael Hodson*, for appellant.

Friday, Eldredge & Clark, by: *R. Christopher Lawson*, for appellees.

Quattlebaum, Grooms, Tull & Burrow, by: *John E. Tull, III* and *E. B. Chiles, IV*, *amicus curiae.*

JIM HANNAH, Justice. David Harris appeals a decision of the Sebastian County Circuit Court granting the City of Fort Smith's motion for summary judgment. Harris asserts that the circuit court erred in finding that one-on-one discussions conducted by telephone or in person between the City Administrator Bill Harding and individual members of the City Board of Directors did not constitute Board action that falls under the Arkansas Freedom of Information Act (FOIA).[1] By contacting individual Board members, Harding obtained the approval of the entire Board to submit a bid in an auction to purchase real property. The circuit court found that under Arkansas law, the FOIA does not apply "to a chance meeting or even a planned meeting of any two members of the city council." The circuit court also noted that although the Board approved submission of the bid, the purchase could not be and was not finalized until it was publicly discussed and approved. We hold that under the facts of this case, contact of individual Board members by the City Administrator to obtain approval of action to be taken by the Board as a whole constituted an informal Board meeting subject to the FOIA.

This case was appealed to the court of appeals, which reversed the circuit court. *Harris v. City of Fort Smith*, 86 Ark.App. 20, 158 S.W.3d 733 (2004). A petition for review was granted by this court, and our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(e).

Facts

Deputy City Administrator Ray Gosack learned that Bank One was going to sell at auction property formerly owned by the Fort Biscuit Company. Because Gosack believed that the Fort Biscuit property could be used for street construction to alleviate noise and congestion in downtown Fort Smith, he told Harding

[1] Ark. Code Ann. §§ 25-19-10—25-19-109 (Repl. 2002).

about the auction. A memorandum from Gosack to Harding noted the possibility of using part of the Fort Biscuit property to improve a downtown truck route. The memorandum also stated, "Acquiring this property through an auction creates unusual challenges for the city." Gosack then explained in his memorandum that normal procedure in seeking Board approval prior to acquisition meant that the information regarding the maximum bid the City could offer would be public information, making competitive bidding impossible.

The Fort Biscuit property was divided into tracts for purposes of the auction and was to be bid in two ways. Bids were to be taken on individual property tracts, and bids were to be taken on the property as a whole. If the bids on individual tracts added up to an amount higher than the highest bid on the entire property, the property would be sold by tracts.

Harding contacted each Board member either in person or by phone to gain approval to bid, as well as to gain approval of bid amounts. The Board approval required that the bids not exceed fifteen percent above the appraised value of the property. The City then had the property appraised. The City was successful in the April 18, 2003, auction in obtaining the tracts needed for the proposed road construction. The tracts were acquired at approximately two-thirds of the appraised value. On April 23, 2003, a "Special Meeting & Study Session" of the Board was held, and a resolution was passed approving the purchase.

Harris attended the "Special Meeting & Study Session" when the purchase of the land was approved. He then filed suit alleging that the one-on-one meetings between Harding and the Board members violated the FOIA. The circuit court found that the one-on-one meetings did not constitute a meeting subject to the FOIA, and further, that although the Board approved submission of the bid, the purchase was later publicly discussed before it was approved. The court of appeals reversed the circuit court holding that the serial conversations between Harding and the individual Board members about a matter involving a bid on the purchase of land constituted a "meeting" under the FOIA. The court of appeals remanded the case to the circuit court to enter an order that the FOIA was violated, to enter an injunction, and to award attorney's fees.

Both parties relied upon stipulated facts in their respective motions for summary judgment. According to the stipulation, Harding contacted Board members to determine "whether the

Board would approve the purchase of the land at a subsequent meeting if Mr. Harding made a successful bid at the public auction." The parties also stipulated that the contact with Board members involved city business, that no notice was given to the public of these one-on-one meetings, and that the one-on-one meetings were held to avoid publicly disclosing the amount of the City's bids.

Standard of Review

When we grant a petition for review, we consider the matter as if the appeal had been originally filed in this court. *Neill v. Nationwide Mut. Fire Ins., Co.*, 355 Ark. 474, 127 S.W.3d 484 (2003); *BPS, Inc. v. Parker,* 345 Ark. 381, 47 S.W.3d 858 (2001). A trial court may grant summary judgment 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. *Craighead Elec. Coop. Corp. v. Craighead County,* 352 Ark. 76, 98 S.W.3d 414 (2003); *Cole v. Laws*, 349 Ark. 177, 76 S.W.3d 878 (2002). Once the moving party has established a prima facie case showing 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. *Craighead Elec., supra; Adams v. Arthur,* 333 Ark. 53, 969 S.W.2d 598 (1998).

The FOIA

The FOIA is to be liberally interpreted to accomplish the purpose of promoting free access to public information. *Johninson v. Stodola*, 316 Ark. 423, 872 S.W.2d 374 (1994). Further, the FOIA is also to be liberally interpreted most favorably to the public interest of having public business performed in an open and public manner. *Laman v. McCord,* 245 Ark. 401, 404-05, 432 S.W.2d 753 (1968). "Statutes enacted for the public benefit should be interpreted most favorably to the public." *Ark. Gazette Co. v. Pickens*, 258 Ark. 69, 78, 522 S.W.2d 350, 355 (1975) (quoting *Broward County v. Doran*, 224 So.2d 693, 699 (Fla. 1969)).

Arkansas Code Annotated Section 25-19-106(a)(Repl. 2002) provides in pertinent part that "all meetings, formal or informal, special or regular, of the governing bodies of all municipalities . . . shall be public meetings." The term "public meetings" is defined in the FOIA:

> "Public meetings" means the meetings of any bureau, commission, or agency of the state, or any political subdivision of the state, including municipalities and counties, boards of education, and all other boards, bureaus, commissions, or organizations in the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds. . . .

Ark Code Ann. § 25-19-103(4) (Repl. 2002). The issue before this court is whether the one-on-one meetings between Harding and the individual Board members, by which the Board approved bidding on the property, as well as bid amounts, constituted a Board meeting subject to the FOIA. An April 5, 2002, memo from Gosack to Harding discussed the unique challenges the Board faced in acquiring the property:

> Acquisition of the Fort Biscuit property would be somewhat unusual. The property will be sold at an auction. We understand the bankruptcy trustee will take bids on each tract individually and on all tracts. The trustee will then determine which option produces the greatest amount of proceeds.
>
> Acquiring this property through an auction creates some unusual challenges for the city.
>
> - Normally, we seek formal board approval, including an offer price, before acquiring property. If we obtain formal board approval for acquisition of the Fort Biscuit property, the city won't be able to competitively bid for the property since our maximum offer would be public information.
> - If the city bids, we'll also need to be prepared to bid for the purchase of all ____ tracts. The tracts not needed for the truck route project could be sold or used for another public purpose.
> - If the city was the successful bidder on the project, the board would need to be prepared to publicly approve the acquisition shortly after the auction date. Backing out of the bid after the auction would be very difficult and unfair to the seller.

> Our purpose now is to gauge the board's interest in pursuing acquisition of the Fort Biscuit property for realignment of the truck route. Given the number of tracts involved, the board might find it useful to visit the site.
>
> If the board is interested, we'll need to have some appraisal work performed to determine how much the city should offer for the property. We would then informally review a maximum offer amount with the board. We'd want to have the board's concurrence on a maximum offer amount before participating in the auction.

The parties stipulated that the one-on-one meetings were held to conduct Board business. According to the Affidavit of Bill Harding attached as an exhibit to the City's motion for summary judgment:

> I asked each Board member if he or she was comfortable with me bidding within this range on the property. Each Board member responded positively. I had each of these conversations with the understanding that any approval for the purchase of the property could not take place until the Board formally convened for a meeting and voted to approve the purchase.

An April 16, 2002, memo from Harding to the mayor and the Board confirmed the decision of the Board:

> This Thursday morning, April 18th, the Fort Biscuit property will be auctioned off to the highest bidders. The real estate portion of the auction is due to start at 11:00 am. We were able to speak to each of you over the last several days and the unanimous response was to go forward with an attempt to purchase the property as a means to alleviate some of the major problems associated with the existing truck route.
>
> Since receiving the "go-ahead" from you we retained Calvin Moye to provide us an opinion as to the value of the real estate to be auctioned. Those values are reflected in the attachment in Tables 1 through 3.
>
> * * *
>
> As such we are asking for authority to bid up to the amount reflected in Appraisal + 15% column, (tracts 3,4,5 and 6), in Table

> 3 of the attachment. As you can see the maximum exposure to the city is $1,099,688 or $1.1 million.
>
> After you have had an opportunity to review the information I will be in contact with you to determine your position on our recommendation.

Both parties rely primarily on *Rehab Hospital Services Corp. v. Delta-Hills Health Systems Agency Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985), and *El Dorado Mayor v. El Dorado Broad., Co.*, 260 Ark. 821, 544 S.W.2d 206 (1976). In *Rehab Hospital,* the plaintiff sought to void a decision of the Executive Committee of Delta Hills, the regional health planning agency, to file a motion for reconsideration of the decision of the Arkansas State Planning Agency to grant a certificate of need to construct a hospital in Jonesboro. This court stated that a telephone poll of the Executive Committee violated the FOIA where there was no emergency and no emergency notice to the press. However, this court also stated that "the most significant issue in this case is what remedies, if any, are appropriate. . . ." *Rehab Hospital,* 285 Ark. at 400, 687 S.W.2d at 842. The plaintiff in *Rehab Hospital* sought "to use the Freedom of Information Act solely to mandate the result of the meeting." *Id.* This court held "that some actions taken in violation of the requirements of the act may be voidable. It will be necessary for us to develop this law on invalidation on a case-by-case basis." *Rehab Hospital,* 285 Ark. at 401, 687 S.W.2d at 843.

In *El Dorado, supra,* the issue was whether a meeting between the mayor and four of the city's eight aldermen constituted a meeting subject to the FOIA. This court stated:

> The Freedom of Information Act applies alike to formal and informal meetings and since we are required to give the Act a liberal interpretation, we cannot agree with appellants that it applies only to meetings of officially designated committees. We can think of no reason for the Act specifying its applicability to informal meetings of governmental bodies unless it was intended to cover informal but unofficial group meetings for the discussion of governmental business as distinguished from those contacts by the individual members that occur in the daily lives of every public official. Any other construction would obliterate the word "informal" as applied to meetings and make it simpler to evade the Act than to comply with it.

El Dorado, 260 Ark. at 823-24, 544 S.W.2d at 207. The court further stated:

> Furthermore, we do not interpret the trial court's judgment as applying the Freedom of Information Act to a chance meeting or even a planned meeting of any two members of the city council. By its very terms the trial court's order applies only to those group meetings such as the facts here showed — *i.e.* any group meeting called by the mayor or any member of the city council at which members of the city council, less in number than a quorum meet for the purpose of discussing or taking any action on any matter on which foreseeable action will be taken by the city council.

El Dorado, 260 Ark. at 824, 544 S.W.2d at 208.

Meeting under the FOIA

The issue in the present case is whether the one-on-one meetings constitute an informal meeting of the Board subject to the FOIA. In *Arkansas Gazette, supra*, a committee made up of University of Arkansas board members met with the University President and others to discuss allowing possession of alcohol in campus housing. The meeting was closed to the public, and the press was asked to leave. The committee then met and later conveyed information to the board that was used by the board to make a decision. This court in *Pickens* stated:

> Of course, pertinent to our discussion in the instant litigation is the question, "Did the decision reached by the committee affect proposed rules for the student body?" To ask the question is but to answer it, for the committee made its recommendations to the board on the basis of its own investigation, and the board adopted that recommendation with but little discussion. When a committee of a board meets for the transaction of business — this is a public meeting, and subject to the provisions of the Freedom of Information Act.

Pickens, 258 Ark. at 76-7, 522 S.W.2d at 354.

Harris argues that by polling the entire Board, an informal meeting of the Board was held. On that basis, Harris argues there is no need to consider whether the FOIA applies to a meeting of two board members. Harris argues that in the end what is involved is a knowing deception of the public to accomplish the purchase. He also argues that even though the public was able to attend the April 23, 2003, meeting, the minds of the Board members were already made up, and refusing to approve the purchase would have been difficult.

Under the particular facts of the matter before us, we conclude that an informal meeting subject to the FOIA was held by way of the one-on-one meetings. The purpose of the one-on-one meetings was to obtain a decision of the Board as a whole on the purchase of the Fort Biscuit property. Counsel for the City at oral argument acknowledged that the issue in this case did not involve a meeting of two as discussed in *El Dorado, supra,* but rather involved conversations that took place with all seven Board members. The facts of this case are more analogous to *Rehab Hospital, supra,* where this court found that polling the Executive Committee to determine the Committee's decision was a meeting that was subject to the FOIA.

The use of Harding as an intermediary between the Board members did not alter the actual character of the result of Harding's work, which was a decision of the Board. The FOIA may not be circumvented by delegation of duties to others. *See, e.g., City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990). We note that the Board in this case had a laudable purpose in acquiring the Fort Biscuit property by confidential bid. The property was acquired for improving traffic conditions in the downtown area, and was acquired at a price that was favorable to the taxpayers. However, the FOIA as presently drafted will not permit approval of a confidential bid by the method used by the Board in this case. Whatever process might be needed to obtain public entity approval of the submission of confidential bids, and approval of the amounts of such bids, has not been exempted under the FOIA as currently drafted. Whether the process required to approve and submit confidential bids should be exempted from the FOIA is a public policy decision that must be made by the General Assembly and not by this court. *Rehab Hospital, supra*, was decided in 1985, and *El Dorado, supra*, was decided in 1976. The legislature could have acted in the intervening years to alter the FOIA, but has not done so to date. We must await legislative action before we can hold differently than in the present case. *See, e.g., Burkett v. PPG Indus., Inc.*, 294 Ark. 50, 740 S.W.2d 621 (1987).

We also note that Harris asks this court to reverse the denial of his motion for summary judgment. The denial of a motion for summary judgment is not appealable. *Murphy Oil USA, Inc. v. Unigard Sec.*, 347 Ark. 167, 61 S.W.3d 807 (2001). Finally, we note that Harris sought an injunction and attorney's fees in his

complaint and sought similar relief in his motion for summary judgment. However, again, Harris's motion for summary judgment was denied, and the City's motion for summary judgment was granted. Therefore, the issues of the injunction and fees were neither considered nor ruled on by the circuit court. With certain exceptions not relevant to this discussion, this court has appellate jurisdiction only, which means that it has jurisdiction to review an order or decree of a circuit court. *Lewellen v. Sup. Ct. Comm. on Prof'l Conduct,* 353 Ark. 641, 110 S.W.3d 263 (2003). There is no order or decree to review on the issues of an injunction or attorney's fees. This case is reversed and remanded for action consistent with this opinion.

THORNTON, J., not participating.

Special Justice BRENT STANDRIDGE joins.

Gary KYZAR *v.* CITY of WEST MEMPHIS, Arkansas; Billy Johnson, *Mayor*; The West Memphis Advertising and Promotion Commission; and Frank Waggener, *Chairman*

04-338 197 S.W.3d 502

Supreme Court of Arkansas
Opinion delivered November 4, 2004

Everett & Hunter, by; *Mike Everett*, for appellant.

Erica Ross, for appellees.

PER CURIAM. Appellant, Gary Kyzar, appeals the decision of the Crittenden County Circuit Court granting a motion to dismiss of appellees, City of West Memphis *et al.* This case concerns a petition for referendum on an ordinance imposing a one-cent "hamburger" tax in West Memphis.

Although not raised by either party, we do not reach the merits of this case because of a failure to comply with our addendum requirements. *See* Ark. Sup. Ct. R. 4-1 and 4-2 (2004). We raise issues of deficiencies *sua sponte*. *Branscumb v. Freeman*, 357 Ark. 644, 187 S.W.3d 846 (2004).

Arkansas Supreme Court Rule 4-2(a)(8) provides that the addendum shall include copies of the "order, judgment, decree . . . from which the appeal is taken, along with any other relevant pleadings, documents, or exhibits essential to an understanding of the case and the court's jurisdiction on appeal." *Id.*

Here, appellant's addendum includes Ordinance 2072, petition for referendum, two letter opinions from the Attorney General, order of partial dismissal, notice of appeal, stipulation of counsel, and exhibits. In the order of partial dismissal from which appellant brings his appeal, the trial court states:

> It is therefore considered, ordered, and adjudged that:
>
> 1. The petition on Ordinance 2072 is fatally flawed and cannot be set for a referendum election.
>
> 2. Count II of plaintiff's first amended and substituted complaint is therefore dismissed with prejudice.
>
> 3. Plaintiff's oral motion for an injunction halting the collection of the tax imposed by Ordinance 29072 [sic] is denied as moot.
>
> 4. Defendant's motion to dismiss count II of plaintiff's first amended and substituted complaint and defendant's motion to strike plaintiff's reply brief as untimely are denied as moot.

The trial court's rulings are based upon appellant's first amended and substituted complaint and upon appellant's motion to dismiss. However, appellant's addendum does not contain appellant's first amended and substituted complaint, appellees' answer, appellees' motion to dismiss, or any response to it. Further, appellees do not provide a supplemental addendum. Therefore, because appellant's brief fails to include the relevant documents, we find it to be deficient such that we cannot reach the merits of the case.

Appellant has fifteen days from the date of this opinion to file a substituted addendum to conform to Rule 4-2(a)(8). *See In re: Modification of the Abstracting System—Amendments to Supreme Court Rule 2-3, 4-2, 4-3, and 4-4*, 345 Ark. Appx. 626 (2001) (*per curiam*); Ark. Sup. Ct. R. 4-2(b)(3) (2004). If appellant fails to file a complying addendum within the prescribed time, the judgment may be affirmed for noncompliance with our rules. *Id.* After service of the substituted brief on the appellees, they shall have an opportunity to file a responsive brief in the time prescribed by the Supreme Court Clerk, or to rely upon appellee's brief that was previously filed in this appeal. *See* Ark. Sup. Ct. R. 4-2(b)(3); *Branscumb*, *supra*.

Rebriefing ordered.

Randall Leon MANOR *v.* STATE of Arkansas

CR 04-1129 197 S.W.3d 503

Supreme Court of Arkansas
Opinion delivered November 4, 2004

John H. Bell, for appellant.

No response.

PER CURIAM. Appellant Randall Leon Manor, by and through his attorney, has filed a motion for rule on clerk. His attorney, John H. Bell, states in the motion that the record was tendered late due to a mistake on his part.

This court recently clarified its treatment of motions for rule on clerk and motions for belated appeals in *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). There we said that there are only two possible reasons for an appeal not being timely perfected: either the party or attorney filing the appeal is at fault, or, there is "good reason." 356 Ark. at 116, 146 S.W.3d at 891. We explained:

> . . . Where an appeal is not timely perfected, either the party or attorney filing the appeal is at fault, or there is good reason that the appeal was not timely perfected. The party or attorney filing the appeal is therefore faced with two options. First, where the party or attorney filing the appeal is at fault, fault should be admitted by affidavit filed with the motion or in the motion itself. There is no advantage in declining to admit fault where fault exists. Second, where the party or attorney believes that there is good reason the appeal was not perfected, the case for good reason can be made in the motion, and this court will decide whether good reason is present.

Id., 146 S.W.3d at 891 (footnote omitted). While this court no longer requires an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where he has erred and is responsible for the failure to perfect the appeal. *See id.*

In accordance with *McDonald v. State, supra*, Mr. Bell has candidly admitted fault. The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion granted.

Quincy MOORE *v.* STATE of Arkansas

CR 04-927 197 S.W.3d 447

Supreme Court of Arkansas
Opinion delivered November 4, 2004

Barbara A. Ketring-Beuch, for appellant.

No response.

PER CURIAM. Quincy Moore filed a motion for rule on clerk on October 19, 2004. Although a partial record was

filed in this case, it contains no transcript of the court proceedings. Moore has also filed a petition for a writ of certiorari seeking completion of the record. Moore received a life sentence and asserts that his trial attorney Barbara A. Ketring-Beuch failed to timely perfect his appeal due to a failure to seek an extension of time from the circuit court within which to complete the record. Moore filed a *pro se* notice of appeal on June 15, 2004. The court reporter received notice from the circuit court that the case was being appealed, but according to her affidavit, she was never contacted regarding payment for preparation of a transcript of the proceedings in circuit court. Consequently, the court reporter prepared a partial record which was tendered to the clerk on August 3, 2004. The partial record is insufficient to allow an appeal to proceed.

The partial record was tendered seventeen days after the notice of appeal was filed. Pursuant to Ark. R. App.—Civ. 5(a), the record on appeal must be filed within ninety days of the filing of the notice of appeal. Rule 5 of the Arkansas Rules of Appellate Procedure—Civil applies in criminal cases. *See, e.g., Jacobs v. State*, 321 Ark. 561, 906 S.W.2d 670 (1995). The ninety days under Rule 5 ran on September 13, 2004. By a letter dated August 4, 2004, Ketring-Beuch was told of the problem with the record. According to an affidavit filed subsequently in this court by Ketring-Beuch, she was unaware a *pro se* notice of appeal had been filed. On September 2, 2004, Ketring-Beuch filed a petition for writ of certiorari seeking relief to file a complete record. Under Rule 5, the circuit court has the power to grant extensions of time to file the record not to exceed seven months from the date that the judgement was entered. Ark R. App. P.—Civ. 5(b)(2). Thus, it appears that when the petition for writ of certiorari was filed, the circuit court still had the power to extend the deadline for filing the record.

On September 23, 2004, this court citing *Coggins v. Coggins*, 353 Ark. 431, 108 S.W.3d 588 (2003), denied the petition for writ of certiorari, and granted Ketring-Beuch's motion to be relieved as counsel. On that same date, Daniel Becker was appointed to represent Moore on appeal. Becker then filed the present motion for rule on clerk asking that the appeal be lodged based on failure of prior counsel to perfect the appeal. Becker also filed a petition for a writ of certiorari seeking that the record be completed and filed.

In this case, it appears that Moore was acting *pro se*, and that Ketring-Beuch was not aware that a notice of appeal had

been filed. However, it also appears that Ketring-Beuch may well have known of the need to complete the transcript while an extension of time could still be granted by the trial court under Rule 5. No such extension was sought. We recently clarified the treatment of motions for rule on clerk and motions for belated appeals in *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). This court no longer requires an affidavit of fault before we will decide motions for rule on clerk and motions for belated appeals. However, as this court stated in *McDonald, supra,* there is no advantage in refusing to admit fault in the motion if fault exists. This court will either decide the matter of fault where the record is sufficient to reach a conclusion, or as this court further stated:

> Where a motion seeking relief from failure to perfect an appeal is filed, and it is not plain from the motion, affidavits, and record whether there is attorney error, the clerk of this court will be ordered to accept the notice of appeal or record, and the appeal will proceed without delay. However, the matter of attorney error will be remanded to the trial court to make findings of fact. *See, e.g., Frazier v. State,* 339 Ark. 173, 3 S.W.3d 334 (1999). Upon receipt by this court of the findings, this court will render a decision on attorney error. *Id.*

McDonald, 356 Ark. at 117, 146 S.W.3d at 892. In the matter before us, the motion and existing record do not plainly reveal whether fault on the part of Ketring-Beuch caused the failure to file a complete record. Therefore, we direct the clerk to accept the appeal, and remand the issue of attorney fault to the circuit court to make findings of fact so that this court may make a decision on attorney error. Further, the petition for writ of certiorari is granted allowing sixty days within which to complete the record.

Bryan MANGRUM *v.* Ronald PIGUE, Sr., Ronald Pigue, Jr., Pig, Inc., Marshall Quinn d/b/a Marshall's Flying Service and Ron Moss

03-853 198 S.W.3d 496

Supreme Court of Arkansas
Opinion delivered November 11, 2004

Henry Law Firm, PLC, by: *Troy Henry*, for appellant.

Butler, Hickey, Long & Harris, by: *Fletcher Long, Jr.*, for appellees Marshall Flying Serv., Inc., and Ron Moss.

Law Office of David W. Calhoon, PLC, by: *David W. Calhoon*, for appellees, Ronald Pigue, Sr. and Pig, Inc.

BETTY C. DICKEY, Chief Justice. Bryan Mangrum alleges the damage to his corn crop was caused by appellees Ronald Pigue Sr., Ronald Pigue Jr., Marshal Flying Service, and Ron Moss. The trial judge granted appellees' motion for directed verdict, ruling as a matter of law, that the activity was not ultrahazardous, and ruling also that there was insufficient evidence to submit the issue of negligence to the jury. We affirm.

Facts

On February 14, 2001, Mangrum filed a complaint alleging Ron Moss, flying for Marshall's Flying Service, had negligently sprayed an ultrahazardous chemical, Roundup Ultra, onto the land of Ronald Pigue so that it drifted on to Mangrum's land, destroying his corn crop.

At trial, Ronald Pigue Sr., testified that he contracted with Marshall Flying Service to have his farm fields sprayed on May 10, 1997, with Roundup Ultra. Pigue also testified that he had applied for an Arkansas pesticide application and was re-certified in 1996. In the course of being re-certified, Pigue was required to attend a one-day course, at which he learned about the problem of chemicals drifting onto lands of another.

A few days after May 10, 1997, Mangrum noticed his corn wilting and turning brown. He called Mark Brawner, the County Extension agent for Greene County, who examined Mangrums's corn field and found discoloration of the leaves of the corn. Brawner recommended Mangrum contact the Arkansas State Plant Board ("Board") because of the possibility of a chemical drift. On May 19, 1997, the Board's Agricultural Specialist, Carlton Wann, investigated Mangrum's complaint of chemical drift, and determined the corn crop was stunted by a chemical consistent with Roundup Ultra.

William Johnson, an extension agronomist, also examined Mangrum's fields after the incident and noted that some areas of the field had stunted plants, primarily in the northeast corner. As Johnson moved westward the corn crops got larger, and he did not see as much stunting or yellowing of color, indicating a drift of Roundup Ultra. Johnson, in a letter to Mangrum, recommended that if Mangrum had not already applied Artizene, he should destroy his corn crop and plant soybeans.

Ford Lewis Baldwin, a weed scientist for the University of Arkansas Cooperative Extension Service, testified that since 1996, he had observed numerous instances of Roundup Ultra causing damage to corn crops from aerial drift. Baldwin commented that he had previously seen the drift for a mile and a half or more, and that it does not take very much Roundup on a crop to cause severe injury or death to a plant.

Joe Dan Lofton, with H & L Flying Service, testified that he hired Donald Masters to spray 2-4-D, Roundup, and Banvel on April 11, 1997. Marshall Quinn, owner of Marshall Flying Service, testified that Ronald Moss did spray Roundup Ultra on the Pigue farm on May 10, 1997, that the winds on that day were from the northeast, and that the Pigue farm was southwest of Mangrum's lot.

At the close of Mangrum's case-in-chief, appellees' counsel moved for a directed verdict stating that "there had been absolutely no proof that the damage to plaintiff's corn was in any way a result from the activities of the defendant." The trial court denied the directed verdict motion. At the conclusion of Ron Moss's testimony, appellees, again, moved for a directed verdict, which the trial court granted stating:

> It does appear that appellate courts have attached the ultra-hazardous label to 2-4-D because of its peculiar propensities. In fact, the cases refer specifically to 2-4-D, not to aerial dispensing of herbicides or pesticides in general. If it is going to be extended to cover other substances besides 2-4-D, the appellate courts have to do it, I am not going to do that.
>
> Since we are not dealing with 2-4-D, this is not an ultra-hazardous activity in and of itself and this is the only circumstances in which strict liability would apply.
>
> Therefore, we are left with negligence and if we are dealing with negligence, it is my understanding that the relationship would have

to be shown between the Piques and Marshall's Flying Service and Mr. Moss. I do not think that can be done. They were independent contractors. Therefore, the directed verdict is granted in favor of the Pigues.

With regard to negligence, the plaintiff had to show that defendants Marshall's Flying Service and Moss were negligent in this incident with Roundup and did some harm to the plaintiff and that defendants' acts were the proximate cause of harm the plaintiff suffered.

It would have to be shown that defendants did something that they should not have or failed to do something they should have. What plaintiff has shown is that he has suffered harm, he has shown no negligence whatsoever and there is no testimony so far that is concerned. Therefore, directed verdict in favor of the remaining defendants as well.

Standard of Review

In determining whether a directed verdict should have been granted, we review the evidence in the light most favorable to the party against whom the verdict is sought and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Curry v. Thornsberry,* 354 Ark. 631, 128 S.W.3d 438 (2003); *Woodall v. Chuck Dory Auto Sales, Inc.*, 347 Ark. 260, 61 S.W.3d 835 (2001); *Lytle v. Wal-Mart Stores, Inc.*, 309 Ark. 139, 827 S.W.2d 652 (1992). A motion for directed verdict should be granted only if there is no substantial evidence to support a jury verdict. *Id.; Mankey v. Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993). Stated another way, a motion for a directed verdict should be granted only when the evidence viewed is so insubstantial as to require the jury's verdict for the party to be set aside. *Id.; Fayetteville Diagnostic Clinic v. Turner*, 344 Ark. 490, 42 S.W.3d 420 (2001); *Conagra, Inc. v. Strother*, 340 Ark. 672, 13 S.W.3d 150 (2000); *Wal-Mart Stores, Inc. v. Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991). Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and the directed verdict should be reversed. *Id.; Howard v. Hicks*, 304 Ark. 112, 800 S.W.2d 706 (1990).

Ultrahazardous Activity

Mangrum argues that the aerial spraying of a poisonous herbicide in the vicinity of his corn crop was, as a matter of law, an

ultrahazardous activity and that the trial court erred in granting appellees' motion for directed verdict dismissing his complaint. We disagree and affirm the trial court.

This court has held that an activity is ultrahazardous if it necessarily involves a risk of serious harm to the person or chattels of others that cannot be eliminated by the exercise of the utmost care and is not a matter of common usage. *Zero Wholesale Gas Company v. Stroud,* 264 Ark. 27, 571 S.W.2d 74 (1978). In *Chapman Chemical Company*, this court applied the rule of absolute liability in cases involving damages caused by crop dusting with 2-4-D, and held:

> If one casts into the air a substance which he knows may do damage to others, and in some circumstances will certainly do so, principles of elementary justice, as well as the best public policy require that he know how far the substance will carry or be conveyed through the air and what damage it will do in the path of its journey, and if he releases such a substance either from ignorance of, or in indifference to the damage that may be done, the rule of strict liability should be applied.

215 Ark. at 643. There the court determined whether the case is a proper one for imposing absolute or strict liability is a question of law for the court.

AMI 1108, Ultrahazardous Activities, adopted *Chapman's* rationale and acknowledged that there was no issue for the jury on the questions of *Chapman's* absolute liability, this being a matter of law for the trial court to decide. AMI 1108 provides:

> By using _____ (explosives, poisons, etc. . . .), _____ (defendant) is liable for any [compensatory damages sustained by _____ (plaintiff) which were proximately caused by the use of the _____. You need only decide what those [compensatory] damages are and what amount _____ (plaintiff) should recover. _____ (plaintiff) has the burden of proving the amount of those damages cause by _____'s (defendant) use of the _____.

According to the Restatement of Torts, § 519:

> One who carries on an ultra hazardous activity is liable to another whose person, land, or chattels the actor should recognize as

> likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra hazardous, although the utmost care is exercised to prevent the harm.

Finally, Restatement of Torts § 523 provides:

> The rule stated in § 519 does not apply where the person harmed by the unpreventable miscarriage of an ultrahazardous activity has reason to know of the risk which makes the activity ultrahazardous and
>
> (a) takes part in it, or
>
> (b) brings himself within the area which will be endangered by its miscarriage
>
> (i) without a privilege, or
>
> (ii) in the exercise of a privilege derived from the consent of the person carrying on the activity, or
>
> (iii) as a member of the public entitled to the services of a public utility carrying on the activity.

Here, the trial court correctly held, as a matter of law, that the spraying of the widely used herbicide, Roundup Ultra, was not an ultrahazardous activity. There is simply an insufficient factual basis in this case to warrant such a drastic action on the part of this court. Roundup Ultra is a chemical that is commonly used in the farming community and is available for sale to the general public. According to the testimony of Ford Baldwin, the chemical can be controlled by the use of ordinary care as to the environmental factors which are present when it is applied. Since this court is not dealing with an ultrahazardous activity in and of itself, the aerial spraying of Roundup Ultra, strict liability does not apply and the trial court is affirmed.

Negligence

Mangrum argues that the trial court erred in granting appellees' motion for directed verdict as there was sufficient evidence of negligence to be submitted to the jury. We disagree and affirm the trial court.

The burden of proof is always on the party asserting negligence, as negligence is never presumed. *Morehart v. Dillard Dep't Stores*, 322 Ark. 290, 908 S.W.2d 331 (1995). To establish a prima facie case of negligence, appellant must show that he sustained damages, that the defendants were negligent, and that such negligence was a proximate cause of his damages. *Id.* While a party may establish negligence by direct or circumstantial evidence, he cannot rely upon inferences based on conjecture or speculation. *Id.*

Negligence is the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do. *City of Caddo Valley v. George,* 340 Ark. 203, 9 S.W.3d 481 (2000). Proximate cause means a cause, which, in a natural and continuous sequence, produces damage and without which the damage would not have occurred. AMI 501.

Although unfortunate, the fact that Mangrum's corn crop was damaged is not in and of itself evidence of negligence. Ordinary care is the care a reasonably careful person would use under the circumstances similar to those shown by the evidence. AMI 303; *Wyles v. Webb,* 329 Ark. 108, 946 S.W.2d 685 (1997).

Mangrum argues that there have been several cases in Arkansas that have upheld jury verdicts for the aerial spraying of chemicals damaging crops when no finding of ultra-hazardous activity was made and the case was submitted to the jury on negligence of the landowner who was having his crop sprayed. *Burns v. Vaughn*, 216 Ark. 128, 129, 224 S.W.2d 365, 366 (1949); *Sullivan v. Voyles,* 249 Ark. 948, 462 S.W.2d 454 (1971); *W.B. Bynum Cooperage Co. v. Coulter,* 219 Ark. 818, 244 S.W.2d 955 (1952). However, these cases can be distinguished from the case at hand.

In *Burns v. Vaughn*, 216 Ark. 128, 129, 224 S.W.2d 365, 366 (1949), this court found that "it was settled by the *Taylor* case, *supra*, that one who uses a dust of this kind [2-4-D] is not liable to his neighbors in every case; negligence must be shown." In that case, "the appellant testified that he knew that the dust was dangerous and instructed his pilot not to release it if there was any wind. During the dusting operations a breeze arose, but the pilot continued to release the dust until appellant succeeded in stopping him." *Id.* This court held that this evidence was sufficient to make

the issue of negligence a matter for the jury. *Id.* However, there is no mention of any issue regarding proximate causation. It was accepted that the dust caused the damage and that the dust originated from appellee's farm.

This court, again, affirmed a jury verdict and rejected defendant's claim that there was no evidence of negligence in *Sullivan v. Voyles,* 249 Ark. 948, 462 S.W.2d 454 (1971). In that case, there was testimony that, when the spraying of defendant's land started, the wind was from the west northwest, blowing from the direction of defendant Sullivan's farm, where the spray was being applied and that the spray came over his farm. *Id.* As a result, his crops were damaged from the chemical that was sprayed. *Id.* In affirming the jury verdict and rejecting defendant Sullivan's claim that there was no evidence of negligence, this court held that the "testimony relative to the wind direction was substantial evidence of negligence in the application of the chemicals." *Id.* However, the complaining farmer was actually standing in his field and testified as to the wind direction and to the spray actually coming over onto his farm; therefore, there was direct evidence of negligence and proximate cause.

In *W.B. Bynum Cooperage Company v. Coulter* 219 Ark. 818, 244 S.W.2d 955 (1952), plaintiffs alleged damage to crops caused by W.B. Bynum Cooperage Co. through its negligent use of plane-sprayed 2-4-D. Bynum argued that the damage could have occurred from excessive rains, not the spraying of 2-4-D. *Id.* Bynum further testified that he was present when the crops were being sprayed and directions were given "to fly low, close control valves on the chemical tank before reaching the borderline of planting, and not to attain elevation for the purpose of turning while it was possible for any of the poison to escape." *Id.* at 819. There was also evidence that Bynum had a flagman placed near the end of his property to guard against overshooting, and the aviator was instructed to stop spraying when he reached the flag. *Id.* This court held that the same character of chemical used in spraying Bynum's crops had caused the injury to plaintiffs' crops in a nearby field, coupled with the admission of Bynum that a commercial aviator had been employed to apply the poison, were sufficient for a jury's inference that spray from the airplane's chemical supply drifted to plaintiffs' land. *W.B. Bynum, supra.* However, the evidence also revealed that the plane actually flew above the tree tops,

in wind blowing directly at the claimant's field. Further, there was a question about whether the plane was equipped with a system to cut off the spray.

In this case, there were no witnesses to the spraying of the Roundup Ultra other than Moss, who testified he took the proper precautions. Neither Mangrum, the Board representative, nor Mangrum's expert have opined that the damage originated from Moss's application of Roundup Ultra on the Pigue farm. Here, there is no testimony of malfunctioning equipment, piloting technique, or any specific identification that the Roundup Ultra, in fact, drifted outside its intended target.

According to Carlton Wann, part of his job with the Board is to investigate complaints of "chemicals, target-off drift." Wann obtained copies of the invoices dated May 10, 1997, showing that Pigue purchased the Roundup Ultra and Prowl, chemicals Marshall Flying Service applied by air that same day at Pigue's request. According to Wann, Roundup Ultra is not a restricted chemical and farmers need keep no record of its use. With respect to actions by Marshall Flying Service, Wann testified:

> I looked at the application made by Ron Moss on May 10th for Marshall's Flying Service. *I don't recall finding anything in their records that violated any State Plant Board regulations. Insofar as I could tell, everything that Ron Moss did on that occasion was in compliance with applicable State Plant Board regulations.*

(Emphasis added). Wann also testified, "I did not find anything amiss, remiss or missing in any shape or form or fashion in the records of Marshall's Flying Service."

Ford Lewis Baldwin, recently retired from the University of Arkansas Extension Service, testified about aerial application of chemicals generally, but offered no testimony whatever regarding proper or improper conduct by the defendants. No witness testified that the defendants were negligent in the application of Roundup and Prowl on May 10, 1997. To the contrary, Ron Moss, the pilot from Marshall Flying Service, testified that he checked wind and conditions for applying the herbicides, found the wind to be three miles per hour, proceeded to the fields he was to treat, and checked to see if anything was growing within a quarter-mile of the fields that might be harmed. He then confirmed wind and direction conditions by blowing smoke from his

plane as he flew over the field. Only then did Moss apply the herbicides. Moss also testified that on the Pigue fields he used the largest orifice to reduce fine particles produced by aerial application, and that because Prowl was being applied, the spray had a yellow color that was visible. Ross further testified he saw no drift. There was no evidence of breach of the defendants' duty of care.

Furthermore, the trial court was correct in ruling that Mangrum failed to show proximate causation. The trial court found that Mangrum had shown he suffered harm, but failed to show negligence. Again, no witnesses were produced who observed any drift take place, nor was there any evidence of faulty equipment, erratic flying, or other malfeasance on the part of appellees. Juries are not permitted to guess or to speculate as to the proximate cause of an alleged injury. *Turner v. Hot Springs St. Rw. Co.,* 189 Ark. 894, 75 S.W.2d 675 (1934). The burden rests upon the appellant to show by a preponderance of evidence that his injuries were caused by some negligent act or omission of appellees. *Id.* To submit to a jury a choice of possibilities is but to permit the jury to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial. *Henry H. Cross Co. v. Simmons,* 96 F.2d 483 (8th Cir. 1938). Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Glidewell v. Arkhola Sand & Gravel Co.,* 212 Ark. 838, 208 S.W.2d 4 (1948).

The evidence in this case was that this aerial application was made under optimal conditions for safety. Moss did everything he was supposed to do. The evidence in this case showed that Roundup was commonly used under the existing conditions. Mere use is not evidence of negligence. The evidence also showed that the three mile per hour wind and time of day when the spraying was done constituted optimal conditions to prevent harm. There was evidence that application in a dead calm could create a greater risk of drift than application in a slight wind. There was no evidence of a breach of the standard of care. The element of breach of a duty of care is not met. Even if there were evidence of breach of that duty, and there was not, there is no evidence that the damage to Mangrum's corn was proximately caused by the defendants.

Negligence is not imposed in the absence of proof. *Bess v. Herrin,* 309 Ark. 555, 831 S.W.2d 907 (1992). The

fact that an accident occurred with nothing more is not evidence of negligence on the part of anyone. *Nichols v. Int'l Paper Co.*, 278 Ark. 226, 644 S.W.2d 583 (1983). Clearly, Mangrum's corn was damaged by accident. Negligence is not presumed from the mere happening of an accident. *Id.* Further, except in cases where *res ipsa loquitur* applies, negligence must be proven. *Id. Res ipsa loquitur* is inapplicable in this case. The doctrine was developed to assist in the proof of negligence where the cause is connected with an instrumentality in the exclusive control of a defendant. *Barker v. Clark*, 343 Ark. 8, 33 S.W.3d 476 (2000) (quoting *Reece v. Webster*, 221 Ark. 826, 256 S.W.2d 345 (1953)). It applies where the evidence of the true cause is available to the defendant but not to the plaintiff. *Dollins v. Hartford Accident & Indem. Co.*, 252 Ark. 13, 477 S.W.2d 179 (1972). In the case before us, Wann testified that Mangrum's cornfield showed symptoms of not just Roundup, but also of 2-4-D. We have no idea where the 2-4-D came from, and the Roundup may or may not have come from Pigue. The circuit court correctly stated:

> It would have to be shown that defendants did something that they should not have or failed to do something they should have. What plaintiff has shown is that he has suffered harm; he has shown no negligence whatsoever and there is no testimony so far as that is concerned.

Affirmed.

Mattie ALLISON *v.*
LEE COUNTY ELECTION COMMISSION;
Mark Smith; Pat Wilson, Individually and as Lee County Clerk;
Patsy Buford; and the City of Marianna, Arkansas,
by its Mayor, Rev. Robert Taylor

04-535 198 S.W.3d 113

Supreme Court of Arkansas
Opinion delivered November 11, 2004

Martin, Tate, Morrow & Marston, P.C., by: *Brian S. Miller*, for appellant.

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

TOM GLAZE, Justice. Appellant Mattie Allison is a resident of and a school teacher in Marianna. Allison has served on the Marianna City Council since January of 1993; she was first elected to Ward 4, Position 2, in 1992. Allison sought reelection as an independent candidate in 2002, filing her political practices pledge and petition for nomination with the Lee County clerk's office on

April 29, 2002. However, on her nomination petition, Allison wrote in that she sought to be placed on the ballot for Ward 4, Position 1. In a May 13, 2002, letter to the Lee County Election Commission, Lee County Clerk Pat Wilson certified that Allison had an adequate number of signatures on her petition to be placed on the November 5, 2002, general election ballot as an independent candidate for Ward 4, Position 1.

On May 30, 2002, Allison attempted to file an amended petition to run for Ward 4, Position 2; however, the clerk refused to accept and file the petition, informing Allison that the filing deadline had passed on May 20, 2002. As a result, on August 14, 2002, Allison filed suit in Lee County Circuit Court, alleging that she had made a mistake in filing for Position 1. On August 27, 2002, Allison filed an amended complaint for injunctive relief and declaratory judgment. In this complaint, she argued that Marianna's ordinance 11-13-01, setting filing deadlines for municipal elections, was void, and that her name should be placed on the ballot.

Although the trial court initially granted Allison's request for a temporary injunction, the court later set the injunction aside. The matter was then set for trial in February of 2003, but was repeatedly continued; the trial was finally held on February 17, 2004. In an order entered on March 1, 2004, the court denied Allison's complaint for injunctive relief and declaratory judgment. On appeal, Allison argues that the trial court erred in its interpretation of Ark. Code Ann. § 14-42-206 (Repl. 1998), which, in relevant part, provides filing deadlines for persons wishing to run in municipal elections as independent candidates.

We do not reach the merits of Allison's appeal because the case is moot. As a general rule, the appellate courts of this state will not review issues that are moot. *Cotten v. Fooks*, 346 Ark. 130, 55 S.W.3d 290 (2001). To do so would be to render advisory opinions, which we will not do. *Id.* Generally, a case becomes moot when any judgment rendered would have no practical legal effect upon a then-existing legal controversy. *Id.* This court has recognized two exceptions to the mootness doctrine. *Id.* The first one involves issues that are capable of repetition, but that evade review, and the second one concerns issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation. *Id.*

The questions raised in Allison's appeal are moot for two reasons. First, the election she wished to challenge occurred

two years ago, in November of 2002. It is now November of 2004. While it is true that, in some election cases, this court will consider the merits of an appeal after the election has been held, it usually does so when the public interest is involved, and the issue tends to become moot before it can be fully litigated. *See, e.g., Comm. to Establish Sherwood Fire Dep't v. Hillman*, 353 Ark. 501, 109 S.W.3d 641 (2003); *Benton v. Bradley*, 344 Ark. 24, 37 S.W.3d 640 (2001). Allison does not suggest that her case falls within this exception, and we are not persuaded that an exception should be made in her case. *See Benton, supra.*

There is a second reason why Allison's appeal is moot. As mentioned above, she challenges the trial court's interpretation of § 14-42-206. In 2002, the relevant portions of that statute provided as follows:

> (a) The city or town council of any city or town with the mayor-council form of government, by resolution passed before January 1 of the year of the election, may request the county party committees of recognized political parties under the laws of the state to conduct party primaries for municipal offices for the forthcoming year. . . .
>
> * * * *
>
> (e)(1) The governing body of any first class city, second class city, or incorporated town may enact an ordinance requiring independent candidates for municipal office to file petitions for nomination as independent candidates with the county clerk no later than noon on the day before the preferential primary election.

Before the trial court and on appeal, Allison argued that the City of Marianna cannot require independent candidates to file for office on the day before the preferential primary, pursuant to § 14-42-206(e), unless the city first complies with § 14-42-206(a) and holds a preferential primary. The trial court, however, found that the procedure authorized by § 14-42-206(e) was not dependent on whether the city requested the county party committees to conduct primaries for the municipal offices.

In 2003, however, the General Assembly amended § 14-42-206. In addition to amending subsection (a), the legislature also amended the portion of the statute relevant to this appeal. Section 14-42-206(e) now provides as follows:

> (e)(1)(A) The governing body of any city of the first class, city of the second class, or incorporated town may enact an ordinance

requiring independent candidates for municipal office to file petitions for nomination as independent candidates with the county clerk:

(i) No earlier than twenty (20) days prior to the preferential primary election; and

(ii) No later than noon on the day before the preferential primary election.

(B) *The governing body may establish this filing deadline for municipal offices even if the municipal offices are all independent or otherwise nonpartisan.*

(Emphasis added.)

Allison's appeal is also moot because the provisions of the law she is challenging have been amended. Any opinion this court would give on the old version of the law would simply be an advisory opinion, a practice in which this court will not engage. *See Benton, supra*; *Cotten, supra*. In *Cotten*, this court noted that one of the mootness exceptions "concerns issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation." Even if this court were to address the trial court's interpretation of § 14-42-206, as it stood in 2002, such an opinion would not prevent future litigation, because any challenge to § 14-42-206 in the future will involve the amended version of the statute passed in 2003. Thus, we dismiss Allison's appeal as moot.

Robert SLUSSER *v.* FARM SERVICE, INC.,
and Monsanto Company, Inc.

04-28 198 S.W.3d 106

Supreme Court of Arkansas
Opinion delivered November 11, 2004

Grider Law Firm, PLC, by: *M. Joseph Grider*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by *John Keeling Baker*, for appellees.

ROBERT L. BROWN, Justice. Appellant Robert Slusser appeals from the circuit court's order granting summary judgment to the appellees, Farm Service, Inc. and Monsanto Company, Inc., and dismissing his claims against them regarding defective seeds for lack of jurisdiction. We affirm the judgment of the circuit court.

During the growing season of 1998, Slusser planted soybean seeds in June that he purchased from Farm Service, which listed on the bag a germination rate of 80%. Monsanto had manufactured the seeds. The seeds failed to germinate, and Slusser purchased more of the soybean seeds and replanted in July. They again failed to grow, and Slusser had them tested by the Arkansas State Plant Board (the Board) on July 23, 1998. The tests produced a germination rate of 29%. Upon informing Farm Service of the problem, it too had the seeds tested on August 17, 1998, and that test produced a germination rate of 35%.

On January 15, 1999, Slusser filed a request for seed arbitration with the Board, in which he claimed that the seeds' germination was defective and that he had suffered $41,115.60 in damages. On June 4, 1999, the Seed Arbitration Committee (the Committee) of the Board issued an order, which concluded that its jurisdiction to hear arbitration claims was governed by Ark. Code Ann. § 2-23-102(a) (Repl. 1996), and that Slusser's "alleged damage or defect was discoverable more than ten (10) days prior to January 15, 1999." The Committee then found that Slusser's request for seed arbitration was not timely filed and that the Committee was without jurisdiction to hear the matter. It denied the claim and dismissed it without further hearings.

On April 10, 2000, Slusser filed an amended complaint against Farm Service and Monsanto, the manufacturer of the seed.[1] In his complaint, Slusser asserted counts of breach of express and implied warranties of merchantability, negligence in the production of the seeds, and *res ipsa loquiter.* Monsanto then moved for summary judgment and claimed that Arkansas law mandates arbitration of claims for nonperformance of agricultural seed as a prerequisite to legal action. Farm Service later moved for summary judgment on the same basis. Slusser responded that § 2-23-102(a), which provides a ten-day time limit in which to file arbitration claims of such matters, is directory and not mandatory.

Following a hearing, the circuit court entered its final judgment and concluded that it lacked subject-matter jurisdiction to hear Slusser's claims, because he failed to satisfy the condition precedent of filing a claim within ten days of discovering a seed defect as required by § 2-23-102(a). The court observed that despite Slusser's belief that he had been damaged by the seeds' failure to perform during the 1998 planting season, he waited until mid-January 1999 before filing his sworn complaint for seed arbitration with the Board. The court concluded that Slusser failed to satisfy a statutorily created condition precedent for the circuit-court action. Accordingly, the court dismissed Slusser's action with prejudice and further ruled that Slusser's claims that the arbitration agreement lacked mutuality and was unconscionable were without merit.

Slusser urges, as his first point, that although the relevant statute, Ark. Code Ann. § 2-23-102(a) (Repl. 1996), does set forth

[1] Slusser's initial complaint was filed June 14, 1999.

a condition precedent to legal action that a buyer make a sworn complaint to the Board to commence arbitration within ten days after the alleged defect becomes apparent, that prerequisite is directory and not mandatory. In addition, he points to specific language in § 2-23-107(b)(3)(B), which permits the circuit court to take into account any finding by the Committee regarding lack of cooperation and the effect of delay in filing an arbitration claim upon the Committee's ability to determine the facts of the case. He claims that to hold as the circuit court did leads to an "absurdity" in interpreting the statute.

We turn then to the statute itself:

> (a) When any buyer believes that he has been damaged by the failure of agricultural seed to produce or perform as represented by the label attached to such seed as required by State Plant Board regulations established under the Arkansas Plant Act of 1917, § 2-16-201 et seq., as a *prerequisite* to the buyer's right to maintain a legal action against the dealer, such buyer *shall* make a sworn complaint against the dealer from whom such seeds were purchased, alleging the damages sustained or to be sustained, and file same with the Director of the State Plant Board *within ten (10) days after the alleged defect or violation becomes apparent*, and the buyer shall send a copy of said complaint to said dealer by United States registered mail.

Ark. Code Ann. § 2-23-102(a) (Repl. 1996) (emphasis added).[2]

Our canons for statutory construction have been noted many times:

> . . . We review issues of statutory construction *de novo*, as it is for this court to decide what a statute means; thus, we are not bound by the trial court's determination. The basic rule of statutory construction

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[2] This statute was amended by Act 921 of 1999 to substitute "within a reasonable time" for the ten-day time limit:

> (a)(1) When any buyer believes that he or she has been damaged by the failure of agricultural seed to produce or perform as represented by the labeling of the agricultural seed, as a prerequisite to the buyer's right to maintain a legal action against the dealer or labeler and within a reasonable time after the alleged defect or violation becomes apparent, the buyer shall file a written notice of intent to seek arbitration to permit inspection of the crops or plants during the growing season.

Ark. Code Ann. § 2-23-102(a)(1) (Supp. 2003).

> is to give effect to the intent of the General Assembly. In determining the meaning of a statute, the first rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. This court construes the statute so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute if possible. When 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. *Id.* However, this court will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent.

Turnbough v. Mammoth Spring Sch. Dist. No. 2, 349 Ark. 341, 346, 78 S.W.3d 89, 92 (2002) (internal citations omitted).

Slusser initially argues the inconsistency of a subsequent statute. *See* Ark. Code Ann. § 2-23-107(b)(3)(B) (Repl. 1996). Section 2-23-107(b)(3)(B) permits a circuit court to "take into account any findings of the committee with respect to the failure of any party to cooperate in the arbitration proceedings, including any finding as to the effect of delay in filing the arbitration claim upon the committee's ability to determine the facts of the case." According to Slusser, in light of this section regarding delay, it would be an absurd interpretation to require a ten-day deadline before legal action could be maintained. We disagree.

It is first and foremost our responsibility to harmonize our statutes where possible. *See Darr v. Bankston*, 327 Ark. 723, 940 S.W.2d 481 (1997). In that vein, we interpret § 2-23-107(b)(3)(B) and its reference to a delay in filing the arbitration claim as including any and all delays by the buyer in filing the claim. The most serious delay that comes to mind would be the buyer's delay in determining that the seed is defective. It is that point in time when the defectiveness "becomes apparent" to the buyer that begins the running of the ten-day period for filing the claim. If the buyer is dilatory in determining defectiveness, this would have a deleterious impact on the committee's ability to get to the field and investigate the alleged defect. Delay within the ten-day period might also be a factor that would hamper the committee's investigation. The short answer to Slusser's argument, however, is that § 2-23-107(b)(3)(B) does not render the ten-day requirement for filing a claim an absurdity.

Slusser, in addition, relies on two foreign cases to support his contention that § 2-23-102(a) is directory and not mandatory. *See*

Helena Chem. Co. v. Wilkins, 47 S.W.3d 486 (Tex. 2001); *Presley v. P & S Grain Co., Inc.*, 289 Ill. App. 3d 453, 683 N.E.2d 901 (1997). Neither case operates as precedent for the instant case for the simple reason that the statutes in Texas and Illinois differ significantly from § 2-23-102(a).

In the *Wilkins* case, the pertinent Texas statute provided an arbitration requirement as a prerequisite to maintaining legal action but included no time frame for doing so. *See* Tex. Agric. Code § 64.002(a). Indeed, section 64.006 of the code provided ". . . the complaint must be filed within the time necessary to permit effective inspection of the plants under field conditions." In the instant case, § 2-23-102(a) specifies a precise time frame for filing — ten days — as a condition precedent for legal action.

In *Presley*, the Illinois statute read that a purchaser of seed "cannot" maintain a civil action against the seller of seed "unless the buyer has first submitted the claim to arbitration." 710 Ill. Comp. Stat. 25/10 (West 1994). The Illinois appellate court found that the word "cannot" rendered the statute directory and not mandatory. The court reasoned:

> If a statute requires certain acts to be done and if the statute also provides a result following the failure to do those acts, then the statute is mandatory; otherwise, if the statute provides no result for the failure to do the acts, the statute is directory.

Presley, 289 Ill. App. 3d at 463, 683 N.E.2d at 909. But, again, the Illinois statute did not include the mandatory word "shall." Nor did it state that the submission of the claim was a "prerequisite." The Arkansas statute at issue in the instant case is different. It mandates that a *complaint* be filed with the Plant Board within ten days of discovering the defect and that this is a prerequisite for any legal action. Thus, the consequences for failure to act are spelled out in § 2-23-102(a), while they are not in the Illinois statute.

The case that supports Farm Service's argument and is the closest factually to the instant case is *Ferry-Morse Seed Co. v. Hitchcock*, 426 So. 2d 958 (Fla. 1983). In that case, the United States Court of Appeals for the Eleventh Circuit certified several questions of law to the Florida Supreme Court. One question dealt with the Florida Statute, § 578.26(1) (1977), which required, as does the Arkansas statute, as follows:

> (1) When any farmer is damaged by the failure of agricultural, vegetable, or forest tree seed to produce or perform as represented

> by the label attached to such seed as required by Section 578.09, as a prerequisite to his right to maintain a legal action against the dealer from whom such seed were purchased, such farmer shall make a sworn complaint against such dealer alleging damages sustained and file same with the department within ten days after the defect or violation becomes apparent and send a copy of said complaint to said dealer by United States registered mail; provided that requirement for filing complaint therein set forth appears legibly typed or printed on the analysis label attached to the package containing such seed at the time of purchase by the farmer.

426 So. 2d at 960 (emphasis in original removed). The question posed to the Florida Supreme Court was does the failure to file the complaint with the Florida Department of Agriculture within ten days bar the farmer from maintaining a legal action. The Florida Supreme Court held that it did:

> We find that Hitchcock's cause of action rested solely upon alleged violations of the Florida Seed Law's labelling [sic] requirements. By failing to comply with the statutory notice requirements Hitchcock is barred from bringing action for damages against the seed merchant, notwithstanding his couching the claim in terms of negligence or breach of warranty.

Id. at 961.

We are also mindful of the blackletter law relating to whether legislative language is mandatory or directory:

> The intention of the legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language of the statute. Words or phrases which are generally regarded as making a provision mandatory include "shall" and "must." Accordingly a statute's use of the mandatory term "shall" normally creates an obligation impervious to judicial discretion.

73 AM. JUR. 2d *Statutes* § 13 (footnotes omitted).

. . .

> . . . A statutory time limit is mandatory only if it contains both an express requirement that an action be undertaken within a particular amount of time and a specified consequence for failure to comply with the time limit

73 AM. JUR. 2d *Statutes* § 15 (footnote omitted).

. . .

> Compliance with a mandatory provision of a statute is a condition precedent to the privilege conferred.

73 AM. JUR. 2d *Statutes* § 14 (footnote omitted).

Arkansas cases agree that in determining whether a statute's provisions are mandatory or directory, "we adhere to the principle that those things which are of the essence of the thing to be done are mandatory. . . ." *See, e.g., Crawford & Lewis v. Boatmen's Trust Co.*, 338 Ark. 679, 690, 1 S.W.3d 417, 424 (1999).

A review of § 2-23-102(a) reveals that there is nothing permissive or directory about the Arkansas statute. The clear and unambiguous language of the statute provides that before the buyer even has the right to maintain a legal action against the dealer, he *shall* make a complaint *and* file the same within ten days after the apparent defect. When the General Assembly uses the word "shall," we have said this clearly shows that it intended mandatory compliance. *See Loyd v. Knight*, 288 Ark. 474, 706 S.W.2d 393 (1986). This assessment is further bolstered by the title of the act which established the chapter: "AN ACT to provide for *Mandatory* Arbitration of Claims Related to Defective Agricultural Seed; to Establish an Arbitration Committee; and for Other Purposes." *See* Act 1024 of 1991 (emphasis added). The General Assembly deemed Act 1024 of such importance that it provided for its immediate effectiveness by including an Emergency Clause.

The mandatory nature of the requirement of an arbitration complaint is further evidenced by the statutory notice required to be put on the seed containers:

> (2) A notice in the following form, or some reasonably equivalent language is sufficient:
>
> "Notice of Mandatory Arbitration
>
> NOTICE: As a prerequisite to maintaining a legal action based upon the failure of seed to which this label is attached to produce as represented, a consumer shall file a sworn complaint with the Director of the State Plant Board within such time as to permit inspection of the crops or plants during the growing season."

Ark. Code Ann. § 2-23-102(d)(2) (Repl. 1996). Lastly, this court has emphasized in the past that if the right of action depends on some condition precedent, the cause of action accrues when the condition precedent is met. *See Zufari v. Architecture Plus*, 323 Ark. 411, 914 S.W.2d 756 (1996).

In short, in light of the repeated references to the mandatory notice in the statute, we are hard pressed to disregard its plain language and hold that the requirement is merely permissive or directory. The intent of the General Assembly is clear to this court that the complaint to the Plant Board filed within ten days after the defectiveness becomes apparent is a condition precedent to legal action. Accordingly, like the Florida Supreme Court in the *Ferry-Morse Seed Company* case, we hold that failure to comply with the mandatory notice requirements precludes legal action for damages.

There is one other point that needs to be addressed in connection with the notice requirement. This point relates to the lack of a requirement in the statute (§ 2-23-102(d)(2)) that the notice on the seed containers include the ten-day time limit. We observe, initially, that the notice on the seed container in the instant case complies with the statutory requirement. But, in addition, we do not conclude that the absence of the ten-day requirement in the statutory notice undermines the ten-day mandate under § 2-23-102(a).

Slusser, of course, knew as early as July 1998 that the seeds were not germinating properly. Yet, he did not file his complaint with the Plant Board until more than five months later. Hence, his dilatoriness barred his legal action under any definition of what is a reasonable time to comply with the statute. But irrespective of that, we do not deem the absence of the ten-day time limit in the statutory notice for containers in § 2-23-102(d)(2) to do away with the clear language of § 2-23-102(a). The statutory notice required for containers alerts farmers to the fact they have to file a complaint with the Plant Board to preserve their right to pursue legal action. The stated reason for this under § 2-23-102(d)(2) is to give the Plant Board time to permit inspection of the plants during the growing season. The growing season was over by the time the complaint was filed by Slusser. And, in our judgment, Slusser had an obligation to ascertain when the complaint was required to be filed. This he plainly did not do. *See*

Henderson v. Gladish, 198 Ark. 217, 128 S.W.2d 257 (1939) (observing that every person is presumed to know the law).

Slusser further complains that § 2-23-102(a) lacks mutuality in that it places the onus on buyers to file their complaints within ten days but makes no comparable requirement for the dealers. However, Slusser fails to cite this court to any authority standing for the proposition that arbitration procedures *required by statute* must contain elements of mutuality. And the statute is clearly what we are interpreting — not a contract. Without citation to authority or persuasive argument, we decline to address the point. *See Gwin v. Daniels*, 357 Ark. 623, 184 S.W.3d 28 (2004).

The same is true of Slusser's argument that the statutory notice requirement of ten days is unconscionable and violative of public policy. The ten-day requirement is prescribed by the General Assembly as part of the arbitration procedures. And arbitration is clearly favored in Arkansas. *See Cash in a Flash Check Advance of Ark., L.L.C. v. Spencer*, 348 Ark. 459, 74 S.W.3d 600 (2002). Slusser cites us to no authority that the doctrine of unconscionability should apply in this context. Thus, we will not address the point. *See Gwin v. Daniels, supra.*

As a final point, we agree with Farm Service and Monsanto that a specific argument that § 2-23-102(d)(2) requiring notice on seed containers was violative of public policy was not raised to the circuit court. Accordingly, we will not address the issue.

Affirmed.

THORNTON, J., not participating.

SOUTHWESTERN BELL TELEPHONE CO., INC.
Southwestern Bell Advertising, LP, and
Southwestern Bell Yellow Pages, Inc. *v.*
PIPKIN ENTERPRISES, INC.,
That French Salon, and Blake Batson

04-404 198 S.W.3d 115

Supreme Court of Arkansas
Opinion delivered November 11, 2004

Cynthia Barton and *Edward Skinner*; *Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.*, by: *Hermann Ivester*; and *The Wright Law Firm*, by: *Travis R. Berry*, for appellants.

Nichols & Campbell, P.A., by: *H. Gregory Campbell* and *Mark W. Nichols*, for appellees.

JIM HANNAH, Justice. Southwestern Bell Telephone Co., Southwestern Yellow Pages, Inc., and Southwestern Bell Advertising, LP (Southwestern Bell) appeal an order of the Clark County Circuit Court certifying a class action suit under Ark. R. Civ. P. 23. Southwestern Bell asserts that the circuit court erred in: (1) certifying the class because the class definition adopted requires a determination of the ultimate issue before class membership can be determined; (2) its factual findings; (3) finding that the requirement of commonality was met; and, (4) finding that the requirement of typicality was met. We hold that Pipkin Enterprises, Inc., That French Salon, and Blake Batson (Appellees), have failed to define a class to allow certification under Rule 23. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(8) and Ark. R. App. P.— Civ. 2(a)(9).

Standard of Review

This court reviews class certification under an abuse-of-discretion standard. *Worth v. City of Rogers*, 351 Ark. 183, 89 S.W.3d 875 (2002). An abuse of discretion means discretion improvidently exercised, *i.e.*, exercised thoughtlessly and without due consideration. *Arnold v. Camden News Publ'g Co.*, 353 Ark. 522, 110 S.W.3d 268 (2003).

Facts

Appellees filed a class action complaint on behalf of themselves and all other persons "located in Arkansas who paid interest charges to the Defendants . . . from the date of the complaint forward and for the immediately preceding five years." Appellees contracted with Southwestern Bell to have listings and advertisements placed in Southwestern Bell's phone books. Southwestern Bell allowed Appellees to pay in monthly payments over a twelve-month period. The contract provided that should the Appellees make a late payment, they would be subject to a one and one-half percent charge. The "interest" complained of is alleged to be interest charged by Southwestern Bell on overdue payments on

advertising contracts. Appellees contend that this interest "violates the usury provisions of the Arkansas Constitution." Appellees also assert that a twenty-five dollar collection fee charged by Southwestern Bell each time a payment is not made on time must be considered in determining whether a usurious rate of interest is being charged.

According to Southwestern Bell, "By agreeing to allow Appellees to spread their payments over twelve months," Southwestern Bell was "forbearing from collection of the entire principal balance on or prior to the dates of publication and effectively lending Appellees money. The very essence of the payment terms was a loan of money at 0% interest."

Southwestern Bell asserts that the interest charged on late payments is less than the legal amount that could be charged based on the total sum owed on any given contract. The class action concerns damages arising since November 15, 1997.

Class Definition

The circuit court defined the class as: "All Arkansas customers of Defendants who paid or were charged usurious interest charges since November 15, 1997." The ultimate issue in this case is whether charges paid by Appellees were usurious. It thus appears that determining whether any given person is a class member will require determining first whether that person paid usurious interest.

Before a circuit court may consider whether a class may be certified, or in other words, whether the six criteria for class certification under Ark. Code Civ. P. 23 have been met, a class must exist. *State Farm & Cas. Co. v. Ledbetter,* 355 Ark. 28, 129 S.W.3d 815 (2003). The standard that must be met in determining whether a class exists is not explicitly set out in Rule 23. *Arkansas Blue Cross & Blue Shield v. Hicks,* 349 Ark. 269, 78 S.W.3d 58 (2002).

A class must be susceptible to precise definition. *Id.* Before a class may be certified under Rule 23, the class description must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class, and the identity of the class members must be ascertainable by reference to objective criteria. *Arkansas Blue Cross, supra.*

In the proceeding before the circuit court, Southwestern Bell argued in its response to the Motion for Class Certification that Appellees erred in defining the class. In Appellees' reply to Southwestern Bell's response, Appellees argued about which individuals would be included in the class. The circuit court then defined the class in its Order Certifying Class. Thus, the issue of a class definition was raised and decided in the circuit court.

Southwestern Bell now argues on appeal that the class definition used by the circuit court in the Order Certifying Class is "invalid on its face." Southwestern Bell argues more specifically that the definition used by the circuit court "depends on a determination of the ultimate question, *i.e.*, whether Yellow Page's [Southwestern Bell's] charges were usurious." We agree. As Southwestern Bell argues, until the question of usury as to any given individual is answered, it cannot be determined whether he or she falls within the class. Whether a person is a member of the class depends on whether the person was subjected to usury.

Appellees argue that "the identity of the class members can be ascertained without investigating the merits of each individual's claim because the fact that customers paid interest charges during the above-referenced time period necessarily dictates that they are members of the class." Appellees go on to argue that Southwestern Bell's assertions about the definition requiring a determination of the ultimate issue is simply a matter of semantics, and "that usury is a well recognized and defined term that is synonymous in Arkansas with 'charges exceeding 5% over the Federal Discount rate. . . .' "

In the case before us, there are no objective criteria that the circuit court may use to identify class members based on the circuit court's definition. As this court stated in *State Farm, supra*:

> As the class in this case is presently defined, the trial court would be required to inquire into the facts of each insured's case in order to determine whether that person is a suitable class member. We have repeatedly held that neither the trial court nor the appellate court may delve into the merits of the underlying claim when deciding whether the requirements of Rule 23 have been met. *The Money Place v. Barnes*, 349 Ark. 518, 78 S.W.3d 730 (2002); *Fraley*, 339 Ark. 322, 5 S.W.3d 423 (1999); *see also Capital One Bank v. Rollins*, 106 S.W.3d 286 (Tex. 2003) (holding that a class definition was

> defective where it required a determination of the merits before the court could ascertain the existence of a class). Accordingly, the trial court abused its discretion in certifying this matter as a class action where the class definition provides no objective criteria for ascertaining class membership and also requires the trial court to delve into the underlying merits in order to determine who is an appropriate class member.

State Farm, 355 Ark. at 37.

Appellees' argument that the circuit court need not reach the merits of the case to determine class membership is not persuasive. The circuit court, in determining class membership, would have to make a determination of the ultimate issue, which is whether each prospective class member had been charged interest in excess of that allowed by the Arkansas Constitution. Neither the circuit court nor the appellate court may delve into the merits of the underlying claim when deciding whether the requirements of Rule 23 have been met. *See State Farm, supra.* This case must be reversed and remanded.

Appellees, however, further argue that if the class definition is flawed, this court should still affirm the case and provide specific instructions for modification of the definition so that the circuit court's ruling on the six Rule 23 criteria may be reviewed in the present appeal and thereby "conserve judicial and litigant resources by avoiding repeated and unnecessary appeals." We are cited to no convincing authority for this proposition and cannot alter the fact that the circuit court abused its discretion in certifying this matter as a class action where the definition provides no objective criteria for ascertaining class membership and where the circuit court must delve into the merits in order to determine who is an appropriate class member. *State Farm, supra.*

Because we reverse and remand this case on the issue of class definition, it is not necessary to address Appellant's remaining points on appeal.

Tommy Joe CRAWFORD *v.* STATE of Arkansas

CR 04-1114 198 S.W.3d 121

Supreme Court of Arkansas
Opinion delivered November 11, 2004

Keith, Miller, Butler & Webb, PLLC, by: *Andrew R. Miller*, for appellant.

No response.

PER CURIAM. Andrew R. Miller, attorney for appellant, Tommy Joe Crawford, petitions this court under Ark. Sup. Ct. R. 3-5 to issue a writ of certiorari directing the court reporter, Sharon Fields, to complete the transcript in this case. Petitioner states that, due to a death in Ms. Fields's family, the court reporter was unable to prepare and file the transcript by October 18, 2004, the extended deadline, which was seven months from the date of judgment. Attorney Miller asks for an additional thirty days for the court reporter to complete the transcript. Petitioner filed a partial record on October 15, 2004. Arkansas Rule of Appellate Procedure—Civil 5 E(2) states, "In no event shall the time be extended more than seven (7) months from the date of the entry of the judgment or order . . . ."

We issue the writ of certiorari directing Ms. Sharon Fields to complete and file the transcript in this matter within thirty days from the date of this order. The Supreme Court Clerk is directed to forward a copy of this per curiam to the Board of

Certified Court Reporter Examiners for any action it may deem appropriate under its rules. *See Epps v. State*, 338 Ark. 551, 998 S.W.2d 419 (1999).

Teresa EDWARDS *v.* STATE of Arkansas

CR 04-1127 198 S.W.3d 120

Supreme Court of Arkansas
Opinion delivered November 11, 2004

Jeff Rosenzweig, for appellant.

No response.

PER CURIAM. Appellant Teresa Edwards pled *nolo contendere* to the charge of forgery in the first degree, Class C felony. She was subsequently sentenced to a term of six years' imprisonment and a fine of $5,000. She was also ordered to pay restitution in the amount of $125,388. The judgment and commitment order was entered on May 5, 2004. Five days later, on May 10, the trial court denied Appellant's motion for reconsideration. Appellant filed a notice of appeal on May 28. A partial record was tendered to this court on August 26.

Appellant was initially represented in the trial court by the public defender. At the time of her plea and subsequent sentencing, however, she was represented by Jerome Green. It was Mr. Green who filed the notice of appeal. It has since come to our attention that Mr. Green has not paid the professional dues required annually of attorneys licensed to practice law in this state for the years 2003 and 2004. Accordingly, Mr. Green was not in good standing at the time that he represented Appellant in this case. *See Bly v. State*, 334 Ark. 426, 975 S.W.2d 97 (1998) (*per curiam*).

On October 15, 2004, attorney Jeff Rosenzweig filed in this court a motion for entry of appearance as counsel for Appellant and a petition for writ of certiorari to complete the record in this case. Both the motion and petition reflect that while Mr. Green filed the notice of appeal and ordered the transcript from the court reporter, he failed to make payment for the record, and, consequently, the court reporter did not prepare it. Both also reflect that Appellant believed that the full record had been lodged on appeal, when, in reality, only a partial record had been tendered.

Based on the above and foregoing, we grant Mr. Rosenzweig's motion for entry of appearance as counsel for Appellant, and we issue a writ of certiorari directing the court reporter to complete the transcript in this case within thirty days from the date of this *per curiam* opinion. We also direct the clerk of this court to accept the record as filed on the date that it was tendered, August 26.

We further order Mr. Green to appear before this court at 9:00 a.m., on Thursday, December 2, 2004, to show cause as to why he should not be held in contempt for his conduct in

representing Appellant while not in good standing and his failure to secure the record for Appellant's appeal.

It is so ordered.

Carla Rajean PIGEON *v.* STATE of Arkansas

CA CR 04-1124 198 S.W.3d 122

Supreme Court of Arkansas
Opinion delivered November 11, 2004

Bruce J. Bennett, for appellant.

No response.

PER CURIAM. Bruce J. Bennett, attorney for appellant, Carla Rajean Pigeon, petitions this court under Ark. Sup. Ct. R. 3-5 to issue a writ of certiorari directing the court reporter, Sharon Fields, to complete the transcript in this case. Petitioner states that, due to a death in Ms. Fields's family, the court reporter was unable to prepare and file the transcript by October 15, 2004, the extended deadline, which was seven months from the date of judgment. Attorney Bennett asks for an additional thirty days for the court

reporter to complete the transcript. Petitioner filed a partial record on October 15, 2004, the date the transcript was due. Arkansas Rule of Appellate Procedure—Civil 5 E(2) states, "In no event shall the time be extended more than seven (7) months from the date of the entry of the judgment or order . . . ."

[redacted] We issue the writ of certiorari directing Ms. Sharon Fields to complete and file the transcript in this matter within thirty days from the date of this order. The Supreme Court Clerk is directed to forward a copy of this per curiam to the Board of Certified Court Reporter Examiners for any action it may deem appropriate under its rules. *See Epps v. State*, 338 Ark. 551, 998 S.W.2d 419 (1999).

[redacted]

Aaron SMOTHERS *v.* STATE of Arkansas

CR 04-944 198 S.W.3d 119

Supreme Court of Arkansas
Opinion delivered November 11, 2004

[redacted]

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

No response.

PER CURIAM. Appellant Aaron Smothers pled guilty to several felony charges and was sentenced, per a negotiated plea agreement, to ten years' imprisonment. He was represented by Stephen Morley, but on the day of his plea, Stephen's brother, attorney Randall Morley, stood in for Stephen and represented Appellant during the plea hearing. The judgment and commitment order was filed on April 20, 2004. On June 9, Appellant filed a *pro se* notice of appeal. A partial record was tendered with our Clerk on August 31. That same date, our Clerk notified Stephen Morley that, as attorney of record, he would need to file a motion for belated appeal on Appellant's behalf, as the *pro se* notice of appeal was not timely.

Instead of filing a motion for belated appeal, Stephen Morley filed a response to our Clerk's request, stating that Appellant never informed him that he wanted to appeal. Attached to this response was the affidavit of Randall Morley, which reflected that Appellant never told Randall that he wanted to appeal. Based on this information, Stephen told this court that he could not, ethically and truthfully, in good faith, file a motion for belated appeal in which he or his brother must accept fault for not timely filing the notice of appeal.

Given the attorneys' assertion that Appellant had never stated that he wanted to appeal, we remanded the matter to the trial court to settle the record as to whether Appellant had ever informed either attorney that he wished to appeal. *See Smothers v. State*, 359 Ark. 55, 194 S.W.3d 206 (2004) (*per curiam*). We also voiced some concern about whether Appellant had the right to appeal from his guilty pleas. We noted that the right to appeal from a guilty plea is governed by Ark. R. Crim. P. 24.3(b), but that such right is limited to a conditional plea reserving in writing the right to a review of an adverse determination of a pretrial motion to suppress seized evidence or a custodial statement. Accordingly, we instructed the trial court to settle the record as to whether the trial court ever made an adverse ruling on Appellant's motion to suppress, and whether Appellant's guilty pleas were entered conditionally, pursuant to Rule 24.3(b).

The trial court held a hearing on these issues on October 19 and filed its findings of fact on October 26. The trial court found that the testimony of Stephen Morley and Randall Morley was

more credible than Appellant's. Both attorneys testified that they had advised Appellant that, by pleading guilty, he would have no right to appeal. Both attorneys also testified that Appellant never told them that he wished to appeal. Based on this testimony, the trial court found that Appellant did not advise either attorney that he wished to file an appeal of his guilty pleas.

The trial court also found that the record in this case reflects that there was no adverse ruling on Appellant's motion to suppress. Finally, the trial court found that the record conclusively demonstrated that Appellant's guilty pleas were not entered conditionally pursuant to Rule 24.3(b).

Based on the foregoing findings, we conclude that neither trial attorney was at fault for failing to file a notice of appeal on Appellant's behalf. We also conclude that Appellant cannot proceed with his *pro se* appeal because his guilty pleas were not entered in accordance with the requirements of Rule 24.3(b). Accordingly, we dismiss the appeal.

Anthony MULLINS *v.* STATE of Arkansas

03-1393 198 S.W.3d 504

Supreme Court of Arkansas
Opinion delivered November 18, 2004

Sam T. Heuer, for appellant.

Mike Beebe, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

BETTY C. DICKEY, Chief Justice. Anthony Mullins was charged in Faulkner County Circuit Court with possession of gambling devices. The jury found him not guilty by mistake of law, and the trial judge ordered the machines forfeited. Mullins appeals, alleging: (1) the trial court erred in holding Ark. Code Ann. § 5-66-101 (Supp. 2003) constitutional, and (2) the trial court's ruling in ordering the machines to be forfeited was clearly erroneous. We find his appeal is without merit and affirm.

Mullins owns and operates the Wild Rose Arcade ("Arcade") in Mayflower, Arkansas. On November 27, 2001, Faulkner County deputies, working undercover, investigated the Arcade for illegal gambling. One deputy returned the next day and questioned Mullins's daughter, Melany, about the operation of the Arcade.

On January 9, 2002, pursuant to a search warrant, approximately ninety of the Arcade's machines were seized, and Mullins was charged with ninety-nine counts of possessing a gambling machine, in violation of Ark. Code Ann. § 5-66-104 (Supp.

2003). On February 4, 2002, Mullins filed a motion seeking the return of his property. The trial court ordered the machines to be returned pending the outcome of the trial; however, after the State filed a motion for reconsideration, the trial court authorized the State to retain seven of the machines for the purpose of testing.

At a pretrial hearing on the motion, an Arcade employee and various players testified, saying they did not consider playing the games to be gambling and that they did not believe they were in violation of any law when playing the machines. Thomas Fricke, an expert witness, explained the difference between gambling devices and amusement devices, saying Mullins's machines removed the element of consideration required in the classical definition of gambling. Fricke added that the degree of skill required to play the games substantiates the claim that these are not gambling devices, as no skill is involved. The trial court found that the pertinent questions to submit to the jury were whether Mullins had notice, and whether the operation of the machines was illegal.

At a jury trial on February 18, 2003, and February 21, 2003, the State consolidated all charges into a single count of violating Ark. Code Ann. § 5-66-104, and the jury was given three possible jury instructions: not guilty; not guilty by mistake of law; and guilty. The verdict was not guilty by mistake of law. On April 17, 2003, the State filed a petition to seize Mullins's machines as contraband. The State argued that "a finding of mistake of law, as set forth in A.C.A. 5-2-206, indicates that the defendant engaged in conduct set forth in the charging document, in this case, setting up, keeping, or exhibiting any gaming device." When the court ruled that the machines were prohibited gambling devices, the State asked that the trial judge issue a warrant directing the seizure and destruction of the contraband, pursuant to Ark. Code Ann. § 5-5-101, which states, "the presiding judge shall seize the gambling devices because they are articles possessed under circumstances prohibited by law . . . [and] the judge shall destroy [the] contraband."

On April 21, 2003, the trial court issued an order to release $2,296.10 to Mullins, the amount seized in connection with this case, but made no mention of the machines. On June 13, 2002, the trial court issued its findings of fact and conclusions of law ordering that the machines were contraband in violation of Ark. Code Ann. § 5-5-101. The trial court granted the State's motion to seize and destroy the machines, but stayed the destruction pending appeal.

In his appeal Mullins argues that the trial court erred in holding Ark. Code Ann. § 5-66-101 constitutional, and that the trial court's ruling, ordering his machines to be forfeited to the State, was clearly erroneous. However, Mullins's reliance on the affirmative defense of not guilty by mistake of law precludes him from raising these points on appeal.

The trial court found that Mullins's machines were slot machines, and the jury found Mullins not guilty by mistake of law. In other words, the jury found that Mullins's machines were illegal gaming devices, but it accepted appellant's affirmative defense that his possession and operation of them was legally excused due to his reliance upon inapplicable law in operating the Arcade. Ark. Code Ann. § 5-2-206(c) states:

> It is an affirmative defense to a prosecution *that the actor engaged in the conduct charged to constitute the offense* believing that the conduct did not, as a matter of law, constitute an offense, if he acted in reasonable reliance upon an official statement of the law contained in . . .

(Emphasis added). Thus, by asserting the defense of mistake of law, appellant admitted that his machines were illegal.

After viewing photographs of the gaming devices at the pretrial hearing, the trial court stated:

> Looking at these, it looks to me like these are video slot machines, whatever name you put on them. And because you insert a little bit of skill, does it make it any difference than the skill it takes to make a decision on which card to hold and which card to fold in a video poker game . . . Well, it looks to me like on the surface that these are gambling machines. So you have to look then at the statute and see what it says . . . I don't think there's any question that playing these games — whether you call them games of chance or games of skill, it's — it's like they describe here. It's clear that the intent of using the credits to play the machine was to win or lose credits . . . That's a risk undertaken between the player and the business. A contest of chance whereby either the player or the business would be the winner . . . The question is then whether the Defendant in this case had notice that what he was doing was illegal.

While Mullins argues to this court that his machines are not slot machines, but are allowed under the Chuck E. Cheese Law, Ark. Code Ann. § 26-57-402 (Supp. 2003), he does not challenge

either the trial court's pretrial ruling that the machines were indeed slot machines or the jury's verdict that necessarily included a determination that the machines were illegal.

Mullins argued the affirmative defense of not guilty by mistake of law. Ark. Code Ann. § 5-2-206(3)(e)(Repl. 1997) provides:

> A mistake of law other than as to the existence or meaning of the statute under which the defendant is prosecuted is relevant to disprove the specific culpable mental state required by the statute under which the defendant is prosecuted.

We cannot say the trial court erred in accepting the State's argument that Mullins's machines were the same as those ruled illegal in *Sharp v. State,* 350 Ark. 529, 88 S.W.3d 848 (2002). The assertion of the defense of mistake of law was, in this case, an admission that Mullins had engaged in illegal conduct. Because the jury found Mullins's machines were illegal, concurring with the trial court's conclusion that the machines were slot machines that are excluded from Ark. Code Ann. § 26-57-401 (Repl. 1997), the trial court did not err in ordering the machines forfeited and destroyed.

Affirmed.

Mark Duane WRIGHT *v.* STATE of Arkansas

CR 04-715 198 S.W.3d 537

Supreme Court of Arkansas
Opinion delivered November 18, 2004

Joel W. Price, for appellant.

Mike Beebe, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

BETTY C. DICKEY, Chief Justice. Mark Duane Wright appeals the judgment and conviction of the Franklin County Circuit Court, sentencing him to a term of six years in the Arkansas Department of Correction and a fine of $7,500 for sexual indecency with a child, a Class D felony. This appeal presents an issue of first impression regarding the applicability of the deemed denied provision of Ark. R. Crim. P. 33.3, when the trial court delays hearing the posttrial motion and enters an order specifically extending the time for the defendant to file his notice of appeal. As such, we have jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(b)(1). Wright asserts that he should have been granted a new trial because of ineffective assistance of counsel, alleging his counsel: (1) vouched for the credibility of the victim over that of Wright; and (2) failed to introduce crucial evidence on the question of whether Wright acted out of a desire for sexual gratification, an element of the crime charged. Because the trial

court was without jurisdiction to rule on the posttrial motion once it had been deemed denied, we need not reach the merits of the case *sub judice*, and we dismiss the appeal.

Facts

On August 4, 2002, appellant Mark Wright, a close family friend of the victim, ten-year-old D.S., was giving her driving lessons following a Sunday afternoon get-together. While she was driving Wright's car around a parking lot and between adjacent driveways, Wright began touching D.S. on and near her vagina. D.S. testified that she slapped his hand away each time he tried to touch her. Later, after D.S. brought the car to a stop, Wright kissed her between her navel and the top of her bikini bottoms. When she resumed driving, Wright twice pulled the leg of his shorts aside and showed D.S. his penis. In addition, he told her how pretty and sexy she was, and that he would teach her anything that she needed to know about sex. Approximately a week later, D.S. told her parents about the incident, and they, in turn, informed the authorities.

Wright was charged with second-degree sexual assault, a Class B felony, and two counts of sexual indecency with a child, a Class D felony. On November 20, 2003, a Franklin County jury convicted Wright of one count of sexual indecency with a child, but it failed to convict him on the other two charges. Wright was sentenced to six years' imprisonment in the Arkansas Department of Correction and fined $7,500.

The judgment was entered on December 5, 2003. Wright filed a motion for new trial on December 26, 2003, alleging that his rights to a fair trial, due process, and effective assistance of counsel were violated. On January 8, 2004, Wright filed a notice of appeal from the December 5, 2003 judgment entered against him. On January 9, 2004, the trial court entered an order purporting to extend the time for the hearing on the motion for a new trial because the court reporter could not prepare a transcript within ten days. The trial court ordered that the matter be set for hearing on all posttrial matters as soon as practicable after the court reporter prepared the transcript. Finally, the order stated that Wright's time to file a notice of appeal shall not expire until thirty days after the disposition of all motions or applications. The State contends that because the trial court did not act on the motion for a new trial, it was deemed denied on January 26, 2004 per Ark. R. Crim. P. 33.3(c) and Ark. R. App. P.—Crim. 2(b)(2) (2004). Accordingly,

his January 8, 2004 notice of appeal was deemed filed on January 27, 2004 per Ark. R. App. P.—Crim. 2(b)(2) (2004). On February 26, 2004, thirty-one days after the motion had been deemed denied, Wright filed a second notice of appeal from the December 5, 2003 judgment. In addition, he did not give notice of appeal from the motion for new trial that the State claims was deemed denied on January 26, 2004. On March 5, 2004, the trial court held a hearing on Wright's motion for a new trial, and on March 9, 2004, the trial court entered an order denying said motion. On March 26, 2004, Wright filed a third notice of appeal from both the December 5, 2004 judgment and the March 9, 2004 order denying his motion for a new trial. This appeal follows.

Standard of Review

We construe court rules using the same means, including canons of construction, as are used to construe statutes. *Barnett v. Howard*, 353 Ark. 756, 120 S.W.3d 564 (2003). It is well settled that the appellate court reviews issues of statutory construction *de novo*, as it is for the appellate court to decide what a statute means. *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001). In this regard, we are not bound by the trial court's decision. *Id.* However, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. *Id.*

Ineffective Assistance of Counsel

For his sole point on appeal, Wright argues that he deserves a new trial due to ineffective assistance of counsel. Specifically, he contends that his trial counsel allegedly: (1) vouched for the victim's credibility over that of Wright; and, (2) he failed to introduce crucial evidence on the question of whether Wright acted out of a desire for sexual gratification, which is an element of the crime of sexual indecency with a child. However, neither of these arguments can be reached by this court, because Wright did not timely file his notice of appeal from the deemed denied motion for a new trial.

Rule 33.3(a) of our rules of criminal procedure provides that:

> (a) A person convicted of either a felony or misdemeanor may file a motion for new trial or any other application for relief. Such pleadings shall include a statement that the movant believes the

> action to be meritorious and is not offered for the purpose of delay. A copy of any such motion shall be served on the representative of the prosecuting party. The trial court shall designate a date certain, if a hearing is requested or found to be necessary, to take evidence, hear, and determine all of the matters presented. *The hearing shall be held within ten (10) days of the filing of any motion or application unless circumstances justify that the hearing or determination be delayed.*

Ark. R. Crim. P. 33.3(a) (2004)(emphasis added). While the trial court's conclusion that the inability to get a transcript within ten days constitutes circumstances that justify that the hearing or determination be delayed was not error, the State contends that after 30 days the trial court lost jurisdiction to hear the case under Rule 33.3(c), which provides:

> Upon the filing of a posttrial motion or application for relief in the trial court, the time to file a notice of appeal shall not expire until thirty (30) days after the disposition of all motions or applications. If the trial court neither grants nor denies a posttrial motion or application for relief within thirty (30) days after the date the motion or application is filed, the motion or application shall be deemed denied as of the 30th day.

Ark. R. Crim. P. 33.3(c) (2004). Wright argues that there is an apparent conflict between the "unless circumstances justify a delay" language of Rule 33.3(a) and the "shall be denied" language of Rule 33.3(c). We disagree. In the case at bar, the trial court was perfectly within its right to hold a hearing on the motion for a new trial after ten days if such circumstances justified a delay. However, the trial court was required to hold a hearing and make a determination within 30 days, or lose jurisdiction. While the time period enumerated in Rule 33.3(a) is discretionary, the time restrictions of Rule 33.3(c) are mandatory. *See, e.g., Davis v. State*, 350 Ark. 22, 86 S.W.3d 872 (2002) (posttrial motions deemed denied on the 30th day after filing, and the trial court lost jurisdiction to have hearing on motions after that time even though the hearing date had been continued by agreement of the parties to allow time for testing and expert examination of document). Recently, this court expressly held that the trial court loses the authority to act on a posttrial motion once it has been deemed denied. *State v. Markham*, 359 Ark. 126, 194 S.W.3d 765 (2004). Unlike subsection (a), which has an exception to the ten-day deadline, subsection (c) does not provide for any exception to the

thirty-day deadline. Accordingly, we hold that there is no conflict between section (a) and section (c) of Rule 33.3 of our rules of criminal procedure, and the trial court lost jurisdiction after 30 days.

Consequently, because the motion was deemed denied on January 26, 2004, Wright failed to file a timely notice of appeal. Ark. R. App. P.—Crim. 2(b)(2)(2004) provides:

> A notice of appeal filed before disposition of any post-trial motions shall be treated as filed on the day after the entry of an order disposing of the last motion outstanding or the day after the motion is deemed denied by operation of law. Such a notice is effective to appeal the underlying judgment or order. A party who also seeks to appeal from the grant or denial of the motion shall within thirty (30) days amend the previously filed notice, complying with subsection (a) of this rule. No additional fees will be required for filing an amended notice of appeal.

Because the motion was deemed denied on January 26, 2004, the January 8, 2004 notice of appeal was deemed to have been filed the next day, January 27, 2004.

We have recently held that a notice of appeal must designate the judgment or order appealed from, and be filed within thirty days of that order. *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). *See also, Ruffin v. State*, 64 Ark. App. 98, 983 S.W.2d 146 (1998) (a notice of appeal must designate the judgment or order appealed from, and an order not mentioned in the notice of appeal is not properly before an appellate court). In addition, this court has held that if an appellant wishes to appeal an adverse ruling on a posttrial motion and the appellant has previously filed a notice of appeal of the judgment, the appellant must file a notice of appeal regarding the ruling on the motion within the time provided in Ark. R. App. P—Crim. 2. *See, e.g., Smith v. State,* 329 Ark. 238, 947 S.W.2d 373 (1997). Thus, if Wright wanted to appeal the denial of his motion for new trial, he had 30 days in which to amend his notice of appeal to include the denial of his motion for a new trial. However, Wright did not file his second notice of appeal until February 26, 2004, 31 days later. We have held that the timely filing of a notice of appeal is, and always has been, jurisdictional. *LaRue v. LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980). Moreover, the second notice of appeal was not amended to include the denial of a motion for new trial. Wright's failure to

timely file an amended notice of appeal regarding the denial of the motion for a new trial, as required by Ark. R. App. P—Crim. 2(b)(2)(2004), means that he has appealed only from the judgement of December 5, 2003. Accordingly, Wright's appeal of the denial of his motion for a new trial due to ineffective assistance of counsel is not properly before this court. As such, we cannot reach the merits of Wright's claim, and we dismiss the appeal.

Appeal Dismissed.

Frank A. BAILEY, Jr. and Christy Anne B. Chilcott *v.* DELTA TRUST & BANK, Successor Trustee to Union National Bank N/K/A Bank of America, N.A., as Trustee of the Frank A. Bailey Irrevocable Trust; and Doris H. Bailey

04-411 198 S.W.3d 506

Supreme Court of Arkansas
Opinion delivered November 18, 2004

[Rehearing denied January 6, 2005.]

John C. Lessel, for appellants/cross appellees Frank A. Bailey, Jr. and Christy Anne B. Chilcott.

Bailey, Trimble, Lowe, Sellars & Thomas, by: *Rick Sellars*, for appellee/cross appellant Doris H. Bailey.

TOM GLAZE, Justice. This appeal involves the interpretation of a trust agreement. This court assumed jurisdiction of the appeal because it also requires us to consider the proper manner for determining the amount of a supersedeas bond pursuant to Ark. R. Civ. P. 62(d). Our jurisdiction is therefore proper under Ark. Sup. Ct. R. 1-2(b)(6).

On August 9, 1989, Frank A. Bailey, Sr. ("Bailey") executed a revocable trust ("the Bailey Trust"), which became irrevocable on the date of his death, December 12, 2001. The Bank of America (formerly Union National Bank) was named as trustee ("the Bank" or "the Trustee"). Bailey had married Doris Bailey (known as "Dottie") in 1978. At the time of his death, Bailey was survived by Dottie and by two adult children from a prior marriage, Frank A. Bailey, Jr. ("Frank") and Christy Anne B. Chilcott ("Christy"). Dottie also had a son, Robert C. Rogers, from a former marriage. Dottie was the sole lifetime beneficiary under the Bailey Trust. Frank and Christy were named as remainder beneficiaries, who would receive all remaining trust assets after the termination of the Trust upon Dottie's death. Paragraph 3, the dispositive provisions of the Bailey Trust, which are at issue in this appeal, provided in relevant part as follows:

> (b) In the event SETTLOR is survived by DORIS H. BAILEY, then for her lifetime, the TRUSTEE shall pay to DORIS H. BAILEY or deposit in her personal checking account, or pay for her use and benefit such sums from the net income and/or principal of the Trust as the TRUSTEE shall deem proper or necessary to provide for her care, comfort, support, maintenance, and medical care.
>
> (c) At the request of SETTLOR, or at the request of DORIS H. BAILEY after SETTLOR'S death, or upon the declaration of incompetency of SETTLOR, or upon the declaration of incompetency of DORIS H. BAILEY after SETTLOR'S death, the

> TRUSTEE shall pay on behalf of the SETTLOR and/or DORIS H. BAILEY all valid debts or obligations incurred by them which are brought to the attention of the TRUSTEE by its receipt of a statement for services rendered to or goods purchased by or for the SETTLOR and/or DORIS H. BAILEY.

After Bailey's death, Dottie demanded reimbursement from the Bailey Trust for one hundred percent of her expenses from the date of Bailey's death, on December 12, 2001, through August 31, 2003. In September of 2003, the Bank, as Trustee, filed a petition for instruction with the Pulaski County Circuit Court. In its petition, the Bank noted that disputes had arisen concerning Bailey's intent with respect to the terms of the Trust. Particularly, the Bank stated, Frank and Christy argued that the only "valid debts and obligations" that the Trust should pay from Trust assets were those that the Trustee deemed proper or necessary to provide for Dottie's care, comfort, support, maintenance, and medical care; Dottie, on the other hand, asserted that all debts or obligations she incurred for services rendered or goods purchased should be paid from Trust assets upon presentment of all legitimate bills for payment. Therefore, the Bank sought a clarification of the Trust language and terms regarding the beneficiaries' rights and the Trustee's duties.

Frank and Christy filed a response in which they agreed with the Bank that the Trust was ambiguous. In addition, Frank and Christy argued that the dispositive provisions should be read "as a whole," so that the "valid debts or obligations" for which the Trust are obligated under paragraph 3(c) are those which meet the standard of paragraph 3(b), as being "proper or necessary to provide for Doris H. Bailey's care, comfort, support, maintenance, and medical care." Dottie also filed a response and counterclaim to the Bank's petition for instruction, denying that the terms of the Trust were unclear and asserting that she had the right to invade the corpus of the Trust.

The trial court held an initial hearing on the Bank's petition on January 8, 2003. At that time, the parties and the court agreed that the first issue to be decided was whether the terms of the Trust were ambiguous or unambiguous. After that hearing, the trial court sent out a letter opinion, subsequently incorporated into an order, in which the court found that the Trust was unambiguous. In addition, the court interpreted the relevant terms of the Trust to mean that the language of subsection 3(b), directing the Trustee to pay such sums from the income and/or principal as "the Trustee

shall deem proper or necessary to provide for her care, comfort, support, maintenance, and medical care," imposed upon the Trustee an affirmative, mandatory obligation to make those payments. The court also concluded that the language gave the Trustee the authority to utilize its discretion in determining what sums are "proper and necessary" for Dottie's "care, comfort, support, maintenance, and medical care." The court determined that this affirmative obligation of the Trustee under subsection 3(b) existed even if the Trustee never receives a "receipt of a statement for services rendered to or goods purchased by" Dottie as referenced in subsection 3(c). However, the court wrote, it might be that the Trustee, upon the receipt and payment of such statements, in its discretion could determine that such payments satisfy all or a part of the monies necessary to fulfill its obligation pursuant to 3(b).

With respect to subsection 3(c), the court found that the terms of that paragraph imposed "a separate affirmative duty" on the Trustee to "pay on behalf of Doris H. Bailey all valid debts or obligations incurred by Doris H. Bailey which are brought to the attention of the Trustee by its receipt of a statement for services rendered to or goods purchased by Doris H. Bailey."

After receiving the letter opinion from the court, the Bank and Frank and Christy asked the court to reconsider its opinion and accept briefs from the parties concerning how the Trust ought to be interpreted. The court denied those parties' requests, informing the parties that they could file motions for reconsideration once an order had been entered. On January 27, 2003, the Bank wrote to the court, again asking the court to reconsider its letter opinion, and seeking further instruction as to how the Trust terms should be interpreted. The trial court, however, entered an "Order of Instruction" on January 31, 2003, reincorporating its rulings from the earlier letter opinion, as set out above. The court also directed the Bank to ask for additional instruction in the form of an Amended Petition for Instruction, in order to give the other parties a chance to respond.

The Bank and Frank and Christy filed timely motions to amend the findings, for new trial, or for reconsideration. Both parties alleged that the court had erred by rendering judgment on the interpretation of the Trust terms without giving the parties a full opportunity to be heard and present evidence on the issues. They further argued that the court erred by concluding that the Trust was unambiguous, and that, even assuming the Trust was

unambiguous, the court had nonetheless erred in its construction of the Trust's terms. In addition, the Bank argued that the court's interpretation effectively made the Bank a guardian of Dottie's person, in violation of Arkansas law.

Dottie filed a response on February 27, 2003, in which she noted that, contemporaneously with the trial court's order, she had presented to the Bank bills she had paid and for which she sought reimbursement. Dottie further claimed that the Bank had not yet paid her bills, and that the court should therefore hold the Bank in contempt.

The trial court denied the Bank's and Frank and Christy's motions for reconsideration by order entered March 5, 2003. On March 25, 2003, the Bank filed its second amended petition for instruction, petition to withdraw as Trustee, and petition to modify Trust.

After seeing Dottie's requests for reimbursement, Frank and Christy answered the Bank's petition for instruction and, in the same pleading, filed a cross-claim against Dottie for waste, bad faith, and breach of duty. In support of their waste claim, Frank and Christy noted that, as of December 31, 2002, the total value of the assets of the Trust was $695,537.85, of which $224,600 was comprised of the value of the real estate owned by the Trust and in which Dottie was living. In addition, Frank and Christy alleged that Dottie's requests for reimbursement amounted to $130,450.03 and $69,766.78; assuming that the Trust paid those amounts, the Trust would be depleted by $200,216.81, or over 42.5% of the Trust's assets. At that rate, they claimed, the assets of the Trust would be depleted within three years.

After the trial court denied the Bank's motion to withdraw as Trustee and Dottie's motion to dismiss Frank and Christy's cross-claims, the case proceeded to trial on September 23, 2003. On September 30, 2003, the trial court entered an order denying the motions for reconsideration filed by the Bank and by Frank and Christy. In addition, the court reaffirmed its conclusion that the Bank, as Trustee, had an affirmative obligation to exercise its discretion to determine what sums it deemed necessary for Dottie's "care, comfort, support, maintenance, and medical care." The court found that the Bank's obligation to exercise its discretion in these respects existed independent of the provision of financial information by Dottie, but the Bank's exercise of discretion would only be reviewed from the perspective of information that was

reasonably available to the Bank at the time that it exercised its discretion. In addition, the court found that paragraph 3(b) did not impose upon Dottie any duty to provide the Bank with evidence of her financial condition. The court further found that the phrase "valid debts or obligations" meant, "generally speaking, any legal or contractual liabilities of [Dottie] for goods or services." The court ordered the Bank to distribute the amount of $91,778.84 to Dottie for reimbursement for "valid debts or obligations"; however, the court also ordered Dottie to reimburse the Bank $13,942.56 for monies paid to her by the bank that were not for "valid debts or obligations." The court denied, without further comment, Frank and Christy's cross-claims for waste, bad faith, and breach of duty.[1]

Frank and Christy filed a timely notice of appeal; in addition, they filed a motion for supersedeas and a motion for attorney's fees. Dottie also filed a motion for attorney's fees. Following a hearing, the trial court entered an order granting the motion for supersedeas and staying the execution of the September 30, 2003, order "upon the posting by the respondents Frank A. Bailey, Jr. and Christy Anne Chilcott, within ten (10) days of the entry of this order of a cash bond . . . in the amount of . . . $181,792.28." The order also provided that, upon the posting of the bond, the Bank was to withhold payment to Dottie of the judgment amount and the amounts of her attorney's fees, but was to pay Dottie $9,600.00 a month for her care, maintenance, and support during the pendency of the appeal. The court awarded attorney's fees to Dottie and to the Bank, and conditionally granted Frank and Christy's motion for attorney's fees, awarding them $26,415.49, which was only to be paid in the event they were successful on appeal; if they lost on appeal, the court directed that the amount of attorney's fees and costs payable to them was to be reduced by all attorney's fees, costs, and expenses incurred by either the Trustee or Dottie from October 28, 2003, forward.

Frank and Christy filed a notice of appeal from the order pertaining to the supersedeas bond and the attorney's fees; Dottie also filed a timely notice of cross-appeal from that part of the order awarding Frank and Christy attorney's fees. Frank and Christy's arguments on appeal fall into three general categories: 1) the court

[1] The court also granted the Bank's motion to withdraw as Trustee, appointing Delta Trust and Bank as successor Trustee. In addition, the court set forth guidelines to assist Dottie in preparing appropriate requests for disbursement in the future.

erred in its construction of the provisions of the Trust; 2) the court erred in rejecting Frank and Christy's cross-claims of waste, bad faith, and breach of duty; and 3) the court erred with respect to the supersedeas bond. Dottie's cross-appeal urges that the court erred in awarding attorney's fees to Frank and Christy.

In their first point on appeal, Frank and Christy contend that the trial court misinterpreted the terms of the Bailey Trust. The cardinal rule in construing a trust instrument is that the intention of the settlor must be ascertained. *Aycock Pontiac, Inc. v. Aycock*, 335 Ark. 456, 983 S.W.2d 915 (1998). In construing a trust, we apply the same rules applicable to the construction of wills. *Id.* The paramount principle in the interpretation of wills is that the intent of the testator (or the settlor, in the case of a trust) governs. *Id.* (citing *In re: Estate of Lindsey*, 309 Ark. 596, 832 S.W.2d 808 (1992)). This intention is to be determined from viewing the four corners of the instrument, considering the language used, and giving meaning to all of its provisions, whenever possible. *Id.* This court will construe the words and sentences used in a will or trust in their ordinary sense in order to arrive at the testator's true intention. *Estate of Wells v. Sanford*, 281 Ark. 242, 663 S.W.2d 174 (1984). In order to determine the intentions of the testator, consideration must be given to every part of the will. *Martin v. Simmons First Nat'l Bank*, 250 Ark. 774, 467 S.W.2d 165 (1971).

Although Frank and Christy argued to the trial court that the terms of the Trust agreement were ambiguous, they have abandoned that challenge on appeal. Instead, they argue that, even assuming the language to be unambiguous, the trial court erred in its interpretation of the Trust's terms. When the terms of a trust are unambiguous, it is the court's duty to construe the written agreement according to the plain meaning of the language employed. *Acklin v. Riddell*, 42 Ark. App. 230, 856 S.W.2d 322 (1993) (citing *C. & A. Constr. Co. v. Benning Constr. Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974)). The language at issue in the present case consists of the following two phrases: 1) "such sums . . . as the Trustee shall deem proper or necessary to provide for [Dottie's] care, comfort, support, maintenance, and medical care"; and 2) "the Trustee shall pay on behalf of . . . [Dottie] all valid debts or obligations . . . for services rendered to or goods purchased by or for . . . [Dottie]." The issue for this court to resolve is what the settlor, Frank A. Bailey, Sr., intended with these provisions.

As noted above, the trial court found that these provisions imposed upon the Trustee an obligation to exercise its discretion

in order to determine what sums would be necessary for Dottie's care, comfort, support, maintenance, and medical care, and that this obligation existed independent of the provision of financial information by Dottie to the Trustee. In addition, the court found that paragraph 3(b) does not impose upon Dottie a duty to provide the Trustee with evidence of her financial condition. The court further found that, under paragraph 3(c), the Trustee was obligated to pay all of Dottie's valid debts and obligations, without requiring Dottie to provide evidence of her financial condition, but noted that "valid debts and obligations" would only include "any legal or contractual liabilities of [Dottie] for goods or services."

Frank and Christy argue that the trial court erroneously interpreted paragraph 3(c) in isolation, without considering the other provisions of the Trust. In particular, they point to paragraph 5 of the Trust, which provides, in relevant part, as follows:

> In the event that . . . DORIS H. BAILEY is declared incompetent after SETTLOR'S death, then the TRUSTEE shall apply for . . . her benefit only such portion of the income and/or principal of the Trust as the TRUSTEE, in its sound and sole discretion, shall deem necessary to support and maintain . . . DORIS H. BAILEY.

In addition, paragraph 3(c) provides that "at the request of [Dottie] after Settlor's death . . . or upon the declaration of incompetency of [Dottie] after Settlor's death," the Trustee shall pay on Dottie's behalf all valid debts and obligations. According to Frank and Christy, these two clauses dealing with Dottie's incompetency mean that Bailey's intent was to impose upon the Trustee a duty to determine the needs of support and maintenance of the beneficiary after her incompetence. For paragraph 5 and paragraph 3(c) to have any consistency, they contend, the "valid debts and obligations" of paragraph 3(c) must be judged by the Trustee's exercise of its "sound and sole" discretion in paragraph 5.

Dottie, on the other hand, points out that Bailey's intent is clear, and that it is plain that he intended for the Trust to take care of her first, and to leave to his children anything that might be left over after Dottie had been taken care of. In support of this interpretation, she notes that the Trust makes reference to her and her needs eleven times, whereas it refers to Frank and Christy only once, in the "termination of Trust" clause, which provides as follows:

> [T]his Trust shall terminate at the time of the death of the SETTLOR or DORIS H. BAILEY, whichever last occurs, and, after

> payment of all debts and obligations of such survivor, the principal and accumulated income, *if any*, shall be distributed [in equal shares to Frank and Christy].

(Emphasis added.)

Because the remainder of the Trust goes to Frank and Christy *in the event any principal and accumulated income remain* after payment of all debts and obligations, Dottie argues, it is therefore clear that Bailey intended her welfare to be the paramount concern of the Trust. In addition, she notes that it would be illogical for Bailey, Sr., as settlor, to give his widow the right to demand payments of valid debts and obligations brought to the Trustee's attention, if his real intent had been to give the Trustee sole discretion over all spending of the Trust's assets. We agree with Dottie.

It is apparent from the terms of the Trust, which speaks most frequently of taking care of Dottie's needs and obligations, that Bailey, Sr. intended Dottie to be the primary object of his bounty. In *Martin v. Simmons First National Bank*, 250 Ark. 774, 467 S.W.2d 165 (1971), this court came to a similar conclusion where the testator's will and trust left the residuary beneficiaries shares of the estate "only after all debts, taxes and expenses of administration had been paid, all other specific bequests had been distributed, and the trust established." *Martin*, 250 Ark. at 780. The residual beneficiaries were "to benefit from the trust only to the extent that it has not been exhausted in providing for [the life beneficiary] in the eventualities mentioned in the [will]." *Id.*

In addition, it was proper for the court to conclude that Dottie was not required to provide evidence of her financial condition. In *Martin*, *supra*, this court held that "[u]nless something appears in the will indicating a different purpose, it is ordinarily presumed that the trustor intended the beneficiary to be supported and maintained from estate income, or as is sometimes the case, from sale of a part of the corpus." *Martin*, 250 Ark. at 780 (quoting *Cross v. Pharr*, 215 Ark. 463, 221 S.W.2d 24 (1949)). The *Martin* court further pointed out that if the testator had intended for the beneficiary to be required to exhaust her own resources first, before accessing the trust's assets, the testator could have spelled that out clearly; however, in the absence of such a declaration, it was apparent that the intent of the testator was to provide for the beneficiary's expenses out of the trust, "without regard to any resources that [the beneficiary] might have." *Id.* at 785.

Here, Frank Bailey, Sr. did not require that Dottie exhaust all of her own assets before being able to invade the Trust, and provided that his children were to receive only the "principal and accumulated income, *if any*" after Dottie passes away. We conclude that the trial court properly interpreted the Trust agreement as requiring the Trustee to provide first and foremost for Dottie's "care, comfort, support, maintenance, and medical care" and her "valid debts and obligations."[2]

Frank and Christy's next arguments on appeal concern the trial court's dismissal of their claims of waste, bad faith, and breach of fiduciary duty. In their cross-claims against Dottie, Frank and Christy alleged that 1) her presentment of claims for reimbursement of 100% of her living expenses would constitute the waste of the Trust assets; 2) Dottie could only be depleting the Bailey Trust's assets in order to preserve her own assets for her own son by a previous marriage; and 3) her demand for such a large piece of the Trust's assets constituted a breach of her duty, as life beneficiary, to preserve the corpus of the Trust for the remainder beneficiaries. The trial court denied all three cross-claims, finding that there was no evidence presented that Dottie had attempted to commit waste of the Trust assets or that her actions — or those of her son, as her attorney-in-fact — were undertaken in bad faith.

No rule of public policy prohibits a testator from conferring on a life beneficiary the right to invade the corpus of a trust. *Alexander v. Alexander*, 262 Ark. 612, 624, 561 S.W.2d 59, 65 (1978). However, the *Alexander* court wrote further as follows:

> Even when the testamentary grant creates a life estate rather than a trust, the life tenant having the discretion to dispose of the subject property for his own benefit must exercise his discretion in good faith and not squander or waste the property to prevent the

[2] Frank and Christy have raised a subpoint in which they contend that their interpretation of the trust instrument is supported by provisions from the Internal Revenue Code. However, although Frank and Christy raised this argument in their motion for a new trial or reconsideration, they do not point out where Dottie responded to the issue, nor is it apparent that they pursued the issue at any hearing before the court or at trial. Further, it does not appear that the trial court ever specifically issued a ruling on this point. It is the appellants' burden to obtain a ruling on an issue in order to preserve the argument for appeal. *See, e.g., Ghegan & Ghegan v. Barclay*, 345 Ark. 514, 49 S.W.3d 652 (2001); *Junkin v. Northeast Ark. Internal Medicine Clinic*, 344 Ark. 544, 42 S.W.3d 432 (2001). Therefore, because Frank and Christy failed to obtain a ruling, we do not consider this point on appeal.

> remainder of the estate from going to the remainderman. A life tenant normally has the duty to conserve the estate. The power of invasion by the life tenant of "as much of the principal . . . as in his judgment is necessary and proper" must be exercised in good faith. A power "to be used for his own personal benefit insofar as he requires it" does not limit the power to the "needs" or "support" of the life tenant, but it requires action in good faith toward the remainderman. Even the demand or request by a lifetime beneficiary of a trust having the power to consume the corpus must be made in good faith and not for the purpose of deleting the corpus and defeating the intention of the settlor. Where the purpose of the income beneficiary with sole discretion to invade the corpus is to defeat the rights of the remainderman, the exercise of the discretion is not in good faith. It has been held that a demand for the entire corpus of a trust by a surviving spouse having an absolute power of invasion is premature when made before the trustee has come into possession of the corpus. Such a demand at any time must be in good faith and not the result of disagreements.

Id. at 628-29, 561 S.W.2d at 67-68 (internal citations omitted).

In this case, the trial court reviewed the documents that Dottie had submitted to the Bank for reimbursement and produced a spreadsheet reflecting its conclusions regarding which of the items it considered proper for reimbursement, which items were not proper, and a number of items for which Dottie was required to reimburse the Trust. In its conclusions, the court found that the following expenditures were not proper for reimbursement or disbursement by the Trust, and denied Dottie's request for payment: 1) charitable contributions and gifts (totaling $21,858.00); 2) items that had been duplicated in the requests for reimbursement ($116,836.67); 3) items for which there was insufficient evidence submitted for the court to make a determination that the item was a valid debt of obligation, including receipts for fast-food meals, items labeled as "reimbursement to Robert Rogers," and charges for payment to a veterinarian for pets not owned by Dottie ($3,006.66); 4) items that were not valid debts or obligations, such as ATM withdrawals, credit card payments, payments for Dottie's first husband's funeral expenses, payroll payments to Dottie's son Robert Rogers, and other such items ($69,633.29); and 5) items for which there was both insufficient evidence and that was at least partially not a valid debt or obligation of Dottie's ($4,584.45).

Frank and Christy argue that the documents submitted by Dottie to the Bank for reimbursement, and which the court found to be improper items for reimbursement, prove that Dottie was wasting the Trust's assets. However, Sandra Walker, the Bank's trust officer handling the Bailey Trust, testified at trial that the Bank did not provide Dottie with information on how Dottie should go about submitting requests for disbursement or reimbursement. Prior to Frank Bailey, Sr.'s death, Walker stated, the Trust would transfer an average of $12,000 a month to the Baileys' personal checking account; however, after Bailey's death, the Trust ceased making the monthly payments. Walker testified that she spoke with Dottie about how they would need to make changes in the distributions from the Trust, but Dottie was never forthcoming about her financial situation and her needs. However, Walker further testified that Dottie was "not financially astute and gets confused easily with any financial matters." Robert Rogers, Dottie's son by her first marriage, testified that he prepared his mother's submissions to the Trust, but he never received "any instruction from anyone as to how to prepare [the] documentation for submission."

Given the facts presented to the trial court, the trial court reached the correct conclusion: there were many items that were not "valid debts and obligations" proper for reimbursement, and Dottie would be required to reimburse the Trust for many of those items, but there was no evidence that Dottie had made those requests in bad faith with the intent to waste the Trust's assets. Frank and Christy argue on appeal that there could be no other motive for Dottie's seeking reimbursement for all of her living expenses, but they presented absolutely no proof at trial as to what her motives might have been. To the contrary, there was testimony that the Bank never gave Dottie any instruction on how to request disbursements or reimbursements; therefore, it is likely that Dottie, whom Sandra Walker admitted was "not financially astute,"[3] simply did not know how to present her requests and just

[3] For example, Walker testified that Dottie called her one day to ask about some large charges on her Bank of America credit card statement. What apparently happened was that Dottie had continued to write checks out of the Bank of America checking account to which the Trust had made monthly deposits before Bailey died, not realizing that the Trust had ceased making such deposits upon Bailey's death. The credit card charges represented overdraft-protection payments that the Bank provided automatically as a service to account holders.

gave the Bank everything she had. Because Frank and Christy failed to present a prima facie case that Dottie was acting in bad faith and wasting the Trust's assets, the trial court did not err in dismissing their cross-claims.

In their final point on appeal, Frank and Christy argue that the trial court erred with respect to both the amount and nature of the supersedeas bond that Frank and Christy sought to post after the judgment was entered in this case. Following the trial court's order, Frank and Christy filed a motion for supersedeas, in which they proposed a bond in the amount of $20,000. The motion asserted that Dottie had sufficient assets and income apart from the Bailey Trust to meet her financial obligations during the pendency of the appeal, and it claimed that the Trust itself had sufficient assets to satisfy the judgment should the appeal not be successful. The proposed $20,000 represented an amount that Frank and Christy estimated to be equal to the cost to Dottie Bailey of borrowing the estimated amount that would not otherwise be available for distribution from the Bailey Trust with respect to the judgment and for additional items for distribution claimed by Dottie for the period pending the appeal, plus reasonable appeal costs.[4]

Dottie objected to Frank and Christy's motion and their suggested bond, arguing instead that they should be required to post a bond of $260,000.00, which would cover the liquidated sum currently due to her under the terms of the judgment, together with an amount sufficient to cover her reasonably expected monthly expenses during the appeal.

After a hearing, the trial court entered an order granting the motion for supersedeas, but required the posting of a bond in the amount of $181,792.28. The court calculated this figure in the following manner:

> The supersedeas bond amount has been determined from the record by: (1) totaling the amounts submitted to the Trustee for

[4] To arrive at the figure of $20,000.00, Frank and Christy figured that Dottie's reimbursement requests had been receiving an average of $12,000 per month, or an average of $144,000 per year. Adding the amount that Dottie had been required to reimburse the Trust brought that amount up to $235,778.84. Frank and Christy asserted that, if Dottie were required to borrow that $235,778.84, the interest for one year (the time the appeal would probably take), her interest (calculated at 7%) on that amount would be $16,504.52. They then rounded up to $20,000.00 to add "sufficient funds to cover the costs of appeal[.]"

> utilities, healthcare, gasoline, taxes, and accounting fees, from January 1, 2002, through the present date; (2) factoring the amounts previously paid to respondent Doris Bailey by the Trustee; (3) adding the amounts ordered to be paid to . . . Doris Bailey in the judgment; (4) adding the amounts that would be payable to the respondent Doris Bailey for utilities, healthcare, gasoline, taxes, and accounting fees for an appeal twelve (12) months in duration; (5) deducting the monthly sums received from other sources by Doris Bailey; and (6) adding interest at the rate of ten percent (10%) per annum during the pendency of the twelve month appeal period, graduated for the amounts accruing each month during the twelve month appeal period.

In addition, the court ordered that, in the event Frank and Christy posted the supersedeas bond, the Trustee was to pay Dottie $9,600 per month for her "care, maintenance, and support" during the pendency of the appeal, noting that, in the event the appeal were affirmed, the $9,600-per-month payments would be offset against all amounts owed to Dottie pursuant to the judgment. Should Frank and Christy be unable to post the bond, the order provided, the parties were directed to proceed under the terms of the judgment.

On appeal, Frank and Christy argue that the trial court erred in requiring them to post the higher supersedeas bond, because the amount of the bond did not take into consideration the fact that the Trust would be available for Dottie to satisfy the judgment if the appeal were denied.

Rule 62 of the Arkansas Rules of Civil Procedure and Ark. R. App. P.—Civ. 8 govern supersedeas bonds. Rule 62(d) provides that, "[w]hen an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay[.]" Rule 8(c) provides as follows:

> Whenever an appellant entitled thereto desires a stay on appeal, he shall present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be to the effect that appellant shall pay to appellee all costs and damages that shall be affirmed against appellant on appeal; or if appellant fails to prosecute the appeal to a final conclusion, or if such appeal shall for any cause be dismissed, that appellant shall satisfy and perform the judgment, decree or order of the circuit court.

The purpose or effect of a supersedeas bond is to secure the payment of a judgment following its affirmance on appeal. See *Ryder Truck*

Rental, Inc. v. Sutton, 305 Ark. 374, 807 S.W.2d 909 (1991). Rule 8(c) affords the court sufficient discretion to marshal security, so long as security remains the ultimate goal. The phrase "as the court requires" in Rule 62 "clearly gives the court discretion to determine when and to what extent a supersedeas bond must be secured. *Ryder Truck Rental*, 305 Ark. at 379. The bond must be sufficient in amount to guarantee that the appellant will pay the appellee "all costs and damages that shall be affirmed against appellant on appeal," and these costs and damages "include interest on the judgment and all costs and damages for delay that may be adjudged against [the] appellant on appeal or which may result from dismissal or affirmance of the decision appealed." *Schramm v. Piazza*, 53 Ark. App. 99, 918 S.W.2d 733 (1996); *see also Home Mutual Fire Ins. Co. v. Jones*, 62 Ark. App. 182, 969 S.W.2d 675 (1998) (rejecting proposed supersedeas bond when the amount offered would not cover the costs of interest on the judgment). Ark. R. App. P.—Civ. 8 and Rule 62 "authorize[ ] the court to determine on a case-by-case basis the extent to which an appellee's judgment may or may not be in jeopardy and to marshal security of a kind and sufficient degree to secure the payment of the judgment following affirmance on appeal." *Ryder Truck Rental*, 305 Ark. at 380.

Although Frank and Christy appear to argue that the trial court abused its discretion in setting the amount of the supersedeas bond, they fail to address the fact that the trial court properly took into account the "costs and damages" to which Dottie would be entitled if she prevails on appeal. The $20,000 they proposed would not even come close to covering the amount of the judgment Dottie was awarded. As Dottie points out, the proper calculation for determining the amount of the supersedeas bond would be for the amount of money she would have received from the Trust as it would have been paid to her under the judgment. The amount also includes a sum to compensate her for the delay she would suffer in not having access to money the Trust would otherwise pay her when she was entitled to it. As she notes, these sums amount to vastly more than the $20,000 proposed by Frank and Christy.

In addition, given the careful calculations in which the trial court engaged and the thorough consideration of the various factors enumerated above to determine an appropriate amount, it clearly cannot be said that the trial court abused its discretion.

Abuse of discretion is a high threshold that does not simply require error in the trial court's decision, but requires that the trial court act improvidently, thoughtlessly, or without due consideration. *O'Neal v. State*, 356 Ark. 674, 158 S.W.3d 175 (2004); *Nazarekno v. CTI Trucking Co.*, 313 Ark. 570, 856 S.W.2d 869 (1993). It is obvious that the trial court wanted to ensure that Dottie would be provided for during the pendency of the appeal, in accord with her late husband's intentions. In a child-support case, where the parent paying support sought to appeal the support order, this court held that "other considerations must be taken into account with respect to a decree for . . . child support. Despite the dissolution of the marriage the husband may still be responsible for the support of . . . his children. Those dependents are not to be left penniless during the pendency of an appeal." *Goodin v. Goodin*, 240 Ark. 541, 400 S.W.2d 665 (1966); *see also Rogers v. Rogers*, 80 Ark. App. 430, 97 S.W.3d 429 (2003) (noting that the purpose of a supersedeas is to maintain the status quo pending the period the judgment is superseded, and upholding the trial court's decision to enforce a support award in spite of a supersedeas).

Although the present case is obviously not a child-support case, it nevertheless involves the provision of financial support to an elderly, frail, and ailing woman whose husband sought to ensure that her needs would be met. The trial court examined all of the relevant facts, including the amounts that would be necessary to provide for Dottie's maintenance and care during the pendency of the appeal, and determined an amount that would be sufficient to cover her costs during that time — i.e., an amount sufficient to cover "all costs and damages that shall be affirmed against appellant on appeal." Ark. R. App. P.—Civ. 8(c). In short, we simply disagree with Frank and Christy that the trust assets replace the need for a supersedeas bond under these facts.

Frank and Christy raise an alternative argument that the court erred in assessing interest at the rate of 10% per annum, arguing that this court held in *Hartford Fire Insurance Company v. Sauer*, 358 Ark. 89, 186 S.W.3d 229 (2004), that the maximum interest rate permitted under the Arkansas Constitution would be five percent over the primary credit rate. However, this case had obviously not been decided when the trial court entered its supersedeas order on October 28, 2003, and the trial court properly applied the law that was in effect at that time. *See Carroll*

Elec. Coop. Corp. v. Carlton, 319 Ark. 555, 892 S.W.2d 496 (1995). Finally, Frank and Christy assert that the trial court erred by requiring the distribution to Dottie of $9,600.00 per month in addition to the posting of the $181,792.28 supersedeas bond. However, as Frank and Christy were not able to post the bond, and the $9,600.00-per-month distributions are not being made, this alternative argument is moot.

We now turn to Dottie's sole argument on cross-appeal, wherein she contends that the trial court erred in awarding attorney's fees to Frank and Christy. In its October 28, 2003, order, the trial court conditionally granted attorney's fees to Frank and Christy in the amount of $26,415.49. However, the court noted that they would not receive this amount unless they prevailed on appeal, and if they lost on appeal, "the amount of attorney's fees and costs payable to the respondents . . . shall be reduced by all attorney's fees, costs, and expenses incurred by either the Trustee/Successor Trustee and/or Doris H. Bailey, from October 28, 2003, forward."

The trial court erred in awarding attorney's fees. The general rule is that attorney's fees are not allowed except when expressly provided for by statute. *Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). Ark. Code Ann. § 16-22-308 (Repl. 1999) provides as follows:

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

(Emphasis added.)

Frank and Christy did not prevail on any of their arguments; the trial court dismissed their cross-claims for waste, bad faith, and breach of duty, and the court rejected their arguments regarding the interpretation of the trust instrument. In order to be eligible for attorney's fees, a litigant must be a "prevailing party." *Burnette v. Perkins & Associates*, 343 Ark. 237, 33 S.W.3d 145 (2000) (citing *Hewitt v. Helms*, 482 U.S. 755 (1987)). Because Frank and Christy were not prevailing parties, the trial court erred in awarding them fees, even in the conditional manner in which it did so here.

This case is therefore affirmed on direct appeal, and reversed on cross appeal.

Gary Kent JONES and Jean L. Jones *v.* Linda K. FLOWERS and Mark Wilcox, Commissioner

04-449 198 S.W.3d 520

Supreme Court of Arkansas
Opinion delivered November 18, 2004

[Rehearing denied January 6, 2005.]

Paul Johnson, for appellants.

Carol L. Lincoln, for appellee Mark Wilcox.

Kelly Law Firm, PLC, by: *A. J. Kelly*, for appellee Linda K. Flowers.

DONALD L. CORBIN, Justice. Appellants Gary Kent Jones and Jean L. Jones appeal the order of the Pulaski County Circuit Court granting summary judgment to Appellees Linda K. Flowers and Mark Wilcox, as Commissioner of State Lands ("Commissioner"). The Joneses raise the following arguments on appeal: (1) the trial court erred in ruling that Ark. Code Ann. § 26-37-202(e) (Repl. 1997) is constitutional; and, (2) the trial court erred in ruling that the State was not required to locate Mr. Jones's correct address. As this case implicates a constitutional challenge to a statute, it was certified to us from the Arkansas Court of Appeals. Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(b)(6). We find no error and affirm.

In 1967, Mr. Jones purchased real property located at 717 North Bryan Street in Little Rock, Arkansas. He lived there with his wife until 1993, at which time he moved out of the home and into an apartment. After moving, Mr. Jones failed to notify the tax collector of his new address. Mrs. Jones continued to live in the home after her husband moved out. Mr. Jones failed to pay his real property taxes for the years 1997, 1998, 1999, and 2000. Mr. Jones's real property was subsequently certified to the Commissioner as delinquent on February 24, 2000. The Commissioner then sent notice, via certified mail, to Mr. Jones of the delinquency

and his right to redeem. The notice also stated that the real property would be subject to a public sale on April 17, 2002. This notification was returned to the Commissioner as "unclaimed." On April 1, 2002, a notice of the public sale was published in the Arkansas Democrat Gazette.

No bids were made on the real property at the public sale, but on February 5, 2003, Ms. Flowers submitted an offer to purchase the real property. On February 19, 2003, the State sent, via certified mail, a notice of the proposed tax sale to Mr. Jones at the Bryan Street address. According to the notice, the real property would be sold on March 21, 2003, if the delinquent taxes and penalties were not paid. This notice was also returned to the State as unclaimed. Ms. Flowers subsequently purchased the home through a negotiated sale on May 28, 2003. The purchase price was $21,042.15. On or about July 2, 2003, an unlawful detainer notice was posted on the door of Mr. Jones's property.

Mr. Jones filed a complaint on July 28, 2003, alleging that the sale of his home was invalid because he never received actual notice of the tax sale or of his right to redeem. According to his complaint, the tax sale resulted in an unlawful taking of his property without due process. Ms. Flowers filed a counterclaim for unlawful detainer on August 20, 2003. In his answer to the counterclaim, Mr. Jones admitted that he received actual notice of Ms. Flowers's notice to vacate, posted on the property on July 2. Mr. Jones then filed an amended complaint on September 17, 2003, adding his wife as a plaintiff, as she was the person living in the home at the time of the tax sale. Ms. Flowers filed a motion for summary judgment on October 2, 2003, arguing that the notices sent by the State complied with procedural due process. Thus, according to Ms. Flowers's motion, no fact issues remained to be determined. A similar motion for summary judgment was filed by the Commissioner on November 17, 2003.

On November 24, 2003, the Joneses filed a motion for summary judgment, arguing that the Commissioner admitted that it had no knowledge of their receiving notice of the forfeiture and subsequent sale. According to their motion, the Joneses claimed that there were no issues of fact to be resolved and, thus, summary judgment in their favor was appropriate. Attached to the motions were affidavits by Mr. Jones and Mrs. Jones averring that they never received notice of their right to redeem the property after the tax sale.

On January 14, 2004, the trial court entered an order finding that Ark. Code Ann. § 26-37-301 (Repl. 1997) complied with the constitutional requirements of due process. The trial court then granted Ms. Flowers's and the Commissioner's motions for summary judgment and denied the Joneses' motion. The trial court also granted Ms. Flowers's counterclaim for unlawful detainer and ordered that she was entitled to immediate possession of the real property. This appeal followed.

For their first argument on appeal, the Joneses aver that section 26-37-202(e) is unconstitutional because it does not require notice of the property owner's right to redeem after the tax sale. Thus, according to their argument, the sale of the property is void, and they are now entitled to redeem the property. Ms. Flowers and the Commissioner contend that the Joneses' argument on this point is without merit.

We will not address the merits of this argument because the trial court did not rule on the issue of whether section 26-37-202(e) is unconstitutional for failing to include a notice requirement. We have repeatedly stated that a party's failure to obtain a ruling is a procedural bar to consideration of the issue on appeal. *Rigsby v. Rigsby*, 356 Ark. 311, 149 S.W.3d 318 (2004); *Bell v. Bershears*, 351 Ark. 260, 92 S.W.3d 32 (2002). Moreover, in *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003), this court held that constitutional arguments must be raised and fully developed in the trial court. It is also well settled that the burden of providing a record sufficient to demonstrate error is upon the appellant. *Id.*

The record in the instant case reveals that this issue was raised for the first time in a "Brief In Support of Motion for Summary Judgment" filed by the Joneses on November 24, 2003. In that brief, they argued that Act 626 of 1983 was constitutionally defective because it did not require notification of the "second redemption period." This issue was further raised by the Joneses in "Plaintiffs' Memorandum to Defendants' Response to Motion for Summary Judgment." The trial court's order, however, does not address this issue. Moreover, it would have been inappropriate for the trial court to consider the issue as it was raised only in the Joneses' briefs and not in their motion for summary judgment. This court has held that it would be error for a trial court on motion for summary judgment to consider any issues raised for the first time in a party's briefs or exhibits. *Eldridge v. Board of Correction*,

298 Ark. 467, 768 S.W.2d 534 (1989); *see also City of Barling v. Fort Chaffee Redev. Auth.*, 347 Ark. 105, 60 S.W.3d 443 (2001). Accordingly, the Joneses' argument regarding the constitutionality of section 26-37-202(e) is not preserved for our review.

As their second point on appeal, the Joneses argue that the trial court erred in ruling that the State was not required to locate Mr. Jones's correct address after the tax-sale notices were returned to the State unclaimed. In other words, they argue that the trial court erred in ruling that the State's sale of his property was constitutional under section 26-37-301. They further argue that due process required the State to conduct a reasonable search of public records in an attempt to ascertain Mr. Jones's correct address before selling his property. Ms. Flowers and the Commissioner counter that an attempt to provide actual notice is all that is required in order to comply with the requirements of due process. We agree.

As a general rule, in reviewing the grant of a motion for summary judgment, this court determines if summary judgment was appropriate based on whether the evidence presented in support of summary judgment leaves a material question of fact unanswered. *Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 343 Ark. 224, 33 S.W.3d 128 (2000). This court views the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

However, in the instant case, the granting of the motion for summary judgment was based upon the trial court's interpretation of a statutory provision. We review issues of statutory interpretation *de novo*, as it is for this court to decide what a statute means. *Fewell v. Pickens*, 346 Ark. 246, 57 S.W.3d 144 (2001); *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). In this respect, we are not bound by the trial court's decision; however, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. *Harris v. City of Little Rock*, 344 Ark. 95, 40 S.W.3d 214 (2001).

We begin our analysis by reviewing the language of section 26-37-301, which provides in relevant part:

> (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.

This court has repeatedly held that in cases involving redemption of tax-delinquent lands 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. *Tsann Kuen Enters. Co. v. Campbell*, 355 Ark. 110, 129 S.W.3d 822 (2003); *Jones v. Double "D" Props., Inc.*, 352 Ark. 39, 98 S.W.3d 405 (2003); *Pyle v. Robertson*, 313 Ark. 692, 858 S.W.2d 662 (1993). Here, the Joneses would have this court read a requirement into section 26-37-301 that is simply not there, namely, that the State must try to locate the correct address of a delinquent taxpayer when a notice is returned unclaimed. The question then becomes whether such action is required in order to comply with the constitutional dictates of due process. We think not.

The Fourteenth Amendment of the United States Constitution provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. 14, § 1. In discussing due process requirements, the United States Supreme Court has stated that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Our own cases interpreting this well-established rule of law are consistent with this principle.

Most recently in *Tsann*, 355 Ark. 110, 129 S.W.3d 822, this court held that section 26-37-301 satisfies the requirements of due process and provides sufficient notice to nonresident landowners

prior to their property being sold. In that case, Tsann Kuen Enterprises was a nonresident corporation that purchased real property in Bentonville. After the purchase, the company moved its corporate offices and failed to notify the Benton County Tax Collector of its new address. After the company failed to pay its real property taxes for four years, the tax collector certified to the Commissioner that the taxes on the property were delinquent. The Commissioner then sent a notice of delinquent taxes to the company's last known address. The notice was returned marked "unclaimed" and "forwarding order expired." The Commissioner again sent a notice to that same address, via certified mail, stating that unless the taxes were paid, the property would be sold on July 28, 2002. That notice was returned as well, and the Commissioner then published notice in a local newspaper, as well as the statewide newspaper. No taxes were paid and the property was sold. The new owners filed a complaint in unlawful detainer. The company answered and argued, in part, that the notice provision of section 26-37-301 was unconstitutional. The trial court denied the company's request that the statute be found unconstitutional and an appeal to this court followed.

On appeal, this court rejected the company's argument that had the State posted notice on the property or mailed notice to the physical address, the caretaker living there would have notified the company's owner, and he would have paid the taxes. In so doing, this court recognized that while Tsann had an interest in the property sold, the court also had to consider the State's interest and whether additional procedural safeguards would be unduly burdensome to the State. The court then pointed out that pursuant to Ark. Code Ann. § 26-35-705 (Repl. 1997), the taxpayer has the obligation to furnish his or her correct address.

In concluding as it did, the *Tsann* court relied on its previous decision in *Jones*, 352 Ark. 39, 98 S.W.3d 405. *Jones* also involved the sale of real property after the owner failed to pay the real property taxes. After the sale, the property owner brought suit against the Commissioner, arguing that it had failed to comply with the requirements of section 26-37-301. The trial court ruled that the Commissioner complied with the statutory provision. This court likewise held that the Commissioner strictly complied with section 26-37-301 when, prior to the tax sale, it sent notice by certified mail to the last known address of the property owner. *Id.* Moreover, this court in *Jones* held that section 26-37-301 does not require the Commissioner to take every step possible to ensure

that the notice arrives in the property owner's hand. Noting that the notice was returned "unclaimed," the court went on to elaborate that the Commissioner was merely required to notify the owner at the owner's last know address. *Id.*

The *Jones* court also pointed out that the facts before it were analogous to the facts presented to the court of appeals in *Wilson v. Daniels*, 64 Ark. App. 181, 980 S.W.2d 274 (1998). In that case, the court of appeals held that the Commissioner complied with the notice requirement when it mailed a second notice to the taxpayer's correct address, despite the fact that the notice was returned unclaimed. *Id.*

In their brief to this court, the Joneses argue that our holding in *Tsann*, 355 Ark. 110, 129 S.W.3d 822, does not apply or, alternatively, that it should be overruled as violating federal due process. They make no attempt to distinguish this court's holding in *Jones*, 352 Ark. 39, 98 S.W.3d 405, and we are unpersuaded by either of their arguments regarding *Tsann*. First, the distinction that the property owner in *Tsann* was a nonresident corporation is of no merit. The Joneses argue that the distinction is critical because their situation involves a property owner losing his homestead, while *Tsann* involved a corporation losing a rental property. To support their argument on this point, the Joneses point to the fact that the General Assembly amended section 26-37-301 in 2003, indicating a desire to afford greater protection to an owner of a homestead. A similar argument was raised and rejected by this court in *Tsann*. There, the property owner argued that the General Assembly amended section 26-37-301 by Act 1376 of 2003 in order to remedy the unfairness of the statute.[1]

In rejecting this argument, this court stated:

> The problem with this argument is that Act 1376 of 2003 does not become effective until January 1, 2004. We have stated that a litigant has standing to challenge the constitutionality of a statute if the law is unconstitutional as applied to that particular litigant.

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[1] Act 1376 provides, in part:

> If the Commissioner of State Lands fails to receive proof that the notice sent by certified mail under this section was received by the owner of a homestead . . . then the Commissioner of State Lands, or his or her designee, shall provide actual notice to the owner of a homestead . . . by personal service of process at least sixty (60) days before the date of sale.

> *Chapman v. Bevilacqua*, 344 Ark. 262, 42 S.W.3d 378 (2001). The general rule is that one must have suffered injury or belong to that class that is prejudiced in order to have standing to challenge the validity of a law. *Id.* Tsann Kuen cannot show that it suffered injury due to the application of the amended version of § 26-37-301 since the amended version does not become effective until January 1, 2004, and was not applied in the present case.

Id. at 122, 129 S.W.3d at 829. Likewise, the Joneses cannot demonstrate that they were injured simply because the legislature later amended section 26-37-301. A right to redeem from a tax sale is governed by the statute in force and effect at the time the sale was made. *Hogg v. Nichols*, 134 Ark. 280, 204 S.W. 211 (1918). Accordingly, the Joneses' argument simply does not support the conclusion that the holding in *Tsann* is inapplicable to homestead property owners.

Nor do we agree with the Joneses' contention that the extra safeguards sought by the property owner in *Tsann* were more burdensome than those sought here. Here, the Joneses argue that the Commissioner should be required to search the public records or the phone book in order to ascertain the property owner's correct address. Again, this argument ignores the fact that section 26-35-705 requires the property owner to notify the tax collector of his correct address.

The Joneses next contend that if this court construes *Tsann* to be applicable in this case, it should be overruled. In support of this contention, they argue that a majority of courts have held that in order to comply with due process there must be some action taken to locate a property owner's correct address. Ms. Flowers and the Commissioner contend that there is no reason to revisit an issue already decided by this court. We agree.

The very fallacy of the Joneses' argument in this regard is supported by their admission in their brief to this court that due process does not require actual notice before depriving a property owner of his property. Citing to *Dusenbery v. United States*, 534 U.S. 161 (2002), the Joneses argue that while actual notice may not be required, such notice must be reasonably calculated to apprise a party of its rights. According to the Joneses, it is unreasonable for the State not to attempt to locate a property owner's correct address. In fact, in *Dusenbery*, the Court held that a state complied with the requirements of due process when it attempted to provide

actual notice. In that case, officials seized drugs, weapons, and personal property, including cash, after arresting Dusenbery. After his conviction, the FBI sent by certified mail a notice of forfeiture proceedings to the address where he was arrested, as well as to an address in his mother's hometown. Dusenbery challenged the forfeiture, arguing that his due process rights were violated because he did not receive actual notice of the proceeding. To support his contention, Dusenbery relied on a previous Supreme Court decision in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), and argued that in that case the Court held that actual notice must be given. The Court rejected that argument and stated that there is no requirement that actual notice be given in order to comply with the requirements of due process.

Here, there is no dispute that the State attempted to provide the Joneses with notice, both via certified mail and through publication in the newspaper. Accordingly, we cannot say the trial court erred in concluding that the State complied with the provisions of section 26-37-301 and that the tax sale was valid.

Affirmed.

Marvin G. JEFFERSON *v.* STATE of Arkansas

CR 04-686 198 S.W.3d 527

Supreme Court of Arkansas
Opinion delivered November 18, 2004

Raymond Abramson, for appellant.

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

JIM HANNAH, Justice. Appellant Marvin Gay Jefferson was convicted of attempted second-degree murder and aggravated robbery and sentenced to a total of thirteen years' imprisonment. Jefferson was initially charged with attempted capital murder and aggravated robbery, as were codefendants Ronald Foster and Tyrell Starr. Jefferson appealed his conviction to the court of appeals, which reversed on the ground that the circuit court erred in admitting into evidence the redacted statement of Jefferson's non-testifying

codefendant. *See Jefferson v. State*, 86 Ark. App. 325, 185 S.W.3d 114 (2004). We granted the State's petition for review of this decision, pursuant to Ark. Sup. Ct. R. 1-2(e). When we grant review following a decision by the court of appeals, we review the case as though it had been originally filed with this court. *See Zangerl v. State*, 352 Ark. 278, 100 S.W.3d 695 (2003). Jefferson raises two points on appeal for our consideration. He first argues that the circuit court erred in denying his motion for directed verdict. He also argues that the circuit court violated his Sixth Amendment right to confrontation, as set forth in *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny, by admitting into evidence the redacted statement of his non-testifying codefendant, Tyrell Starr, at their joint trial. We hold that the circuit court erred in admitting codefendant Starr's redacted statement. Accordingly, we reverse and remand for a new trial.

Facts

On the afternoon of March 20, 2002, in Holly Grove, Arkansas, William Robert Rawls, a bank's mail courier, was driving the bank van on a highway behind a Cadillac that bore no license plate. Rawls stated that the car's left turn signal was engaged, that the car slowed to a stop, and that he stopped the van behind it in order not to hit the car. Three people were riding in the Cadillac. According to Rawls, the front seat passenger in the Cadillac, wearing a ski mask, exited the car and shot at the van windshield four times. Rawls said that the shooter then approached the passenger side of the van and said, "Give me your money." Rawls told the shooter that he did not have any money. The shooter replied that he was going to kill Rawls and then took Rawls's bank bag and threw it on the ground.

When the shooter threw the bag to the ground, he told the man who had been riding in the back seat of the Cadillac to pick up the bag. The man complied by putting the bag in the Cadillac's back seat. The driver of the Cadillac never exited the vehicle. The two passengers re-entered the Cadillac and drove away. Rawls testified that neither the shooter nor the other passenger was wearing orange. He said that the driver never turned around, and that he could only see the back of the driver's head and shoulders.

Marvin Ensley, a man who lived near the location of the robbery, was listening to his police scanner at the time of the robbery. After hearing about the incident on his scanner, Ensley went to the area of the robbery. Ensley later told law enforcement

officials that he had seen a black man wearing orange overalls walking along side the woods. Another man, Hal Bones, stated that on March 20, he gave a ride to Jefferson, who was wearing an orange suit. Bones reported that Jefferson told him that he had been hunting but had lost his gun in the water. Bones asked Jefferson if he wanted to go and look for the gun; Jefferson said that he did not. A ski mask was located by police about a half mile from the crime scene. DNA from saliva found on the mask was consistent with the DNA of Ronald Foster.

Jefferson was ultimately brought in for an interview with the police. In a statement given to a criminal investigator with the Arkansas State Police, Jefferson said that he was in the Cadillac at the time the crime occurred. However, he denied that he had any knowledge that the other two, one of whom he identified as Foster, were going to commit a robbery or that they had a gun. Jefferson claimed to be wearing bright orange at the time, and he said that "if I was going to do something like that[,] I would not have been wearing bright orange where everyone could see me."

Jefferson stated that after the crimes, Foster went through the bank bag and began to discard items from the car. Jefferson further stated that after Foster and Starr stopped the car, he exited the car, leaving the two behind. Jefferson said he was just in the wrong place at the wrong time.

Both Foster and Starr gave handwritten statements to the police. Starr implicated both Jefferson and Foster by name. Starr stated that he allowed Jefferson to drive his car that day and that Jefferson stopped the Cadillac in the roadway. Starr also stated that Foster was in the front passenger seat, put on a ski mask, and shot at the van. Starr claimed that Jefferson assisted Foster. Starr said that after the crime, he moved to the driver's seat to drive away, that Jefferson and Foster "jumped in" the car, and that Foster disposed of the bank bag and pieces of the gun.

Jefferson and Starr were tried together. Foster entered a guilty plea. Prior to trial, Jefferson filed a motion in limine to prevent the use of Starr's statement, arguing that pursuant to *Bruton v. United States*, 391 U.S. 123 (1968), and *Gray v. Maryland*, 523 U.S. 185 (1998), his Confrontation Rights under the Sixth Amendment would be violated by use of Starr's statement without the benefit of his testifying. The State retyped Starr's handwritten statement, changing both Foster's and Jefferson's names to "he," "they," or "some other guy," attempting to comply with the

dictates of *Bruton, supra,* and *Gray, supra.* Jefferson's counsel contended that even with the changes to pronouns, the inference was prejudicial by indirectly referring to Jefferson. The State put Foster's name back into the statement where Foster was incriminated to avoid any confusion between Foster and Jefferson. Jefferson's counsel maintained that the statement was still violative of Jefferson's rights of confrontation, even with the addition of Foster's name. The circuit court disagreed and allowed the State to use Starr's modified statement, finding that the State's corrections complied with the requirements of *Bruton* and *Gray.*

At trial, Rawls testified as outlined above, and Barry Roy, a criminal investigator with the Arkansas State Police, recounted his investigation of the crimes and read into evidence Jefferson's statement and a modified version of codefendant Starr's statement. At the close of the State's case, Jefferson moved for a directed verdict, arguing that the State failed to prove that he had the premeditation or deliberation necessary for attempted capital murder or knowledge that any such offense was about to take place. As to the aggravated robbery, Jefferson argued that the prosecution failed to prove that he had the purpose to commit a theft or that he was an accomplice. The motions were denied.

The jury deliberated, finding Jefferson guilty of attempted second-degree murder and aggravated robbery. We now address Jefferson's arguments on appeal.

Sufficiency of the Evidence

A motion for directed verdict is a challenge to the sufficiency of the evidence. *Ramaker v. State,* 345 Ark. 225, 46 S.W.3d 519 (2001). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Cummings v. State,* 353 Ark. 618, 110 S.W.3d 272 (2003). We will affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

The longstanding rule in the use of circumstantial evidence is that, to be substantial, the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused. *Ross v. State,* 346 Ark. 225, 57 S.W.3d 152 (2001). The question of

whether the circumstantial evidence excludes every other reasonable hypothesis consistent with innocence is for the jury to decide. *Id.* Upon review, this court must determine whether the jury resorted to speculation and conjecture in reaching its verdict. *Id.*

Jefferson contends that the circuit court erred in denying his motion for directed verdict as to the charge of attempted capital murder because the State failed to prove that he acted with premeditation and deliberation, that he took a substantial step in the course of conduct intended to culminate in the commission of capital murder, or that his conduct was strongly corroborative of his criminal purpose. Though charged with attempted capital murder, Jefferson was convicted of the lesser-included offense of attempted second-degree murder. Nevertheless, Jefferson moved the circuit court to direct a verdict solely on the greater offense of attempted capital murder.

We hold that Jefferson's argument concerning the sufficiency of the evidence as to his second-degree murder conviction is procedurally barred. A defendant, in making his motions for directed verdict, must anticipate an instruction on lesser-included offenses and specifically address the elements of that lesser-included offense on which he wishes to challenge the State's proof in his motion. *See Brown v. State*, 347 Ark. 308, 65 S.W.3d 394 (2001). Since Jefferson failed to address the elements of attempted second-degree murder in his directed-verdict motion, we do not address this issue.

Next, we consider Jefferson's challenge to the sufficiency of the evidence to support his aggravated robbery conviction. Jefferson argued that there was no proof of his actual participation and that there was no proof that he had any knowledge of the plan to commit this crime such that accomplice liability should attach. Pursuant to Ark. Code Ann. § 5-12-103(a)(1) (Repl. 1997), a person commits aggravated robbery if he commits robbery and is armed with a deadly weapon or represents by word or conduct that he is so armed. A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another. Ark. Code Ann. § 5-12-102(a) (Repl. 1997).

A person is criminally liable for the conduct of another person when he is an accomplice of another person in the commission of an offense. Ark. Code Ann. § 5-2-402(2) (Repl.

1997). One's presence at the crime scene or failure to inform law enforcement officers of a crime does not make one an accomplice as a matter of law. *Atkinson v. State*, 347 Ark. 336, 347, 64 S.W.3d 259, 266 (2002). Relevant factors in determining the connection of an accomplice to a crime are the presence of the accused in proximity of a crime, the opportunity to commit the crime, and an association with a person involved in a manner suggestive of joint participation. *Id.* Under the accomplice liability statute, a defendant may properly be found guilty not only of his own conduct, but also that conduct of his accomplice; when two or more persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996). Finally, there is no distinction between principals on the one hand and accomplices on the other, insofar as criminal liability is concerned. *Id.*

[redacted] In this case, Jefferson admits to being in the Cadillac when the crimes occurred. He further stated that he was "wearing bright orange" at the time of the crime. Rawls stated that neither of the two men who got out of the Cadillac was wearing a bright orange suit at the time of the crimes, and that the person remaining in the car was the driver. The State contends the jury could have reasonably concluded that Jefferson was the driver, and that by blocking the van, which required it to stop, and by waiting while Foster fired shots at the van's driver and Jefferson and Foster's companion retrieved the bank bag, Jefferson aided or encouraged the commission of aggravated robbery, thereby establishing his guilt as an accomplice. The State's contention is well taken. Further, Jefferson's admitted presence and flight from the scene was for the jury to consider, even though he denied any criminal knowledge or intent. A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence. *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003). Intent to commit a robbery may be inferred from the facts and circumstances of the case. *Jenkins v. State*, 350 Ark. 219, 85 S.W.3d 878 (2002). The circuit court did not err in denying the motion for directed verdict on the aggravated robbery; it was a fact question properly left to the jury to resolve.

Redacted Statement

Jefferson next argues that the circuit court erred in denying his motion in limine to preclude admission of a non-testifying

codefendant's statement, in violation of his Sixth Amendment right of confrontation. Jefferson and two other men were originally charged with aggravated robbery and attempted capital murder. One of the men, Ronald Foster, entered a guilty plea. The remaining man, Starr, was to be tried with Jefferson. Jefferson filed a motion to sever. The motion was denied. Both Jefferson and Starr gave statements to police. Jefferson filed a motion in limine to preclude the State from admitting Starr's statement. In response to the motion, the circuit court ordered redaction of the out-of-court statements of both defendants. The State removed the names and used substitutes, such as "he," "him," and "them." At the request of defense counsel, Foster's name was put back into the statements. Still, Jefferson continued to argue that even with the redactions, he could not protect his right of cross-examination secured by the Confrontation Clause, and he proposed further redactions in the statements. The circuit court did not allow further redactions. The statements as admitted into evidence are as follows:

Statement of Tyrell Starr

> I had went to Stuttgart to fill out some job applications and while I was gone Ronald Foster called my grandmother Willie Mae Strong's house, looking for me. When I got back, grandma told me Ronald Foster had called. Then Ronald Foster came walking up to the house. Ronald Foster told me he wanted to ride. He said make the block and then told me to stop and he got out of the car and talked to some guy. I didn't hear what they were talking about. He said "I ain't never drove your car I always let you drive my car." I let him drive my car. We went to the liquor store, and I went inside and bought some beer. Then I got in the back seat behind him, and we rode out of town on Highway 17. I noticed Ronald and him looking back, and I saw a white van behind us. We were driving in the middle of the road so the van could not pass us. Then he slowed down and turned his blinker on like he was going to turn. Then he stopped in the road. When they stopped, I was wondering what was going on. I had not seen a mask or a gun at this time. When the car stopped it was blocking the road. Ronald was sitting in the front passenger's seat, and he pulled the ski mask over his head and I saw the gun. Ronald got out of the car and started shooting at the van. He got out and ran back there to. I was scared so I jumped out and got under the driver's wheel and started to drive off. They just jumped on the car, they did not get in the car. I stopped and they got in the car. I asked them "What the — they were doing?" They told me to shut up and drive. We hit the mud hole hard and mud

and water went all over the car. We went up the road and after we went through the mud hole, Ronald started throwing stuff out the window. He threw a long red bag — a long black bag, a red bank bag and then tried to take the gun apart and throw it away piece by piece. We took a right on Sand Road and we had to turn around, water was too deep. We went back toward Holly Grove about a half a mile and turned left into a field road and we got stuck. They wanted me to burn my mama's car up. "Y'all just — up." We were then stuck for a couple of hours. We finally got out about dark and he left before we got the car out. He walked or ran back to town. When Ronald and I got back to town, I let Ronald out near the projects when you come into Holly Grove on Highway 17. He got out of the car and got into the car with Spike, Tedrick Nunn. I went to try to find my mother and tell her what happened. I went to my house and the phone rang and I talked to her and told her what had happened. My mama told me to go turn myself in and that's what I was going to do when Bob stopped me.

Statement of Marvin Jefferson

I was working on my car at my auntie's house when he and Ronald Foster came by. He asked me if I wanted to make the block and I asked him to take me to Virginia Keaton's so I could give her five dollars for letting me park my car at her house. I didn't realize anything was going on. I had not seen a gun or a mask up to this point. All I know is that all of a sudden, they stopped the car and jumped out.

Ronald Foster on the front passenger side, he had a black mask he pulled over his head. I heard some hollering, someone say, "Give me the money." I wanted to get out of the car and run, but I didn't want them shooting me. Then I heard some shooting, I think it was three or four shots. When they got back in the car, I asked them "What the — they were doing?" They were going through the bag, it was Ronald going through the stuff in the bag and some other guy was driving. When we got to the deep puddle of water the car slowed down, the car slowed down, Ronald was throwing shit out of the car. That's when I decided to jump out of the car and get away from them. I jumped out of the car and hit the field heading toward Holly Grove. They kept going, the car was going down the road from me. All I know is I didn't rob anyone. I was just in the wrong

> place at the wrong time. I was wearing bright orange, and if I was going to do something like that I would not have been wearing bright orange where everyone could see me. I am telling the truth and I am a victim of circumstances.

* * *

In *Bruton v. United States*, 391 U.S. 123, 126 (1968), the United States Supreme Court held that a defendant is deprived of his right of cross-examination under the Confrontation Clause of the Sixth Amendment when a codefendant refuses to testify but the codefendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. Subsequently, in *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), the Court held that the Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction[1] when the confession is redacted to eliminate not only the defendant's name, but also any reference to his or her existence. In *Gray v. Maryland*, 523 U.S. 185, 195 (1998), the Court held that "redactions that replace a proper name with an obvious blank, the word "delete," a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results." The Court has not addressed the issue of whether a non-testifying codefendant's statement is admissible when the defendant's name has been replaced with a pronoun.

We begin by noting that *Bruton* is not directly on point because once Starr's statement was redacted, Jefferson was not specifically named in that statement. We also note that *Richardson* is distinguishable from the present case. In *Richardson*, the United States Supreme Court was asked to determine "whether *Bruton* requires the same result when the codefendant's confession is redacted to omit *any* reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." 481 U.S. at 202 (emphasis added). The Court noted that "[t]he confession was redacted to

[1] The judge specifically instructed the jury that the non-testifying codefendant's confession was not to be considered as evidence against the defendant. *See Richardson*, 481 U.S. at 205.

omit reference to the respondent — indeed, to omit all indication that *anyone*, other than [the other codefendants] participated in the crime." *Id.* at 203 (emphasis in original).

Here, Starr's statement was not redacted to omit all reference to Jefferson. In fact, it is clear from the redacted statement that someone other than Starr and Foster participated in the crime. Thus, *Richardson* is inapplicable. What we must determine in this case, as Jefferson argues, is whether the United States Supreme Court's holding in *Gray* applies to the facts of this case. In other words, we must determine whether redactions that replace a proper name with a pronoun or an indefinite word are "similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results." *See Gray*, 523 U.S. at 195.

Jefferson argues that replacing his name with a pronoun does not accomplish the directives of *Bruton* and *Gray* because the redactions served as indirect or veiled inferences to Jefferson and substantiated his existence and identity in the highly incriminating statement of Starr. The State disagrees and argues that our federal circuit court's decision in *United States v. Edwards*, 159 F.3d 1117 (8th Cir. 1998), *cert. denied*, 528 U.S. 825 (1999), is applicable here. In *Edwards*, the Eighth Circuit Court of Appeals held that the district court's decision to admit non-testifying defendant admissions, redacted as to codefendants by the use of "we," "they," "someone," and "others," and accompanied by appropriate limiting instructions, did not violate the rule set out in *Bruton*, and its progeny. The court wrote:

> Unlike use of the word "deleted," which directs the jury's attention to an obvious redaction, referring to joint activity by use of the pronouns "we" and "they," or by use of indefinite words such as "someone," does not draw attention to the redaction and thus, in most situations, will not be incriminating unless linked to a codefendant by other trial evidence. Here, for example, the evidence included references to a large cast of characters from the Marlborough neighborhood who were connected in various ways to the defendants. Some of the admissions inculpated nondefendants, thereby weakening any inference that words such as "they" and "someone" referred to the declarant's codefendants. With improper inferences thus weakened, it was appropriate to rely upon

> the normal rule that juries are presumed to obey instructions to disregard the evidence as to codefendants.[2]

Edwards, 159 F.3d at 1126 (citation omitted).

We believe *Edwards* is distinguishable from the instant case. In that case, the Eighth Circuit Court of Appeals noted that the evidence included references to a "large cast of characters" connected to the defendants. Thus, the use of "they," "we," and "someone" would not draw attention to the redaction. Here, there was no "large cast of characters." The prosecution made clear in its opening statement that three individuals participated in the crimes, and two of those were on trial:

> A man gets out of the front seat with a mask on, starts shooting at the vehicle that Mr. Rawls is driving. After the man starts shooting, a man in the back seat gets out of the car and starts running up to the van also. Three (3) people. Two (2) people on trial today. Tyrell Starr and Martin [sic] Jefferson. . . .
>
> You're going to have to pay attention because these two men have given statements. . . . There's three (3) people involved, Ronald Foster's the shooter. The State concedes that . . . [Rawls] can tell you there are three (3) people involved. And, Ronald Foster's the shooter. . . .
>
> How can one man, Ronald Foster, shoot, drive the car, pick up the bag and get away? It's more than one person involved in this. It's three (3) men. Ronald Foster's not on trial today. These two men are on trial, Tyrell Starr and Marvin Jefferson.

* * *

As previously indicated, Rawls testified that three men were involved in the crimes. Starr's statement, written in first-person, refers to three individuals: "I," "Robert Foster," and another individual referred to as "he," "him," and "some guy." Clearly, "I" refers to Starr and, obviously, "Robert Foster" refers to Foster. Though Jefferson's name was not redacted with an

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[2] The *Edwards* court noted that during the trial, the district court "repeatedly instructed the jury to consider each admission only against the declarant." *Edwards*, 159 F.3d at 1124.

obvious blank, the word "delete," or a symbol, as was the appellant's name in *Gray*, the teaching of *Gray* is that even redacted confessions can sometimes "obviously refer directly to someone, often obviously the defendant, and . . . involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Gray*, 523 U.S. at 196. Starr's statement, as admitted into evidence, obviously directly referred to Jefferson, an inference that the jury easily could have drawn from Jefferson's status as a codefendant and the State's concession that Foster was the shooter. We hold that the admission of Starr's redacted statement violated Jefferson's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

The State maintains that even if it were error for the circuit court to admit Starr's statement, reversal is not warranted because any violation of *Bruton* was harmless beyond a reasonable doubt because Jefferson admitted to being in the Cadillac when the crimes were committed. We reject the State's contention.

[redacted] The United States Supreme Court has explained that a violation of the *Bruton* rule may be harmless error if there is overwhelming evidence of the defendant's guilt. *See Harrington v. California*, 395 U.S. 250, 253 (1969). "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Schneble v. Florida*, 405 U.S. 427 (1972). Further, the Court has stated:

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. *Cf. Harrington*, 395 U.S. at 254; *Schneble v. Florida*, 405 U.S. at 432.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

[redacted] In this case, Starr's statement was important to the prosecution's case, as it was the only evidence that Jefferson got out of the car and aided Foster in "shooting at the van." The only

evidence that was cumulative was that both Starr's statement and Jefferson's statement put Jefferson in the car at the time of the crimes. The mere presence of a person at the scene of a crime is not proof of his or her guilt. *Thomas v. State*, 330 Ark. 442, 954 S.W.2d 255 (1997). We do not agree with the State's contention that even if Starr's statement was excluded, there was still overwhelming evidence that Jefferson actively participated in the crimes. To conclude that a constitutional error is harmless and does not mandate reversal, this court must conclude beyond a reasonable doubt that the error did not contribute to the verdict. *See Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999); *Allen v. State*, 310 Ark. 384, 838 S.W.2d 346 (1992); *see also Chapman v. California*, 386 U.S. 18 (1967). We cannot conclude that the admission of Starr's statement is harmless error beyond a reasonable doubt.

Reversed and remanded.

Edna Thomas BROWN *v.* PINE BLUFF NURSING HOME a/k/a Southern Healthcare, Inc., d/b/a Pine Bluff Nursing Center

04-52 199 S.W.3d 45

Supreme Court of Arkansas
Opinion delivered December 2, 2004

Wilkes & McHugh, P.A., by: *Brian G. Brooks*, for appellant.

Anderson, Murphy & Hopkins, L.L.P., by: *David A. Littleton*, for appellee.

TOM GLAZE, Justice. In January of 1998, Ed Thomas was admitted to the Pine Bluff Nursing and Rehabilitation Center ("the nursing home"). Thomas was a seventy-two-year-old man who had been diagnosed with dementia and declared incapacitated. On January 24, 1998, Thomas wandered away from the nursing home; tragically, he was never found. On September 14, 2000, Thomas's daughter and guardian, appellant Edna Thomas Brown, filed a negligence suit against the nursing home, naming Pine Bluff Nursing Home and Stan Townsend, a part owner of the company that owned the nursing home. The complaint was served on Townsend; he and the nursing home answered, and discovery commenced. However, Brown voluntarily dismissed that suit on July 19, 2001.

On July 8, 2002, less than twelve months later, Brown filed a second complaint against Pine Bluff Nursing Home and Stan Townsend, wherein she again alleged that the nursing home "negligently cared for Ed Thomas in such a manner as to be the proximate cause of his probable death." On November 4, 2002, Brown filed a motion to extend the time for service of process, claiming the nursing home's agent for service had changed addresses. The trial court granted Brown an extension order, which was entered on November 5, 2002. Nonetheless, the nursing home was never served with a summons. However, counsel for the nursing home and Townsend became aware of the suit as a result of a letter mailed to the nursing home's administrator, Deborah York, who was not a registered agent for service. Nonetheless, the nursing home and Townsend filed an answer on December 2, 2002, and a motion for summary judgment on April 10, 2003. Both the nursing home and Townsend alleged that Brown had

never properly served the complaint on either party; therefore, they argued, Brown's second lawsuit should be dismissed with prejudice.

On May 1, 2003, more than five years after Ed Thomas's disappearance, the Jefferson County Probate Court declared him to be deceased, pursuant to Ark. Code Ann. § 16-40-105; the court appointed Brown as personal representative of Thomas's estate. On May 9, 2003, Brown filed an amended complaint again alleging negligence; in addition, she alleged for the first time a wrongful death claim under Ark. Code Ann. § 16-62-102. This time, Brown's complaint was properly served, and on May 16, 2003, the nursing home filed a motion to dismiss the amended complaint, reiterating the failure-of-service contentions raised in its previous motion for summary judgment.

In her response to the nursing home's motion to dismiss, Brown argued that, since the filing of the nursing home's motion for summary judgment, the facts had changed. In particular, she pointed out that, due to the probate court's declaration that Thomas was dead, she had a wrongful death claim that had not previously existed. Brown also noted that her complaint in the first suit contained neither a wrongful death claim nor a statutory survival claim, and that neither cause of action could have been pled prior to the declaration of Thomas's death. Because the May 9, 2003, amended complaint involved allegations of fact that occurred after the July 8, 2002, complaint was filed, she claimed, the amended complaint should properly be classified as a supplementary pleading under Ark. R. Civ. P. 15(d), as opposed to an amended pleading under Ark. R. Civ. P. 15(a). In addition, Brown argued that no wrongful death cause of action accrued until May 1, 2003, when the trial court declared Thomas dead; therefore, she contended, in the event the court decided to grant the nursing home's motion to dismiss, such dismissal should be without prejudice under Ark. R. Civ. P. 41(a). In a supplemental response, Brown further argued that, under Ark. Code Ann. § 16-56-116 (Supp. 2003), the statute of limitations should be tolled due to Thomas's mental incompetence.

After a hearing, the trial court granted the nursing home's summary-judgment motion on September 19, 2003, finding that it and Townsend were not properly served within the extended time for service. In addition, the court found that Brown's wrongful death claim was barred by the three-year statute of limitations, *see* Ark. Code Ann. § 16-62-102(c)(1) (1987 & Supp. 2003), because

the wrongful death claim was derivative of the initial complaint alleging negligence. The court also rejected Brown's savings-statute argument, ruling that the savings statute applied only to common-law actions, and did not toll the statute of limitations for a wrongful death claim. Therefore, the court dismissed Brown's amended complaint with prejudice.

On appeal, Brown argues that the trial court erred in holding that her wrongful death action was barred; she also contends that Thomas's incompetence tolled the statute of limitations. The parties agree that this appeal presents purely questions of law, and that the appropriate standard of review is therefore *de novo*. *See Sanford v. Sanford*,355 Ark. 274, 127 S.W.3d 486 (2003) (a trial court's conclusion on a question of law is given no deference on appeal); *Murphy v. City of West Memphis*, 352 Ark. 315, 101 S.W.3d 221 (2003); *City of Lowell v. M & N Mobile Home Park, Inc.*, 323 Ark. 332, 916 S.W.2d 95 (1996).

We must affirm the trial court's decision because Brown's wrongful death claim was derivative of her negligence action, and the negligence action was subject to dismissal with prejudice. It is undisputed that Brown's July 8, 2002, complaint contained the same negligence allegations set out in her first suit, which she voluntarily nonsuited. However, Brown never properly served the July 8, 2002, complaint alleging negligence within the extended time for service, which would have been on or before February 3, 2003.[1] Therefore, Rule 4(i) of the Arkansas Rules of Civil Procedure mandates dismissal of the negligence claim, and, because it was a second dismissal, Ark. R. Civ. P. 41(b) dictates that the dismissal operates as an adjudication of the merits, making the dismissal with prejudice.

Because the negligence action was dismissed with prejudice, the dismissal amounted to a final judgment. *See Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003) ("Pursuant to Rule 41(b), the second dismissal was an adjudication on the merits"); *Curry v. Hanna*, 228 Ark. 280, 283, 307 S.W.2d 77, 80 (1957) ("The rule appears to be well established that a 'dismissal with prejudice' is equivalent to a final judgment

[1] As the complaint was filed on July 8, 2002, the 120 days allowed for serving the complaint under Rule 4(i) would have expired on November 5, 2002. As noted above, on November 5, 2002, Brown obtained an order extending the time for service by ninety days, or until February 3, 2003.

insofar as the application of the doctrine of *res judicata* is concerned"); *Seaboard Finance Co. v. Wright*, 223 Ark. 351, 266 S.W.2d 70 (1954) (a dismissal with prejudice is a "final adjudication on the merits" for purposes of *res judicata*).

The negligence alleged in Brown's complaints also formed the underlying cause of the wrongful death action alleged in her May 9, 2003, amended complaint. However, this court has held, as recently as this year, that a wrongful death action is derivative in nature from the original tort, and where the underlying tort action is no longer preserved, the wrongful death action is barred as well. *See Estate of Hull v. Union Pacific R.R.*, 355 Ark. 547, 141 S.W.3d 356 (2004); *see also Simmons First National Bank v. Abbott*, 288 Ark. 304, 705 S.W.2d 3 (1986). In *Estate of Hull*, there was an accident involving a train and a car in March of 1996; Sharon Hull's guardian entered into a settlement with the railroad. As part of the settlement, the guardian executed a release of all liability and claims related to the accident. Hull died in 1999, and at that time, her estate attempted to seek damages against Union Pacific as a result of her death. The trial court dismissed the estate's wrongful death suit, holding that the 1996 settlement and release barred any future suit. This court agreed, noting that a "suit by an injured party, *reduced to final judgment*, extinguishes any wrongful death claim against identical defendants based on identical allegations of fault." *Estate of Hull*, 355 Ark. at 358 (emphasis added). The court held that, since the wrongful death action was derivative in nature from the original tort, and since the original right of the decedent was settled and therefore no longer preserved, Union Pacific had an absolute defense in its prior settlement with the decedent. *Id.* at 360. Likewise, in *Simmons*, the court held that a settlement by an injured party or a suit reduced to judgment during the lifetime of the injured party bars a subsequent wrongful death suit by the next of kin or other beneficiaries because of *res judicata*. *Simmons*, 288 Ark. at 307.

This result is obtained because our wrongful death statute, Ark. Code Ann. § 16-62-102 (1987 & Supp. 2003), provides that a cause of action arises when a person's death is "caused by a wrongful act, neglect, or default and the act, neglect, or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereof *if death had not ensued*[.]" (Emphasis added.) Other jurisdictions with similar wrongful death statutes have reached the same result. *See, e.g.*, *Xu v. Gay*, 257

Mich. App. 263, 668 N.W.2d 166 (2003); *Kessinger v. Grefco, Inc.*, 251 Ill. App. 3d 980, 623 N.E.2d 946 (1993); *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343 (Tex. 1992). The supreme court of Texas explained the rationale for this rule as follows:

> We have consistently held that the right of statutory beneficiaries to maintain a wrongful death action is *entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death*, and *is subject to the same defenses to which the decedent's action would have been subject. In short, wrongful death action plaintiffs stand in the legal shoes of the decedent.* As we said in *Vassallo v. Nederl-Aerik Stoomy Maats Holland*, 162 Tex. 52, 344 S.W.2d 421 (1961):
>
>> It is our opinion that under the express provisions of the Wrongful Death Act, the plaintiff is permitted to assert any basis for recovery that the decedent could have asserted if he were alive, and no other; and that the defendant can assert any defense to that cause of action that it could have asserted if the decedent had survived, and no other. The statutory beneficiaries of a deceased . . . have the same substantive rights to recover as the deceased would have had had his injury been less than death.
>
> Accordingly, we have recognized that *a wrongful death action is not allowed if the decedent could not, immediately prior to his death, have maintained an action*[.]

Russell, 841 S.W.2d at 347 (emphasis added).

In the present case, as discussed above, Thomas's negligence action concluded in a dismissal with prejudice. That action having been dismissed with prejudice, Thomas could not have brought another negligence lawsuit stemming from the same acts in the event that he had survived. Therefore, we affirm the trial court's decision that Brown is barred from bringing the instant wrongful death action, and the trial court was correct to dismiss the case.[2]

CORBIN and HANNAH, JJ., concur.

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[2] For clarity's sake, we point out that we are *not* holding that Brown's wrongful death action is barred by the statute of limitations. Had there not been a dismissal with prejudice of the underlying negligence action, and had Brown simply waited to file the wrongful death complaint after obtaining the declaration of death from the probate court, her action would have been timely, as a wrongful death action does not arise until the date of the death. *See Nelson v. Schubert*, 98 Wash. App. 754, 994 P.2d 255 (2000) (wrongful death action not barred

JIM HANNAH, Judge, concurring. I agree that this case must be affirmed, but I write separately because I believe that this court has erred in the past by holding that a wrongful death action is derivative of the decedent's action for the injuries causing death. However, this case does not provide the appropriate opportunity to overrule the prior cases. This case presents a tragic set of facts; however, this case under our present case law, also presents a failure to preserve a cause of action for injuries suffered by Ed Thomas.

Under current law, any cause of action for injuries suffered by Thomas was extinguished by Brown's failure to timely serve the July 8, 2002, complaint. Because this court long ago erroneously held that a wrongful death action is derivative of an action for injuries suffered by the decedent, the cause of action for wrongful death seeking compensation for injuries suffered by Thomas's next of kin was extinguished along with the cause of action for injuries suffered by Thomas. *Matthews v. Travelers Indem. Ins. Co.*, 245 Ark. 247, 432 S.W.2d 485 (1968). *See also Estate of Hull v. Union Pacific R.R. Co.*, 355 Ark. 547, 141 S.W.3d 356 (2004); *Simmons First Nat'l Bank v. Abbott*, 288 Ark. 304, 705 S.W.2d 3 (1986). The parties in the present case have not challenged the holding of *Matthews*. The holding of *Matthews* was not challenged in *Simmons* or *Estate of Hull*, and in both those cases, this court followed *Matthews* pursuant to the doctrine of *stare decisis*.

In the case before us, Brown argues that the two complaints filed previous to the "Amended Complaint" now at issue did not assert that Pine Bluff Nursing Home caused Thomas's death. She also argues that neither of the two complaints prior to the "Amended Complaint" asserted "wrongful death or survivor actions." The first complaint was non-suited and is not included in the record before this court. The July 8, 2002, complaint alleges a cause of action by Thomas's guardian seeking compensatory and punitive damages for "physical pain and suffering, humiliation, fright and outrage." Thus, Brown asserts that in her first two complaints, she was suing as Thomas's guardian for injuries suffered in his disappearance. The July 8, 2002, complaint was

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by the three-year statute of limitations on the underlying negligence claim, because the limitations period did not begin to run until a missing person's death could be established by statutory presumption); *Howell v. Murphy*, 844 S.W.2d 42 (Mo. Ct. App. 1992) (plaintiff could not have asserted a wrongful death action until after time had elapsed under presumption-of-death statute).

dismissed with prejudice for failure to timely serve under Ark. R. Civ. P. 4(i). That dismissal is not appealed.

If Thomas was alive on July 8, 2002, when the second complaint was filed, his guardian could have proceeded to assert an action on his behalf for his injuries. Ark. Code Ann. § 28-65-305 (Repl. 1987). If he was dead, the guardian could bring no such action. However, Ark. Code Ann. § 16-62-101 (Supp. 2001) provides that for wrongs done to a person before death, a suit may be brought after the person's death for the benefit of his or her estate. Under Ark. Code Ann. § 16-62-102 (Supp. 2001), a wrongful death action may be brought to allow the spouse and next of kin to recover for injuries they suffered as a consequence of a wrongful death.

Thus, while the survival statute provides for compensation to the estate for injuries to the decedent, the wrongful death statute compensates the spouse and next of kin for injuries they suffered as a consequence of the decedent's death. That makes it clear that a wrongful death action is not derivative of any cause of action possessed in life by the decedent, or derivative of any cause of action of the decedent that survives death under Ark. Code Ann. § 16-62-101. However, this court in *Matthews* stated:

> We are not overlooking the argument that the administrator's action for wrongful death is to some extent derivative, in that it may be extinguished either by a suit for personal injuries prosecuted by the injured person to a final judgment during his lifetime, Restatement, Judgments, § 92 (1942), or by the running of the applicable statute of limitation during the injured person's lifetime. *Hicks v. Missouri Pac. R.R.*, 181 F. Supp. 648 (W.D. Ark. 1960), app. dism. 285 F.2d 427 (1960).

Matthews, 245 Ark. at 250. This court relied on *Matthews* in *Simmons.* This court in *Estate of Hull* then necessarily followed the existing precedent. When properly presented to this court, we should reject the above quoted statement in *Matthews* and correct the law.

A wrongful death action allows a spouse and next of kin to recover damages they personally suffered as a consequence of a tortious injury causing the death of a family member. The injury at issue in a wrongful death action is the injury suffered by the spouse and next of kin, not the injuries suffered by the decedent. A survival action compensates the estate for injuries to the decedent. Thus, while a wrongful death action is obviously dependent upon,

or even arguably derivative of a tortious injury suffered by the decedent, it is not derivative of a pending lawsuit or a viable cause of action for injuries suffered by the decedent. In *Matthews*, this court mistakenly stated that an action for personal injuries prosecuted by the injured person to a final judgment during his or her lifetime extinguishes any right to bring a wrongful death action. As Ark. Code Ann. § 16-62-102 clearly indicates, an action for wrongful death is dependent upon a wrongful act causing the death of the decedent. The conclusion that a wrongful death action is derivative of a pending lawsuit or viable cause of action for injuries suffered by the decedent is simply a misstatement of the law and an error. Regrettably, this court has no choice but to affirm this case; however, we should revisit the law on wrongful death at the first opportunity.

CORBIN, J., joins.

Johnny RATLIFF *v.* STATE of Arkansas

CR 04-714 199 S.W.3d 79

Supreme Court of Arkansas
Opinion delivered December 2, 2004

William R. Simpson, Jr., Public Defender, by: *Erin Vinett*, Deputy Public Defender, for appellant.

Mike Beebe, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant Johnny Ratliff was convicted by a Pulaski County jury of three counts of kidnap-

ping, one count of aggravated robbery, one count of rape and one count of theft of property. Ratliff was sentenced to five terms of life imprisonment for the rape, aggravated robbery, and three kidnappings; he was also sentenced to thirty years' imprisonment for the theft of property. On appeal, Ratliff does not challenge the aggravated robbery, rape, and theft convictions, but he does question the three Class Y kidnapping convictions. He contends that, because he voluntarily released his three victims alive and in what he considers to be a safe place, the charges should have been reduced to Class B kidnappings under Ark. Code Ann. § 5-11-102(b) (Repl. 1997). In his second argument, Ratliff submits that the trial court erred in denying his *Batson* challenge to the prosecution's peremptory strike exercised against an African-American venireperson.

Ratliff first contends that the trial court erred in refusing to direct a verdict in his favor on the grounds that he released his victims in a safe place. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, either direct or circumstantial. *Id.* at 595, 112 S.W.3d at 353. Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* When reviewing a challenge to the sufficiency of the evidence, the evidence is viewed in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *Id.*

In Arkansas, a person commits the offense of kidnapping by intentionally restraining another person without their consent for the purpose of obtaining a ransom or reward, or for any act to be performed or not performed for their return or release, or for inflicting physical injury upon them including engaging in sexual intercourse, deviate sexual activity, or sexual contact. Ark. Code Ann. § 5-11-102(a)(1) & (a)(4) (Repl. 1997). "Restraint without consent" includes "restraint by physical force, threat, or deception[.]" Ark. Code Ann. § 5-11-101(2) (Repl. 1997). Kidnapping is generally a Class Y felony, unless the defendant can show by a preponderance of the evidence that he voluntarily released the victim alive and in a safe place; in that case, the charge may be reduced to a Class B felony. *See* § 5-11-102(b).

The undisputed evidence presented to the jury is that Ratliff car-jacked April Rice and her two young daughters at a gas station

at around 7:00 p.m. on December 2, 2001, and held them for approximately two hours. Ratliff eventually released Rice and her children in what he contends was a safe place. In her testimony, Rice confirmed that Ratliff did indeed release her and her children near a lighted home. Rice also stated that the residents of the home, the Dougans, immediately allowed them to seek refuge in their home.

In his argument, Ratliff relies on *Griffen v. State*, 2 Ark. App. 145, 617 S.W.2d 21 (1981), for the proposition that, if the place is actually safe, even if only in hindsight, then it is a safe place within the meaning of the B-felony kidnapping statute. In *Griffen*, an adult kidnap victim was released one block from her home. By analogy, Ratliff argues that he released Rice and her children in a similar safe place, i.e., near a home.

The State, however, correctly points out that Ratliff's "safety in hindsight" argument is erroneous, arguing that the present case is more similar to *Mills v. State*, 351 Ark. 523, 95 S.W.3d 796 (2003). In *Mills*, an eleven-year-old girl was kidnapped and left alone on a dirt road during the day to find her way home. The State argues that no clear distinction can be made between an eleven-year-old being released alone on a dirt road during the day and Rice being released with two infant children on a dirt road at night, noting that Ratliff had no assurance that Rice would find the Dougans' home or that they would allow her and her children into their home.

This conclusion is supported by Rice's testimony, wherein she stated that Ratliff released her after pulling off the interstate onto a darkened road. Rice then added that the Dougan house was not visible from inside the car and that Ratliff never left the car; therefore, he could not have known that he was releasing her and her children near safety. Rice further testified that after being released, she jerked both children out of the car, fearing that Ratliff would drive off with one or both of the children. Once freed from the car, Rice positioned herself so that if Ratliff tried to run over her, she would be able to get the children behind a fence and out of the way. Rice additionally related that she did not look around and see the house until after she was sure that Ratliff had pulled away. Rice stated that only after the taillights disappeared did she see the house and run toward it with her children.

Rice's testimony regarding the safety of the release was bolstered by the testimony of Elizabeth Dougan, the woman who took Rice and her children in that night. Dougan testified that she

and her husband lived in Galloway, off Exit 161 from I-40, behind Love's Truck Stop, about a quarter of a mile down Jeter Road. Dougan stated that her home was approximately a football field's length from the road, that the area near the road is very dark at night, and that to get to her house "you have to be coming there because I live on a farm in the country."

The State contends that Ratliff's argument unnecessarily focuses on Dougan's benevolent deeds rather than on Ratliff's malevolent acts. Unlike the adult released on her street in *Griffen, supra,* Rice was not released in an area familiar to her. The State points out that Rice had been beaten, raped, and threatened with death, and she feared Ratliff might try to run over her when she was left alone on the road. The State notes that Rice and her children were not released in the safety of the Dougans' home, but rather on an unfamiliar dark country road. Furthermore, based on both Dougans' and Rice's descriptions of the property, it seems clear that Ratliff appeared to have no more knowledge that there was a house there than Rice did when she first exited the vehicle.

Given these facts, the trial court correctly allowed the jury to decide which of the kidnapping felonies applied in the present case. The jury was presented with all of the above-cited evidence and specifically determined that Ratliff did not release Rice and her children in a safe place. The jury thus found Ratliff guilty of Class Y kidnapping. There was substantial evidence to support the jury's finding that Ratliff failed to establish by a preponderance of the evidence that he released his victims in a safe place. Therefore, the Class Y kidnapping convictions are affirmed.

For his second point on appeal, Ratliff contends that the trial court erred in denying his *Batson* challenge to the prosecution's peremptory strike exercised on an African-American venireperson. Though Ratliff, an African-American male, made *Batson* challenges regarding the State's peremptory challenges of four African-American jurors at trial, only the State's striking of venireperson Phyllis Sanders, an African-American female, is at issue in this appeal.

Under *Batson v. Kentucky*, 476 U.S. 79 (1986), a prosecutor in a criminal case may not use his peremptory strikes to exclude jurors solely on the basis of race. *See Wooten v. State,* 351 Ark. 241, 91 S.W.3d 63 (2002). In *Batson*, the United States Supreme Court adopted a three-part test to determine whether a peremptory strike violates the Equal Protection Clause. *See Holder*

v. State, 354 Ark. 364, 124 S.W.3d 439 (2003); *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998). The *Batson* test first questions whether a *prima facie* case of discrimination has been shown. In *MacKintrush*, this court held that this first step is accomplished by showing the following: (a) the opponent of the strike shows he is a member of an identifiable racial group; (b) the strike is part of a jury-selection process or pattern designed to discriminate; and (c) the strike was used to exclude jurors because of their race. *MacKintrush*, 334 Ark. at 398, 978 S.W.2d at 296. Once discrimination is evident, the burden of producing a racially neutral explanation shifts to the proponent of the strike. *Id.* If a race-neutral explanation is given, the inquiry proceeds to the third step, in which the trial court must decide whether the opponent of the strike has proven purposeful discrimination. *Id.*

■ ■ We will only reverse a trial court's finding on a *Batson* objection when the trial court's decision was clearly against the preponderance of the evidence. *Holder, supra.* Furthermore, in *MacKintrush v. State, supra*, this court quoted the United States Supreme Court decision in *Purkett v. Elem*, 514 U.S. 765 (1995) (*per curiam*), wherein that Court held that a race-neutral explanation need not be persuasive or even plausible. *MacKintrush*, 334 Ark. at 398, 978 S.W.2d at 296. In *Pacee v. State*, 306 Ark. 563, 816 S.W.2d 856 (1991), this court noted that the nonuse of peremptory challenges may be just as relevant as its use.

The State contends that it struck venireperson Sanders for several reasons, including the fact that she was an LPN who worked with elderly people and people with mental diseases or defects. Because Ratliff was raising an insanity defense, the State expressed a fear that Sanders' prior experience with mental disease would color her perceptions. Ratliff, on the other hand, asserts that the strike was part of an effort to limit the number of African-American jurors on the jury, pointing out that the State struck Sanders, a retired military nurse, but did not strike potential venireman Billy Dixon, a white male, who was also retired from the military. *See Ford v. Norris*, 67 F.3d 162 (8th Cir.1995) (a prosecutor's failure to apply a stated reason for striking black jurors to similarly situated white jurors may evince a pretext for excluding jurors solely on the basis of race). However, during voir dire, the State also asserted an additional reason for striking Sanders, which was because she had previously been on a jury that had acquitted a criminal defendant.

Here, the State only used five of its six peremptory strikes. In addition, the jury included at least one African-American. We have held that the best answer the State can have to a charge of discrimination is to point to a jury which has black members. *See Jackson v. State*, 330 Ark. 126, 130, 954 S.W.2d 894, 895 (1997). Moreover, we have accepted as race-neutral the striking of a juror for the reason that the juror had been on a jury that had acquitted a criminal defendant. *Rockett v. State*, 318 Ark. 831, 890 S.W.2d 235 (1994); *see also Pacee, supra* (holding the State's peremptory strikes against a *Batson* challenge where potential jurors had served on panels that either acquitted criminal defendants or had resulted in hung juries was race neutral). Given the proof and record before us, the trial court's ruling on the *Batson* issue was correct, and we affirm.

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 Ratliff, and no prejudicial error has been found.

Louise A. HENYAN and Robert A. Henyan *v.*
Richard D. PEEK, M.D., and Mark R. Gibbs, M.D.

03-1155 199 S.W.3d 51

Supreme Court of Arkansas
Opinion delivered December 2, 2004

Law Offices of John R. VanWinkle, P.A., by: *John R. VanWinkle*, for appellants.

Friday, Eldredge & Clark LLP, by: *Laura Hensley Smith* and *Brandon James Harrison*, for appellees.

DONALD L. CORBIN, Justice. This appeal raises the issue of when good cause must be shown in obtaining an extension of the time for service of process under Ark. R. Civ. P. 4(i). Appellants Louise A. Henyan and Robert A. Henyan filed a medical-malpractice suit against Appellees Richard D. Peek, M.D., and Mark R. Gibbs, M.D., in the Pulaski County Circuit Court. Appellants were granted two extensions of time to complete service of process on both Appellees. Dr. Peek was served prior to the expiration of the second period of extension, but Dr. Gibbs was not served until one day after the period ended. Appellants sought a third extension to serve Dr. Gibbs. However, before the trial court could rule on their motion, Appellees filed motions to set aside the two prior orders on the ground that Appellants had failed to make a showing of good cause to support the extensions. The trial court granted the motions to set aside, denied Appellants' third extension motion, and dismissed the suit. The court of appeals certified this case to us, as it involves the interpretation and further development of our Rules of Civil Procedure. Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(b)(5) and (b)(6). We affirm.

The record in this case reflects the following sequence of events. Appellants filed their complaint on November 5, 2002. The case was assigned to the Third Division of the Pulaski County Circuit Court. Under Rule 4(i), Appellants had 120 days after the filing of the complaint to serve summons on Appellees. This time period expired on March 5, 2003. On March 4, Appellants filed a motion for an extension of the 120-day period. The motion did

not provide any reason as to why the extension was necessary. Rather, the motion merely reflected:

> 1. That Plaintiffs filed this action on November 5, 2002 against both named Defendants.
>
> 2. That Plaintiffs have not obtained service against either Defendant at this time and pray that this Court enter an Order granting them an additional sixty (60) days or until May 2, 2003, in which to obtain service on both Defendants.

The motion was granted in an order filed on March 5, giving Appellants until May 2 to serve Appellees. No hearing was held prior to the trial court's grant of the motion.

On May 1, Appellants filed their second motion for extension of the time to serve Appellees. This motion was identical to the first one, except that Appellants sought only thirty additional days. This second motion was granted in an order filed on May 5, giving Appellants until June 2 to complete service of process. Again, no reason was given as to why additional time was needed, and no hearing was held prior to the grant of the motion.

At some point in the first part of May, the parties were notified that the case was being transferred from the Third Division to the Second Division of the Pulaski County Circuit Court.[1] On May 15, Appellee Dr. Gibbs filed a motion to set aside the two orders of extension entered by the Third Division. In his supporting brief, Dr. Gibbs asserted that the orders were improvidently granted because Appellants had not demonstrated that they had made any effort to serve Appellees within the initial 120-day period, nor had they offered any good cause for granting the motions. On May 28, Appellee Dr. Peek filed a similar motion and joined in the supporting brief filed by Dr. Gibbs.

On May 29, Appellants filed their response to the motions to set aside. In their supporting brief, Appellants asserted that the extensions were necessary because they had not been able to get a file-marked copy of the complaint from the Pulaski County Circuit Clerk, although they had made several requests for one.

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[1] An order of transfer was entered on May 16, 2003, which reflected that the case was being transferred to Second Division because it had been originally filed there prior to Appellants taking a nonsuit.

They asserted further that a file-marked copy of the complaint was necessary to perfect service on Appellees.

The same date that Appellants filed their response, May 29, they achieved service of process on Dr. Peek. However, they were not able to serve Dr. Gibbs prior to the expiration of the second extended period for service on June 2. As such, Appellants filed on June 2 a third motion for extension to serve Dr. Gibbs, asking for an additional ten days. This third motion reflected in pertinent part that Davis Process Service had attempted to serve Dr. Gibbs at his home and his office and was told that Dr. Gibbs would be out of town until June 5. Dr. Gibbs was actually served on June 3.

The trial court held a hearing on the pending motions on June 18. After hearing argument from both sides, the trial court denied Appellants' third motion for extension and granted Appellees' motions to set aside the two previous orders of extension. The trial court found that there was nothing in Appellants' motions demonstrating good cause to justify the extensions. As for the reason later offered by Appellants, that they were not able to get a file-marked copy of the complaint from the circuit clerk, the trial court indicated that it did not amount to good cause. The trial court reasoned that even though Appellants' counsel was located in Fayetteville, "there's not a whole lot of distance between here and Fayetteville, and it's one of those things that we could retrieve fairly easily." The trial court's bench rulings were memorialized in an order entered on June 23. This appeal followed.

For reversal, Appellants argue that the trial court erred in setting aside the two orders of extension and dismissing their suit. They contend that the motions for extension were timely filed, prior to the expiration of the periods for service, and that Appellee Dr. Peek was served prior to the expiration of those periods.[2] They contend that although they did not state good cause in their motions for extension, good cause was eventually shown. They also contend that they had the right to rely on the orders of extension, despite the later ruling setting them aside. They do not, however, make any argument regarding the trial court's denial of their third motion for extension to serve Appellee Dr. Gibbs.

[2] Appellants acknowledge that it was necessary for them to secure a third order of extension to serve Appellee Dr. Gibbs, whom they admit was not served within the time provided in the second order of extension.

Accordingly, their arguments on appeal concern only the propriety of the service of Appellee Dr. Peek.

We begin our analysis by reviewing Rule 4(i), which provides:

> *Time Limit for Service.* If service of the summons is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice upon motion or upon the court's initiative. *If a motion to extend is made within 120 days of the filing of the suit, the time for service may be extended by the court upon a showing of good cause.* If service is made by mail pursuant to this rule, service shall be deemed to have been made for the purpose of this provision as of the date on which the process was accepted or refused. This paragraph shall not apply to service in a foreign country pursuant to Rule 4(e) or to complaints filed against unknown tortfeasors. [Emphasis added.]

This court has consistently held that service requirements under this rule must be strictly construed and compliance with them must be exact. *See Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003); *Kangas v. Neely*, 346 Ark. 334, 57 S.W.3d 694 (2001); *Raymond v. Raymond*, 343 Ark. 480, 36 S.W.3d 733 (2001); *Southeast Foods, Inc. v. Keener*, 335 Ark. 209, 979 S.W.2d 885 (1998). Thus, service of process under this rule must be accomplished within 120 days after the filing of the complaint, unless the plaintiff has timely filed a motion to extend. *Id.* If service is not obtained within that time and no timely motion to extend is made, dismissal of the action is mandatory. *Id.*

Appellants argue that all that is required to extend the time for service of process under Rule 4(i) is the filing of a motion within 120 days of the filing of the complaint. This argument ignores the plain language of the rule and this court's holding in *King v. Carney*, 341 Ark. 955, 20 S.W.3d 341 (2000). There, this court explained that to obtain an extension of the 120-day period in Rule 4(i), a plaintiff must file the motion for extension prior to the expiration of that 120-day period. This court noted that so long as the motion is timely filed, it is not necessary that the order granting extension be entered prior to the expiration of the 120-day period. *Id.* However, this court went on to state: "The time for service may then be extended by the trial judge *upon a showing of good cause.*" *Id.* at 958, 20 S.W.3d at 343 (emphasis

added). Thus, *King* demonstrates that two things are required by Rule 4(i) to obtain an extension of the period for service: (1) the timely filing of motion for extension, and (2) a showing of good cause. The issue presented by this appeal is whether good cause must be shown prior to the granting of an order of extension. We conclude that it must.

We construe court rules using the same means and canons of construction used to interpret statutes. *Barnett v. Howard*, 353 Ark. 756, 120 S.W.3d 564 (2003); *Bell v. Bershears*, 351 Ark. 260, 92 S.W.3d 32 (2002). The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* When the language is plain and unambiguous, there is no need to resort to rules of statutory construction, and the analysis need go no further. *Id.* We review issues of statutory construction *de novo*, as it is for this court to determine what a statute or rule means. *Id.* 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 in its interpretation of the law, that interpretation will be accepted as correct on appeal. *Id.*

Here, the plain language of Rule 4(i) dictates that the showing of good cause to extend the period for service must be made prior to the granting of an extension. The rule reads: "If a motion to extend is made within 120 days of the filing of the suit, the time for service may be extended by the court *upon a showing of good cause.*" (Emphasis added.) The word "upon" is the key to our interpretation. From the context in which it is used in this provision, "upon" means "on the condition of." *See Webster's Third New International Dictionary* 2518 (2002). Thus, the time for service may be extended on the condition of a showing of good cause to justify extending the initial 120-day period. As such, it will not suffice, as Appellants urge, for good cause to be offered after the fact to justify an extension that has already been granted.

In the present case, it is undisputed that Appellants made no showing of good cause to extend the time for service under Rule 4(i). It is this omission that distinguishes the present case from *King*, 341 Ark. 955, 20 S.W.3d 341. In that case, the motion filed by the plaintiff's attorney provided the following three reasons to justify the extension: (1) he had just received relevant hospital reports; (2) he had just been made aware that one of the defendants

who was also the agent of service for the professional association was deceased; and (3) he was exploring settlement options.

Here, neither of Appellants' motions offered any cause, let alone good cause, for the extensions. Moreover, there is nothing in the trial court's orders indicating that the time for service was being extended upon a showing of good cause. Without a contemporaneous showing of good cause to grant the extensions, Appellants have failed to strictly comply with the service requirements of Rule 4(i). It therefore is of no consequence whether the reason later offered by Appellants, that they were unable to secure a file-marked copy of the complaint from the circuit clerk, amounts to good cause.

Appellants' remaining argument is that once the orders of extension were entered, they had the right to rely on them, despite their later being set aside. For support, they cite to our decision in *King*, 341 Ark. 955, 20 S.W.3d 341. We do not reach the merits of this argument because it is not apparent from the record that Appellants ever raised this issue below. Although the record does reflect that Appellees mentioned the *King* case in an attempt to distinguish it from the present case, Appellants never specifically made the argument that they had the right to rely on the orders of extension. Moreover, even if they had, we still could not reach the merits because the record clearly demonstrates that the trial court never ruled on this reliance argument. Rather, the bench ruling only addresses Appellants' failure to show good cause, while the written order only states that "the motions to set aside order should be granted[.]"

It is well settled that this court will not consider arguments raised for the first time on appeal. *See Ford Motor Co. v. Arkansas Motor Vehicle Comm'n*, 357 Ark. 125, 161 S.W.3d 788 (2004); *South Beach Bev. Co., Inc. v. Harris Brands, Inc.*, 355 Ark. 347, 138 S.W.3d 102 (2003); *South Cent. Ark. Elec. Coop. v. Buck*, 354 Ark. 11, 117 S.W.3d 591 (2003). Similarly, this court has repeatedly held that a party's failure to obtain a ruling is a procedural bar to this court's consideration of the issue on appeal. *See, e.g., Scamardo v. Jaggers*, 356 Ark. 236, 149 S.W.3d 311 (2004); *Finagin v. Arkansas Dev. Fin. Auth.*, 355 Ark. 440, 139 S.W.3d 797 (2003); *Bell*, 351 Ark. 260, 92 S.W.3d 32; *Kangas*, 346 Ark. 334, 57 S.W.3d 694. It was Appellants' burden to raise this issue and obtain a specific ruling on it. Because they did not, we will not consider it now.

We thus affirm the trial court's judgment setting aside the prior orders of extension and dismissing with prejudice Appellants' complaint. Ordinarily, a dismissal under Rule 4(i) is without prejudice. *Kangas*, 346 Ark. 334, 57 S.W.3d 694. However, under Ark. R. Civ. P. 41(b), a dismissal for failure to serve valid process shall be made with prejudice where the plaintiff has previously taken a voluntary nonsuit. *Smith*, 353 Ark. 701, 120 S.W.3d 525 (citing *Bakker v. Ralston*, 326 Ark. 575, 932 S.W.2d 325 (1996)). Appellants do not dispute that they have previously taken a voluntary nonsuit of this case. Accordingly, the trial court was correct in ruling that this dismissal is with prejudice.

Affirmed.

MEDMARC CASUALTY INSURANCE COMPANY *v.* FOREST HEALTHCARE, INC., Regional Management, Inc., The Arkansas Property & Casualty Guaranty Fund, and the Estate of Eula Thurman, Deceased

03-1318 199 S.W.3d 58

Supreme Court of Arkansas
Opinion delivered December 2, 2004

[Rehearing denied January 13, 2005.]

Gramovot & Takacs, P.L., by: *Larry I. Gramovot*; and *Watts, Donovan & Tilley, P.A.*, by: *David M. Donovan*, for appellant.

Jim Bob Steel; and *Latham & Burwell, PLLC*, by: *William Larry Latham, G. Todd Burwell*, and *Whit Waide*, for appellee.

Wilkes & McHugh, P.A., by: *Brian G. Brooks*, for appellee Estate of Eula Thurman.

ROBERT L. BROWN, Justice. The appellant, MedMarc Casualty Insurance Company, appeals from an order granting partial summary judgment to the appellees, Forest Healthcare, Inc., and Regional Management, Inc. ("Forest and Regional"), and dismissing MedMarc's claims against The Arkansas Property & Casualty Guaranty Fund and the Estate of Eula Thurman. At issue was MedMarc's action seeking a declaratory judgment as to the rights and obligations of the parties with respect to a judgment entered against Forest and Regional in a nursing home-negligence suit. MedMarc asserts two points on appeal: (1) whether it had any obligation under its policy and the applicable law to pay any portion of the unallocated verdict; and (2) if it did have any obligation, whether the trial court erred in arbitrarily allocating twenty-five percent of the judgment to MedMarc's policy period. We reverse and remand for a proper allocation.

Eula Thurman was a resident at Forest Healthcare, a nursing home, from December 20, 1997, until September 20, 1999.

PHICO Insurance Company provided insurance coverage for Forest and Regional from October 17, 1997, to April 1, 1999,[1] while MedMarc provided insurance coverage for Forest and Regional from April 1, 1999, to April 1, 2000.[2] The MedMarc policy provided both hospital professional liability coverage and commercial general liability coverage. After her death on September 20, 1999, Ms. Thurman's estate filed a lawsuit alleging negligence, medical malpractice, wrongful death, and breach of contract against Forest and Regional.

During the trial in the earlier Thurman case, counsel for Forest and Regional had requested a jury instruction that would have allowed the jury to apportion damages between the two carriers (MedMarc and PHICO) based on the dates of the various insurance policy periods. Counsel for the Thurman estate objected to the instruction, and the trial court refused to give it on grounds that it would confuse the jury. Following the jury trial, Ms. Thurman's estate was awarded $350,000 in damages for ordinary negligence, $500,000 in damages for medical malpractice, and $5,000 in damages for breach of contract. On March 27, 2002, the final judgment was filed by the circuit court. Though an appeal was taken by both sides, both parties later dismissed the respective appeals.

On January 15, 2003, MedMarc filed its complaint for declaratory judgment which is the subject of this appeal. In it, MedMarc stated that Forest and Regional had requested that it pay all or a portion of the final judgment in the Thurman case. It claimed that it was incumbent on Forest and Regional to prove coverage under the policy, and that because no allocation was made by the jury, its insurance policy provided no coverage for any part of the judgment. It alternatively asserted that a retrospective allocation be made so that it would know its current liability under the insurance contract.

On June 18, 2003, Forest and Regional filed a motion for partial summary judgment and allocation. In their motion, Forest

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[1] In February of 2002, PHICO Insurance Company was placed in liquidation by the Commonwealth Court of Pennsylvania. Therefore, pursuant to Ark. Code Ann. § 23-90-101 *et seq.*, (Repl. 2004), the Arkansas Property & Casualty Guaranty Fund has assumed certain of PHICO's responsibilities.

[2] A review of the record reveals that during the period of MedMarc's coverage, Ms. Thurman remained a resident of Forest but was admitted for in-patient treatment at area hospitals on several occasions.

and Regional claimed that at least some of the jury's verdict in the Thurman case was covered under the MedMarc policy. They further contended that MedMarc carried the burden of proving precisely which portion of the Thurman verdict should be allocated to which insurer. Forest and Regional requested that MedMarc be allocated liability for thirty percent of the judgment.

On July 22, 2003, MedMarc filed its response and cross-motion for summary judgment and allocation. In its response, MedMarc asserted that Forest and Regional failed to prove that any of the bases for the Thurman judgment were covered by the MedMarc policy. With respect to allocation, MedMarc contended that Forest and Regional had the ultimate burden of proving exactly what portion of the verdict was for damages covered by its policy. In an alternative argument, MedMarc maintained that should the circuit court make a retrospective allocation of the verdict, it should allocate liability for no more than five percent of the damages to MedMarc. In its motion for summary judgment, MedMarc contended that it had no obligation to pay any of the Thurman judgment, because Forest and Regional could not establish coverage under its policy.

On August 13, 2003, the circuit court entered its order granting Forest's and Regional's motion for partial summary judgment and denying MedMarc's motion for summary judgment. The circuit court concluded that it was proper to apportion the jury's verdict in the Thurman case and that twenty-five percent of the verdict should be allocated to MedMarc.

On appeal, MedMarc first argues that Forest and Regional, as the insureds, have the burden of proving coverage and the burden of allocating the verdict between damages covered under the policy and those that are not. MedMarc claims that where the insured is unable to meet that burden, the insurer is not obligated to pay any amount under the policy. Forest and Regional respond that under MedMarc's policy language, MedMarc clearly has partial coverage for the judgment. As to the burden of proof regarding allocation, Forest and Regional urge that MedMarc carries this burden and that testimony from the Thurman trial supports the circuit court's allocation of liability of damages to MedMarc of twenty-five percent.

We have previously set forth our standard of review for cases in which summary judgment has been granted:

> 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. *Jackson v. City of Blytheville Civ. Serv. Comm'n*, 345 Ark. 56, 43 S.W.3d 748 (2001). 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. *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). 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). Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. *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 persons might reach different conclusions from those undisputed facts. *George, supra.*

Allen v. Allison, 356 Ark. 403, 412, 155 S.W.3d 682, 689 (2004).

■ We turn then to the first issue which is whether any part of the Thurman damages fall within MedMarc policy's coverage. Pursuant to the language of the MedMarc policies, coverage was provided for injuries that occurred during the policy period. The policy period was from April 1, 1999 until April 1, 2000. Based on the policy language, it appears that MedMarc is *potentially* liable to Forest and Regional for injuries that Ms. Thurman sustained during the time that she resided at Forest during this policy period. It is for the circuit court to determine precisely which injuries fall within the MedMarc coverage.

Thus, the issue becomes to what extent is MedMarc liable for the damages awarded in the Thurman case based upon the time limits of the policy's coverage and the injuries sustained therein. While MedMarc is correct that in most instances the burden is on the insured to prove allocation of liability between insurance carriers, that burden may be shifted to the insurer. Allan D. Windt, in his treatise, *Insurance Claims & Disputes*, explains:

> Assuming that it is proved that a portion of the judgment is covered by the policy and a portion is not, the next question that arises is which party should have the burden of allocating the verdict, in order to ascertain the amount of the damages for which the insurer is responsible. Most courts have held that the burden is on the insured. An exception, however, should be made to that rule in those cases in which the circumstances surrounding the defense of the underlying action were such that the insurer was obligated to seek an allocated verdict or advise the insured of the need for one, but failed to fulfill that obligation. In that event, the burden of persuasion should be placed on the insurer.

Allan D. Windt, *Insurance Claims & Disputes* § 6:27 (4th ed. 2001) (footnotes omitted).

Here, a review of the record reveals that it was MedMarc that provided Forest and Regional with a defense and hired lawyers for them in the Thurman case. According to an affidavit filed by Eugene Zuber, then-president of Forest and then-CEO and president of Regional, "MedMarc had the right to and did control the defense in the Thurman case." This control also continued as to the ensuing appeal. Mr. Zuber adds in a supplemental affidavit that "[i]nsurance defense counsel contacted me and . . . advised that Forest and Regional should dismiss their cross-appeal" from the Thurman case. Mr. Zuber added that it was MedMarc that was controlling this process.

We conclude that MedMarc indeed assumed the burden of apportioning the judgment once it took over the defense in the Thurman trial. The Tenth Circuit Court of Appeals has made this abundantly clear:

> As an initial matter, we note that an insurer who undertakes the defense of a suit against its insured must meet a high standard of conduct. *Duke v. Hoch*, 468 F.2d 973, 978 (5th Cir. 1972); *Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins. Co.*, 550 F. Supp. 710, 714-16 (W.D. Okla. 1981). The right to control the litigation carries with it certain duties. *Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co.*, 129 F.2d 621, 627 (10th Cir. 1942). One of these is the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages. *See Gay & Taylor*, 550 F. Supp. at 716. The reason for this is that when grounds of liability are asserted, some of which are covered by insurance and some of which are not, a conflict of interest arises

> between the insurer and the insured. If the burden of apportioning damages between covered and non-covered were to rest on the insured, who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories. *Duke*, 468 F.2d at 979. The insurer is in the best position to see to it that the damages are allocated; therefore, it should be given the incentive to do so.

Magnum Foods, Inc. v. Continental Cas. Co., 36 F.3d 1491, 1498-99 (10th Cir. 1994).

Added to this is the point that when the insurance carrier assumes the defense of its insured, it is obligated to appeal when there are reasonable grounds to believe that the insured's interests will be furthered. *See* Allan D. Windt, *Insurance Claims & Disputes* § 4:17 (4th ed. 2001). As already mentioned, it was MedMarc who made the decision to drop the appeal in the Thurman case.

We note that MedMarc's counsel for Forest and Regional did request an instruction from the trial judge to apportion the verdict. However, the Thurman estate opposed that instruction, and the circuit judge refused to give it:

> DEFENSE COUNSEL: We have proffered an instruction. I don't think we've talked about it on the issue of dividing the — letting the jury apportion damages as between the time period for the [PHICO] Insurance Policy. You remember, Your Honor, that they had gone into liquidation, and the Arkansas Guaranty Funds has taken that over and so for the guaranty fund to know how much there is, it would be to find that the jury apportion the amount of damages occurring during the [PHICO] policy period which lasted up until April 1 of 1999, and we have tendered an instruction which would allow the jury to apportion those damages between — that occurred before April 1 of '99 and after April 1 of '99, during the time that Mrs. Thurman was in the facility.
>
> PLAINTIFF'S COUNSEL: Your Honor, our position on that, number one, it would be entirely inappropriate. This is an issue that's not before the jury. There's no evidence of these policies before the jury, and it would be confusing and make no sense to them when they get this

> time period breakdown. Of bigger concern is the conflict that this raises between the insurance company who — and the insured, the defendant, who is — who these attorneys are supposed to be representing.
>
> THE COURT: I'm not going to give that one. It's too confusing. You can make your proffer.

MedMarc's counsel then proffered, on behalf of Regional and Forest, as Defendant's Exhibit 35, an interrogatory to apportion damages between MedMarc and PHICO based on time of coverage. The issue of the failure to give the apportionment instruction was not appealed, but, again, that was MedMarc's decision.

While the circuit court did allocate the judgment in this case, it provided no basis for its apportioning to MedMarc twenty-five percent of the liability for the Thurman judgment. We believe that providing the reasoning and basis for the particular allocation in the form of findings of fact and conclusions of law is essential. *See, e.g., Little Rock Wastewater Util. v. Larry Moyer Trucking Inc.*, 321 Ark. 303, 902 S.W.2d 760 (1995) (remanded for reconsideration where order gave no explanation for application of Rule 11 sanctions). A proper allocation in this case, while perhaps difficult, is certainly not impossible. Indeed, other courts have said it can be done. *See, e.g., Duke v. Hoch*, 468 F.2d 973, 984 (5th Cir. 1972) (finding that if allocation of damages is required between what is covered by insurance and what is not, trial judge on remand "will be in the position of establishing as best he can the allocation which the jury would have made had it been tendered the opportunity to do so" and that if impossible for meaningful allocation to be made based on the transcript, additional evidence should be introduced and rebutted by the parties). Because we conclude that a proper allocation is necessary and because the circuit court provided no reason for allocating twenty-five percent of the liability to MedMarc, we reverse and remand the matter with directions for the circuit court to proceed with allocation in accordance with this opinion.

Reversed and remanded.

GLAZE, J., concurs.

THORNTON, J., dissents.

RAY THORNTON, Justice, dissenting. Because I believe that Forest and Regional, rather than Medmarc, had the

burden of allocating the verdict from the Thurman case, and because they failed to meet this burden, I must respectfully dissent.

When a portion of a judgment is covered by an insurance policy and a portion of a judgment is not covered by an insurance policy, the insured bears the burden of allocating the judgment. *See Morris v. Western States Mutual Automobile Insurance Co.*, 268 F.2d 790 (7th Cir. 1959); *General Accident Fire & Life Assurance Corp. v. Clark*, 34 F.2d 833 (9th Cir. 1929); *Aetna Insurance Co. v. Waco Scaffold & Shoring Co.*, 370 So.2d 1149 (Fla. Dist. Ct. App. 1978); Allan D. Windt, *Insurance Claims and Disputes* §§ 6:26, 6:27 (4th ed. 2004); 14 Couch, Lee R. Russ, *Couch on Insurance* § 205:79 (3rd ed. 2004).

The majority asserts that by providing legal representation to Forest and Regional during the Thurman case, Medmarc assumed the burden of allocating the judgment. This contention is misplaced. In support of this position, the majority opinion cites Allan Windt's insurance treatise, which provides:

> Most courts have held that the burden [of allocating the verdict] is on the insured. An exception, however, should be made to that rule in those cases in which the circumstances surrounding the defense of the underlying action were such that the insurer was obligated to seek an allocated verdict or advise the insured of the need for one, *but failed to fulfill that obligation.* In that event, the burden of persuasion should be placed on the insurer.

Allan D. Windt, Insurance Claims & Disputes § 6:27 (4th ed. 2001) (emphasis added).

Relying on the forgoing legal principles, I would conclude that Medmarc did not fail to fulfil its obligations to Forest and Regional. Medmarc did provide representation for Forest and Regional during the Thurman trial. During its representation, Medmarc adequately notified Forest and Regional of their need for an apportioned verdict. Specifically, Medmarc disclosed to Forest and Regional the need to allocate the judgment in a letter from Jim Martin, president of Uni-Ter Claims Services Corporation, to Roger Glasglow, Forest and Regional's attorney. In the letter, Mr. Martin wrote, "[I]t is quite important that any verdict form used at trial requires the jury to allocate damages awarded between injuries, which took place within the Medmarc policy period, and those, which took place outside of that period . . . Medmarc will not be responsible for injuries, which took place

outside of its policy period."[1] Additionally, Medmarc adequately attempted to receive an allocated verdict by requesting an apportionment instruction. Because Medmarc informed Forest and Regional of the need for an apportioned verdict, and because Medmarc requested a jury instruction that would have allowed for the apportionment of the judgment, Medmarc fulfilled its obligations to Forest and Regional. Accordingly, the burden of apportioning the verdict did not shift from Forest and Regional to Medmarc.

Because the burden of allocating the judgment from the Thurman case rested on Forest and Regional, and because Forest and Regional failed to meet this burden, I would conclude that the trial court erred when it granted Forest and Regional's motion for partial summary judgment and when it allocated twenty-five percent of the Thurman verdict to the Medmarc policy period. Accordingly, I would reverse and remand this case to the trial court. Upon remand, I would instruct the trial court to enter an order granting summary judgment in favor of Medmarc. *See Wilson v. McDaniel*, 247 Ark. 1036, 499 S.W.2d 944 (1970) (explaining that we can review the denial of a motion for summary judgment in conjunction with our consideration of an order in which a cross-motion for summary judgment was granted).

I respectfully dissent.

John Earl PATRICK *v.* STATE of Arkansas

CR 03-696 199 S.W.3d 74

Supreme Court of Arkansas
Opinion delivered December 2, 2004

[1] It should be noted that while Medmarc's policy period extended from April 1, 1999, until April 1, 2000, Mrs. Thurman resided at Forest for only forty days during that time.

Phillip A. Moon, for appellant.

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

ROBERT L. BROWN, Justice. Appellant John Earl Patrick appeals from the Carroll County Circuit Court's judgment of conviction in which the court convicted Patrick of attempt to manufacture a controlled substance (methamphetamine) in violation of Ark. Code Ann. § 5-64-401 (Repl. 1997), and sentenced him to fifteen years in prison. Patrick argues on appeal that the circuit court erred in denying his motion to suppress and that his conviction should be reversed, the judgment and commitment order vacated, and this matter remanded for further proceedings. We affirm the judgment of conviction pursuant to Arkansas Supreme Court Rule 4-2(b)(3) for failure to comply with Arkansas Supreme Court Rule 4-2(a)(5) and (8).

Patrick claims on appeal that the circuit court erred in denying his motion to suppress. Specifically, he urges that the entrance of his landlord, Lorraine Taylor, into his home was improper; that the presence of the police on the grounds of his home and their discussions with his landlord made her an agent of the police; and that the search of his home's curtilage prior to obtaining a search warrant violated his Fourth Amendment right to be free from an unreasonable search and seizure. Patrick argues that law enforcement officers may not benefit from a private search when their presence lends tacit approval and "deputizes" Taylor as law enforcement's agent. In addition, he argues that Taylor is considered an arm of the government, because she followed the direction of law enforcement officers.

On June 24, 2004, this court ordered Patrick to rebrief his case due to an insufficient abstract and Addendum under Arkansas

Supreme Court Rule 4-2(a)(5) and (8). *See Patrick v. State*, 358 Ark. 300, 188 S.W.3d 906 (2004) (*per curiam*). Specifically, this court stated

> In the case at bar, the abstract fails to mention the proceeding from which the abstracted testimony comes. The abstract then states: "A discussion then ensued between the Court and counsel regarding issues of discovery and submission of brief [*sic*] and the scheduling of a decision on the suppression hearing." However, this court is left in the dark about what issues were raised supporting suppression and what arguments were made opposing it. Moreover, the appellant has failed to abstract his brief in support of his motion to suppress or, alternatively, to include a copy of that brief in his Addendum.
>
> We order Patrick to submit a substituted brief that contains a revised abstract and Addendum that include all relevant information necessary to an understanding of the issues presented to this court on appeal. Patrick is directed to file the substituted brief within fifteen days from the date of entry of this order. According to Rule 4-2(b)(3), if Patrick fails to file a complying brief within the prescribed time, the order, judgment, or decree appealed from may be affirmed for noncompliance with the Rule.

Patrick v. State, 358 Ark. at 301, 188 S.W.3d at 907 (2004).

Arkansas Supreme Court Rule 4-2(b)(3) provides that this court may automatically affirm a judgment of conviction when the appellant has had the opportunity to cure his deficient brief and fails. Specifically, the rule states:

> Whether or not the appellee has called attention to deficiencies in the appellant's abstract or Addendum, the Court may address the question at any time. If the Court finds the abstract or Addendum to be deficient such that the Court cannot reach the merits of the case, or such as to cause an unreasonable or unjust delay in the disposition of the appeal, the Court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, Addendum, and brief, at his or her own expense, to conform to Rule 4-2 (a)(5) and (8). Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the

> brief, at the expense of the appellant or the appellant's counsel, as the Court may direct. *If after the opportunity to cure the deficiencies, the appellant fails to file a complying abstract, Addendum and brief within the prescribed time, the judgment or decree may be affirmed for noncompliance with the Rule.*

Ark. Sup. Ct. R. 4-2(b)(3) (emphasis added).

On September 23, 2004, Patrick resubmitted his appellant's brief and presented the same reasons for suppressing the evidence. This court is not able to reach the merits of Patrick's arguments, because he has again failed to show whether he presented these arguments to the circuit judge for consideration. Hence, without going to the record, this court has no way of knowing what arguments Patrick presented to the circuit judge, which is a prerequisite to our consideration of the same arguments on appeal. We have stated repeatedly that we will not go to the record to reverse a judgment of conviction, because there is only one record and seven justices. *See, e.g., Johnson v. State*, 342 Ark. 357, 28 S.W.3d 286 (2000); *Pogue v. State*, 316 Ark. 428, 872 S.W.2d 387 (1994).

Patrick's only attempt to comply with our *per curiam* order was to state generally what the hearings were about and when they took place. However, in doing this, he still failed to abstract the attorneys' arguments to the circuit judge. Instead, he retained the conclusory statement from his original brief that we quoted in our *per curiam* regarding the discussion among counsel and the court at the first suppression hearing and then included the following comment in his abstract from the second suppression hearing: "Upon conclusion of arguments, the Court then ruled as follows." He finished by abstracting the circuit court's ruling in which the circuit court denied Patrick's motion to suppress, because Taylor was not an agent of the State when she entered Patrick's home and evidence discovered by authorities in Patrick's yard would have been discovered pursuant to a search warrant. This was clearly inadequate. We had ordered Patrick to present to this court what was argued at trial so that we could determine whether the circuit judge first had an opportunity to consider those arguments. This he did not do.

Moreover, Patrick did not even attempt to comply with our order with respect to his Addendum. We ordered Patrick to include his suppression motion and his brief in support of that

motion in the Addendum, and he failed to include either item. Again, without going to the record, this court has no way of knowing what the motion stated and what legal arguments were offered to support that motion.

Counsel has had his one chance to comply with our *per curiam* order and still failed to comply. Thus, Patrick's conviction for attempt to manufacture a controlled substance is affirmed pursuant to Arkansas Supreme Court Rule 4-2(b)(3).

Affirmed.

Holly COCKRUM, M.D. *v.*
Honorable Timothy Davis FOX, Judge

04-42 199 S.W.3d 69

Supreme Court of Arkansas
Opinion delivered December 2, 2004

Friday, Eldredge & Clark, by: *Laura Hensley Smith* and *Jason B. Hendren*, for petitioner.

Law Offices of Peter Miller, by: *Peter A. Miller*, for respondent.

ANNABELLE CLINTON IMBER, Justice. On January 23, 2003, Barbara and James David Ables, individually and on behalf of their unborn child, a viable fetus, filed suit against petitioner, Holly Cockrum, M.D., and ten unidentified John Does and Jane Does employed at the University of Arkansas for Medical Sciences (UAMS). In their complaint for obstetrical medical malpractice, the Ables assert the following claims of negligence against Dr. Cockrum:

> 14. Dr. Cockrum was negligent in failing to diagnose the condition of Ms. Ables and Baby Ables, in failing to treat Ms. Ables and her unborn child for such condition as should have reasonably been diagnosed, and in failing to exercise ordinary care in the delivery of Ms. Ables's child. Dr. Cockrum failed to exercise and apply the reasonable degree of skill, learning, and care exercised and applied by members of her profession in good standing. Additionally, Dr. Cockrum was negligent in the following particulars:
>
> a. Failing to diagnose the condition of Ms. Ables and Baby Ables;
>
> b. Failing to provide adequate information on the condition of Baby Ables to qualified physicians in a timely manner;
>
> c. Failing to adequately monitor Baby Ables' fetal heart tones;
>
> d. Failing to induce labor while Baby Ables was viable and healthy;
>
> e. Failing to use ordinary care for the safety of Mrs. Ables and Baby Ables.
>
> f. Failing to anticipate the necessity of delivering Baby Ables by Cesarean section, and ultimately failing to deliver Taylor Nicole Ables by Cesarean section;
>
> g. Failing to provide adequate documentation of Mrs. Ables's and Baby Ables's condition;
>
> h. Failing to use ordinary care for the safety of Mrs. Ables and Baby Ables.

With regard to their claims for damages, the Ables seek to recover damages on behalf of and as next of kin of the unborn fetus, as set forth in paragraph 16 of the complaint:

> 16. Baby Ables died as a direct and proximate result of Defendants' above-described negligence. Plaintiff Barbara Ables and James David Ables, on behalf of Baby Ables, are entitled to compensatory damages for which Defendants are jointly and severally liable. Plaintiffs, *on behalf of and as next of kin of Baby Ables*, are entitled to recover damages from Defendants for the following: (a) the death of Baby Ables; (b) the reasonable expense of any necessary medical care, treatment and services; (c) any pain, suffering, and mental anguish experienced in the past and reasonably certain to be experienced in the future; (d) the value of services and contributions of Baby Ables which Plaintiffs Barbara and David Ables are reasonably certain to lose in the future; and (e) loss of life suffered by Baby Ables.

(Emphasis added). In the next paragraph of the complaint, the Ables also seek to recover compensatory damages in their individual capacity:

> 17. As a further direct and proximate result of Defendants' above-described negligence which caused the death of their child, Plaintiffs Barbara Ables and David Ables, individually, have experienced extreme mental anguish, and, in all likelihood, will experience extreme mental anguish in the future. Plaintiffs Barbara and James David Ables, *in their individual capacity*, are entitled to recover damages from Defendants for the following: (a) any mental anguish experienced in the past and reasonably certain to be experienced in the future; and (b) the reasonable expense of any necessary medical or mental healthcare, treatment and services received in the past, including transportation, board, and lodging expenses necessarily incurred in securing such care, treatment and services, and the present value of such expense reasonably certain to be required in the future.

(Emphasis added).

On September 15, 2003, Dr. Cockrum filed a motion to dismiss, in which she alleged that "no personal representative has been appointed, and all of Baby Ables' heirs at law have not been

named as parties plaintiff to the suit."[1] According to Dr. Cockrum, the Ables lack standing to bring this action because all statutory beneficiaries under the wrongful-death statute, Ark. Code Ann. § 16-62-102 (Supp. 2003), must be named as heirs at law in the complaint if there is no personal representative. Further, Dr. Cockrum asserted to the trial court that this court's decision in *Ramirez v. White County Circuit Court*, 343 Ark. 372, 38 S.W.3d 298 (2001), mandated dismissal of the action. The trial court denied the motion to dismiss, ruling that the surviving parents are "heirs at law" pursuant to the tables of descent set forth in Ark. Code Ann. § 28-9-214(3) (Repl. 2004). Dr. Cockrum then filed a motion to reconsider the order denying the motion to dismiss, which motion was also denied by the trial court. Shortly thereafter, Dr. Cockrum filed this original action seeking a writ of prohibition to prevent the Pulaski County Circuit Court from proceeding with the wrongful-death action brought by the Ables, individually and on behalf of their unborn fetus.[2]

We recently reiterated the well-established standards for determining the propriety of a writ of prohibition:

> The writ of prohibition is extraordinary relief that is appropriate only when the trial court is *wholly* without jurisdiction. *Finney v. Cook*, 351 Ark. 367, 94 S.W.3d 333 (2002). The writ is appropriate only when there is no other remedy, such as an appeal, available. *Id.* Prohibition is a proper remedy when the jurisdiction of the trial court depends upon a legal rather than a factual question. *Id.* This court confines its review to the pleadings in the case. *Id.* Morever, prohibition is never issued to prohibit a trial court from erroneously exercising its jurisdiction. *Arkansas Dept. of Human Servs. v. Collier*, 351 Ark. 506, 95 S.W.3d 772 (2003). Additionally, a writ of prohibition is not the appropriate remedy for the denial of a motion to dismiss. *Farm Bureau Mutual Ins. Co. v. Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983).

Conner v. Simes, 355 Ark. 422, 425-26, 139 S.W.3d 476, 478 (2003). Based on our review of the pleadings at issue here, we conclude that

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[1] The Ables have two other children, James David Ables III, born August 3, 1985, and Felicia Day Ables, born April 9, 1987.

[2] Although Dr. Cockrum has named the individual judge as the respondent to her petition, prohibition lies to the circuit court and not the individual judge. *Premium Aircraft Parts, LLC v. Circuit Court of Carroll County*, 347 Ark. 977, 69 S.W.3d 849 (2002). Accordingly, we treat the petition as one against the circuit court. *Id.*

the plaintiffs in the underlying action may have filed claims against the defendants not only for the wrongful death of the unborn fetus, but also for medical malpractice in the treatment of Mrs. Ables. More specifically, the complaint alleges that Dr. Cockrum was negligent in the treatment of Mrs. Ables. Furthermore, the Ables seek to recover compensatory damages in their individual capacity, as well as on behalf of and as next of kin of the unborn fetus. While the parties do not raise this issue on appeal, the question of whether an order is final and subject to appeal is a jurisdictional question that this court will raise *sua sponte*. *Moses v. Hanna's Candle Co.*, 353 Ark. 101, 110 S.W.3d 725 (2003)(citing *Reed v. Ark. State Highway Comm'n*, 341 Ark. 470, 17 S.W.3d 488 (2000)).

If the complaint states a separate claim for negligence in the treatment of Mrs. Ables, the trial court's denial of the motion to dismiss is not a final appealable order in that it does not dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Conner v. Simes*, *supra.*, (citing *Fisher v. Chavers*, 351 Ark. 318, 92 S.W.3d 30 (2002)). Granting a writ in this situation will permit a piecemeal appeal that merely tests the correctness of an interlocutory order. *Conner v. Simes, supra.* Similarly, in *Conner*, we refused to treat the petition for writ of prohibition as one for certiorari because the case did not present a situation where the remedy by appeal was inadequate. *Id.*

With regard to the instant matter, once the trial court has disposed of *all* claims that may have been alleged in the pleadings, Dr. Cockrum can appeal the denial of the motion to dismiss, as an appeal from a final order also brings up for review any intermediate order. Ark. R. App. P.—Civ. 2(b)(2004). While we at one time appeared to endorse the use of an extraordinary writ to prevent untold time and expense, as well as unnecessary grief to the parties, *Fore v. Circuit Court of Izard County*, 292 Ark. 13, 727 S.W.2d 840 (1987), we have retreated from that overreaching language in *Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (1993). *Conner v. Simes, supra.* In any event, this court has *never* used an extraordinary writ to narrow the claims alleged in a complaint. *Id.* "If the asserted threat of 'an unwarranted trial' were a sufficient basis for declaring the remedy by appeal to be inadequate, then a defendant could always appeal from the trial court's action in overruling a demurrer to the complaint. That, again, would be a

piecemeal appeal merely testing the correctness of an interlocutory order." *Burney v. Hargraves*, 264 Ark. 680, 682, 573 S.W.2d 912, 913 (1978). In short, we have never retreated from the unequivocal statement in *Burney v. Hargraves*, *supra*, that an asserted threat of an unwarranted trial is an insufficient basis to conclude that the remedy by appeal is not adequate.

For the above-stated reasons, we deny Dr. Cockrum's petition for writ of prohibition.

THORNTON, J., dissents.

RAY THORNTON, Justice, dissenting. I dissent from the majority's decision that Dr. Cockrum should be forced to defend a claim that is properly remedied by this court granting *certiorari*. By its decision, the majority again elevates form above substance and expands the holding from *Conner v. Simes*, 355 Ark. 422, 139 S.W.3d 476 (2003), to further extinguish extraordinary writs in our jurisprudence.

The majority opinion correctly notes that a writ of prohibition is not appropriate relief for the denial of a motion to dismiss. *Conner*, *supra*. We may, however, treat a petition for a writ of prohibition as a petition for a writ of *certiorari*, carving through the technicalities of the petition when circumstances so warrant. *Ballard v. Clark County Circuit Court*, 347 Ark. 291, 61 S.W.3d 178 (2001) (*per curiam*); *see also Arkansas Public Defenders Comm'n v. Burnett*, 340 Ark. 233, 12 S.W.3d 191 (2000). A writ of *certiorari* will lie when there is an act in the absence of jurisdiction, an act in excess of jurisdiction, or proceedings that are erroneous on the face of the record. *Conner*, *supra*. A writ of *certiorari* may be used to correct an action already taken by a trial court. *Burnett*, *supra*. *Certiorari* is extraordinary relief and requires a showing of plain, manifest, gross, and clear abuse of discretion on the face of the record. *Conner*, *supra*. Furthermore, we will not look beyond the record to determine the merits of the controversy, control discretion, review findings of fact, or reverse a trial court's discretionary authority. *Id.* Abuse of discretion is discretion applied thoughtlessly, without due consideration, or improvidently. *Carlew v. Wright*, 356 Ark. 208, 148 S.W.3d 237 (2004).

In the present case, the trial court clearly erred as to the controlling law for a wrongful-death action. We have held that a wrongful-death action is an action in derogation of common law and, as a statutory construction, it must be strictly construed.

Ramirez v. White County Circuit Court, 343 Ark. 372, 38 S.W.3d 298 (2001). We have also held that a wrongful-death action, where there is not a designated personal representative, is insufficient unless all of the statutory beneficiaries are named as parties. *Id.* If a wrongful-death action is brought by less than all of the named beneficiaries, the complaint is a legal nullity, and it is as if it never existed. *Id.* We held in *Ramirez* that the widower of the decedent failed to meet the statutory requirements when he failed to join their two children. *Id.* We issued a writ of prohibition to prevent the case from continuing. *Id.*

Here, petitioner moved to dismiss the wrongful-death action for failure to join all of the named beneficiaries under Ark. Code Ann. § 16-62-102 (Supp. 2003). The trial court did not follow the law as articulated in *Ramirez*, *supra*, and denied the motion to dismiss.

It is clear that the trial court erred in declining to follow the statutory requirement that all statutory beneficiaries, namely the Ables' other two children, must be joined in a wrongful-death action if there is no personal representative. The wrongful-death action should have been dismissed. The trial court clearly abused its discretion in disregarding the precedent of *Ramirez*, *supra*. This act exceeded the trial court's discretion, and the writ of *certiorari* is appropriate to remedy the clear, plain, manifest, and gross abuse of discretion in denying the motion to dismiss the wrongful-death claim as to Baby Ables. Accordingly, I would grant the writ of *certiorari*.

The majority likens this case to the situation in *Conner*, *supra*. In *Conner*, this court was faced with a petition for a writ of prohibition when a trial court denied a motion to dismiss a wrongful-death claim on behalf of an unborn child. The actions that resulted in the alleged wrongful-death occurred before our decision in *Aka v. Jefferson Hospital Association*, 344 Ark. 627, 42 S.W.3d 508 (2001), went into effect. There was not a cognizable claim at the time the injury arose. The majority denied the petition for a writ of prohibition and refused to treat the petition as one for *certiorari* holding that there was an adequate remedy on appeal. Furthermore, the majority concluded that we would be endorsing piecemeal litigation if we granted the writ. I dissented in *Conner* because I believe that there is a vested right to be free from an unwarranted lawsuit, as we noted in *Forrest City Machine Works v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981). *See Conner*, *supra* (Thornton, J. dissenting). In *Conner*, *supra*, there was a second

count pleaded in the court below, and the majority relied on this second count to deny the writ. The majority based its decision about piecemeal litigation on the fact that there was a second enumerated count in the complaint.

In this case however, as the majority notes, there "may be" another claim camouflaged in the complaint. The majority does not say whether there is or is not another claim and the parties do not contend that there was one. The poorly-drafted complaint is not clear enough to distinguish whether a second count was before the trial court in this case.

The majority further confuses extraordinary writs with interlocutory appeals. An *extraordinary* writ arises only in *extraordinary* circumstances. There is no need for a final appealable order for a writ to issue. In fact, a final and appealable order defeats the issuance of any writ because an adequate remedy on appeal may instead be had. Extraordinary writs function outside of the normal rules of appellate procedure to provide extraordinary relief and should not be treated as an appeal under a different name.

I believe that the majority is emasculating the useful purpose of extraordinary writs in this case by expanding *Conner, supra,* to include preventing the applicability of extraordinary writs on the basis of a hypothetical argument not raised by the parties in the case *sub judice.* For these reasons, I respectfully dissent.

Alfred SHELNUTT *v.* Melba LAIRD
and Max Laird

04-01 199 S.W.3d 65

Supreme Court of Arkansas
Opinion delivered December 2, 2004

Baxter, Jensen, Young & Houston, by: *Ray Baxter*, for appellant.

Richard F. Hatfield, for appellee.

RAY THORNTON, Justice. On June 23, 1995, Don and Dixie McMann executed reciprocal wills. The wills provided that upon the death of one of them, their estate would pass to the surviving spouse, until their death, and the residue would pass to Sandra and Alfred Shelnutt. Sandra Shelnutt was Dixie McMann's daughter. Appellant, Alfred Shelnutt, is Sandra Shelnutt's husband. The McManns's wills also appointed Sandra Shelnutt as executrix. Mr. McMann's will contained the following language:

> I declare that this will is executed contemporaneously with a will of similar testamentary plan executed by my said wife, Dixie McMann, and I declare that my said wife and I have agreed that we shall not alter, amend or change our wills or do any act or suffer any omission which will have the effect of defeating the testamentary plan stated in our wills, except by mutual agreement at the time when both of us are alive.

On February 3, 1998, Dixie McMann died. Thereafter, Don McMann moved in with his sister, appellee, Melba Laird. On July 14, 1998, Mr. McMann executed a new will in which he named Melba Laird as his sole heir and executrix. Additionally, following Mrs. McMann's death, certain assets were transferred out of Don McMann's name and into living trust accounts for Melba and Max Laird.

On June 5, 1999, Mr. McMann died. His first will was admitted to probate and Sandra Shelnutt was appointed the executrix of Mr. McMann's estate. On November 8, 1999, Mrs. Laird contested the will and attempted to have Mr. McMann's second will probated. She argued that Mr. McMann's second will from 1999 should have been admitted to probate rather than the first will from 1995. This matter was appealed to the court of appeals, and in an unpublished opinion, the court of appeals reversed the trial court's order and remanded the case on the ground that the probate court lacked subject-matter jurisdiction to enforce the contract to execute reciprocal wills. *See Laird v. Shelnutt,* CA 00-1226 (Ark. App. Sept. 5, 2001).

Sandra Shelnutt, as executrix of Mr. McMann's estate, filed a separate action against Melba and Max Laird. In that case, Mrs. Shelnutt requested that the chancery court impose a constructive trust on funds that the Lairds had appropriated from Mr. McMann's estate.

In November of 1999, Mrs. Shelnutt hired an attorney to represent her and Mr. McMann's estate. She agreed to pay the attorney fifty percent of whatever was recovered for Mr. McMann's estate.

On January 12, 2001, the Saline County Chancery Court entered an order in which it concluded that the Lairds held a constructive trust in the amount of $738,000. The trial court's findings were appealed to our court of appeals. *See Laird v. Shelnutt,* 75 Ark. App. 193, 55 S.W.3d 795 (2001). The court of appeals

affirmed the trial court and the matter was then reviewed by our court. We also affirmed the trial court's finding that $738,000 was held in a constructive trust. *See Laird v. Shelnutt*, 348 Ark. 632, 74 S.W.3d 206 (2002).

On January 29, 2003, Mrs. Shelnutt, acting individually and as executrix of the estate of Don McMann, entered into an agreement with the Lairds in which she released the Lairds from all claims and damages in exchange for $180,000.

On April 1, 2003, Alfred Shelnutt filed a complaint in the Saline County Circuit Court. In his complaint, Mr. Shelnutt argued that Melba and Max Laird intentionally interfered with the contractual relationship between Don and Dixie McMann.[1] He further claimed that he was a third-party beneficiary to that contract. Mr. Shelnutt argued that if the Lairds had not interfered in the McManns's contract, Don McMann's estate would not have been forced to pay legal fees to protect the assets of the estate and Mr. Shelnutt's portion of Mr. McMann's estate would have been larger. Mr. Shelnutt requested that the circuit court require the Lairds to pay him $413,240.24. This amount represented the attorney's fees and costs paid by Mr. McMann's estate.

On April 21, 2003 the Lairds filed a motion to dismiss Mr. Shelnutt's complaint. The Lairds argued that the complaint should be dismissed for several reasons. Specifically, the Lairds argued: (1) that Mr. Shelnutt was not the real party in interest pursuant to Rule 17 of the Arkansas Rules of Civil Procedure; (2) that the statute of limitations for Mr. Shelnutt's cause of action had expired; (3) that Mr. Shelnutt's complaint failed to allege the necessary facts to establish a cause of action for tortious interference with a contract; (4) that the complaint sought attorney's fees without stating a statutory basis for the fees; and (5) that Mr. Shelnutt's complaint alleged a cause of action based upon tortious interference with an expected inheritance, which is a cause of action not recognized in Arkansas.

On September 5, 2003, a hearing was held on the Lairds's motion to dismiss. Thereafter, on October 7, 2003, the trial court entered an order granting the Lairds's motion. It is from this order that Mr. Shelnutt appeals. He raises five points for our consideration, and we affirm the trial court.

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[1] We note that during the pendency of this case Mr. Laird has passed away.

Appellant is appealing from an order dismissing his complaint. We have outlined our standard of review of motions to dismiss on numerous occasions. In reviewing the trial court's decision on a motion to dismiss we treat the facts alleged in the complaint as true and view them in the light most favorable to the party who filed the complaint. *Cotten v. Fooks*, 346 Ark. 130, 55 S.W.3d 290 (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 v. Bankers Standard Insurance Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002).

Mr. Shelnutt argues that the trial court erred when it granted the Lairds's motion to dismiss. In their motion to dismiss, the Lairds raised five separate grounds upon which the trial court could have dismissed Mr. Shelnutt's complaint. The trial court's order does not expressly state upon which ground the motion was granted. Thus, Mr. Shelnutt is challenging all grounds asserted in the Lairds's motion. After reviewing the case, we have concluded that there was a valid ground upon which to grant the Lairds's motion to dismiss. We will discuss this issue first.

In their motion to dismiss, the Lairds asserted that the three-year statute of limitations applicable to tort actions, codified at Ark. Code Ann. § 16-56-105 (1987), applied to Mr. Shelnutt's complaint. The Lairds further contended that the actions that provide the basis for Mr. Shelnutt's complaint occurred before November 9, 1999. Finally, the Lairds argued that Mr. Shelnutt's complaint, which was filed on April 1, 2003, was barred by the statue of limitations and should have been dismissed. The Lairds's argument is well taken.

The three-year statute of limitations codified at Ark. Code Ann. § 16-56-105 is applicable to the case now before us. We have held that a cause of action accrues the moment the right to commence an action comes into existence, and the statute of limitations commences to run from that time. *Courtney v. First Nat'l Bank*, 300 Ark. 498, 780 S.W.2d 536 (1989). We have also noted that the statute of limitations begins to run when there is a complete and present cause of action. *Id.*

In the case now before us, Mr. Shelnutt filed a complaint alleging a cause of action against Melba and Max Laird for tortious interference with the contractual relationship between

Don and Dixie McMann. To establish such a claim, a party must prove the following elements: (1) the existence of a valid contractual relationship; (2) knowledge of the relationship on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship; (4) resultant damage to the party whose relationship has been disrupted; and (5) that the conduct of the defendant was "improper." *Faulkner v. Arkansas Children's Hosp.*, 347 Ark. 941, 69 S.W.3d 393 (2002).

The actions that Mr. Shelnutt alleges constituted interference with the contractual relationship between the McManns are as follows: (1) Mrs. Laird contacted an attorney for Mr. McMann and a new will was drafted in which Mr. McMann's estate was left to Mrs. Laird rather than the Shellnuts; (2) certain assets were transferred out of Mr. McMann's name and into living trust accounts maintained by Melba and Max Laird; and (3) Mrs. Laird contested Mr. McMann's first will in which the estate was left to the Shellnuts, and attempted to have Mr. McMann's second will probated.

After reviewing Mr. Shelnutt's complaint, we note that the foregoing actions were complete on November 8, 1999. According to the complaint, the new will was prepared and the assets were transferred prior to Mr. McMann's death. Mr. McMann died on June 5, 1999. The Shelnutts became aware of the transferring of assets after Mr. McMann's death.[2] On November 8, 1999, Mrs. Laird filed a will-contest action and sought to have Mr. McMann's second will probated. It is established that Mr. Shelnutt's cause of action accrued no later than November 8, 1999. Therefore, this is the date upon which the statute of limitations began to run. Mr. Shelnutt had until November 8, 2002, to file his complaint against the Lairds. Mr. Shelnutt filed his complaint on April 1, 2003, which was more than three years after his cause of action accrued. Accordingly, we conclude that the trial court properly dismissed Mr. Shelnutt's complaint.

We note that Mr. Shelnutt argues that his cause of action was of a "continuing nature" and that the statute of limitations did not begin to run until January 30, 2003. Mr.

[2] Although Mr. Shelnutt's complaint does not state the exact date upon which the Shellnuts learned of the transferred property, at the hearing on the motion to dismiss, the parties agreed that a complaint seeking the return of the assets was filed in 1999.

Shelnutt has not provided us with authority to establish that the tort of intentional interference with a contractual relationship is a continuing tort. Therefore, we decline to consider this argument. *See Gwin v. Daniels*, 357 Ark. 623, 184 S.W.3d 28 (2004) (holding that we will not consider an argument raised on appeal where the appellant has failed to cite authority).

Additionally, we note that Mr. Shelnutt argues that he could not determine the amount of damages for his cause of action until 2003 when the funds for the McMann estate were retrieved from the Lairds and the attorney was paid for assisting in the retrieval of these funds. Mr. Shelnutt's contention is misplaced. Mr. Shelnutt's damages could have been calculated on the day that Mrs. Laird attempted to probate Mr. McMann's second will.

Having concluded that the trial court properly dismissed Mr. Shelnutt's complaint, it is not necessary for us to review the remaining points on appeal because they involve alternative grounds upon which the trial court might have granted the Lairds' motion to dismiss.

Affirmed.

Danyel CASEY *v.* STATE of Arkansas

CR 04-1206 199 S.W.3d 56

Supreme Court of Arkansas
Opinion delivered December 2, 2004

Charles D. Hancock, for appellant.

No response.

PER CURIAM. Danyel Casey, by her attorney, Charles D. Hancock, has filed a motion for rule on clerk.

On July 9, 2004, a judgment and commitment order was entered convicting Casey of one count of sexual assault in the second degree and sentencing her to twenty-four months' imprisonment. A timely notice of appeal was filed by Mr. Hancock on July 15, 2004. In the instant motion, Mr. Hancock avers that a

secretary in the Lonoke County Public Defender's office, Sara Talbert, failed to inform him that an extension had not been granted until after the ninety days in which to file the record had already passed. Mr. Hancock further points to the fact that during the course of the proceeding, he experienced two deaths in his family. He states that he believes that there is good reason that the appeal was not perfected based on all the circumstances.

This court recently clarified its treatment of motions for rule on clerk and motions for belated appeals in *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). There we said:

> . . . Where an appeal is not timely perfected, either the party or attorney filing the appeal is at fault, or there is good reason that the appeal was not timely perfected. The party or attorney filing the appeal is therefore faced with two options. First, where the party or attorney filing the appeal is at fault, fault should be admitted by affidavit filed with the motion or in the motion itself. There is no advantage in declining to admit fault where fault exists. Second, where the party or attorney believes that there is good reason the appeal was not perfected, the case for good reason can be made in the motion, and this court will decide whether good reason is present.

356 Ark. at 116, 146 S.W.3d at 891 (footnote omitted). While this court no longer requires an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where he has erred and is responsible for the failure to perfect the appeal. *See id.* However, where a motion seeking relief from failure to perfect an appeal is filed and it is not plain from the motion, affidavits, and record whether there is attorney error, the clerk of this court will be ordered to accept the notice of appeal or record, and the appeal will proceed without delay. *See id.* At that time, the matter of attorney error will be remanded to the trial court to make findings of fact. *See id.* Upon receipt of the findings by this court, it will render a decision on attorney error. *See id.*

In the present case, we cannot say that there is good reason that the appeal was not perfected. Because the motion and accompanying record fail to reveal plainly whether there was attorney error by Mr. Hancock, we direct the clerk to accept the appeal, and we remand the matter of attorney error to the circuit court to make findings of fact.

Melchizedek SHABAZZ *v.* STATE of Arkansas

CR 04-1026 199 S.W.3d 77

Supreme Court of Arkansas
Opinion delivered December 2, 2004

Appellant, pro se.

No response.

PER CURIAM. On September 17, 2002, judgment was entered reflecting that Melchizedek Shabazz had pleaded guilty or *nolo contendere* to three counts of delivery of a controlled substance for which an aggregate sentence of forty years' imprisonment was imposed.

Shabazz appealed the judgment to the court of appeals. The state filed a motion to dismiss the appeal on the ground that Ark. R, Crim. P. 24.3(b) (2003) provides that "[w]ith the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty . . . reserving in writing the right, on appeal from the judgment, to review an adverse determination of a pretrial motion to suppress evidence." The state asserted that while the parties in the trial court appeared to have agreed that petitioner could enter a conditional plea, the plea did not meet the requirements of Rule 24.3(b) and thus the judgment was not appealable. The court of appeals granted the motion and dismissed the appeal on June 11, 2003.

On August 11, 2003, petitioner filed in the trial court a *pro se* petition for postconviction relief pursuant to Criminal Procedure Rule 37.1 challenging the judgment. The petition was dismissed on August 20, 2003, on the ground that it was not timely filed. Petitioner did not file a timely notice of appeal from the order, and he now seeks leave to proceed with a belated appeal pursuant to Ark. R. App. P.–Crim. 2(e).

We need not consider petitioner's reasons for failing to perfect an appeal because it is clear from the record that the trial court did not err when it ruled that the petition was untimely. This court has consistently held that a postconviction matter will not be permitted to go forward where it is clear that the petitioner could not prevail. *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); *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).

Criminal Procedure Rule 37.2(c) provides in pertinent part that a petition attacking a judgment entered on a plea of guilty or *nolo contendere* is untimely if not filed within ninety days of the entry of judgment pursuant to the plea of guilty. The ninety-day period to file a petition under Criminal Procedure Rule 37.1 expired in petitioner's case on December 16, 2002. Petitioner did not file his petition for postconviction relief until August 11, 2003, making the petition late. As the time limitations imposed in Criminal Procedure Rule 37 are jurisdictional in nature, the circuit court could not grant relief on an untimely petition and petitioner was thus procedural barred from proceeding under the rule. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989).

The fact that petitioner chose to proceed with an invalid appeal of the judgment does not alter the requirements of the rule. While Rule 37.2(c) provides that a petition filed within sixty days of the dismissal of an appeal from the judgment is timely, the rule applies to valid appeals. As stated, the appeal that petitioner filed in the court of appeals was not from an appealable judgment.

Petitioner argues that it was his attorney's error that caused him to pursue an invalid appeal, and thus he should not be penalized for the failure to file a timely Rule 37.1 petition. The argument must fail because the filing of a timely petition is a *jurisdictional* requirement.

Motion denied.

Gary Lee STEWART *v.* STATE of Arkansas

CR 04-1199 199 S.W.3d 78

Supreme Court of Arkansas
Opinion delivered December 2, 2004

[redacted]

Clint Miller, for appellant.

No response.

PER CURIAM. Appellant Gary Lee Stewart, by and through his attorney Clint Miller, Deputy Public Defender, has filed a motion for belated appeal. The motion reflects that Appellant was convicted in the Pulaski County Circuit Court of one count of possession of a controlled substance, two counts of first-degree terroristic threatening, and one count of carrying a weapon. The judgment and commitment orders were entered on September 7, 2004.

During the proceedings below, Appellant was represented by Deputy Public Defender Lance Sullenberger. Mr. Sullenberger did not file a notice of appeal on Appellant's behalf. The motion now before us reflects that there is a dispute as to whether Appellant informed Mr. Sullenberger that he wanted to appeal his convictions. Appellant thus asks us to remand this matter to the trial court to settle the record.

[redacted] Pursuant to our holdings in *Kuelper v. State*, 355 Ark. 539, 140 S.W.3d 464 (2004) (*per curiam*), and *Venis v. State*, 350

Ark. 110, 84 S.W.3d 867 (2002) (*per curiam*), we remand this matter to the trial court to determine whether Appellant actually requested his trial attorney, Mr. Sullenberger, to file a notice of appeal on his behalf. However, because both Mr. Sullenberger and Mr. Miller work for the Pulaski County Public Defender, it is not necessary for the trial court to settle the record as to which attorney is the attorney of record on appeal. We grant the parties thirty days from the date of this *per curiam* order to settle this issue. Once we receive the trial court's findings, we will then take up the motion for belated appeal.

It is so ordered.

[redacted]

[redacted]

[redacted]

[redacted]

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