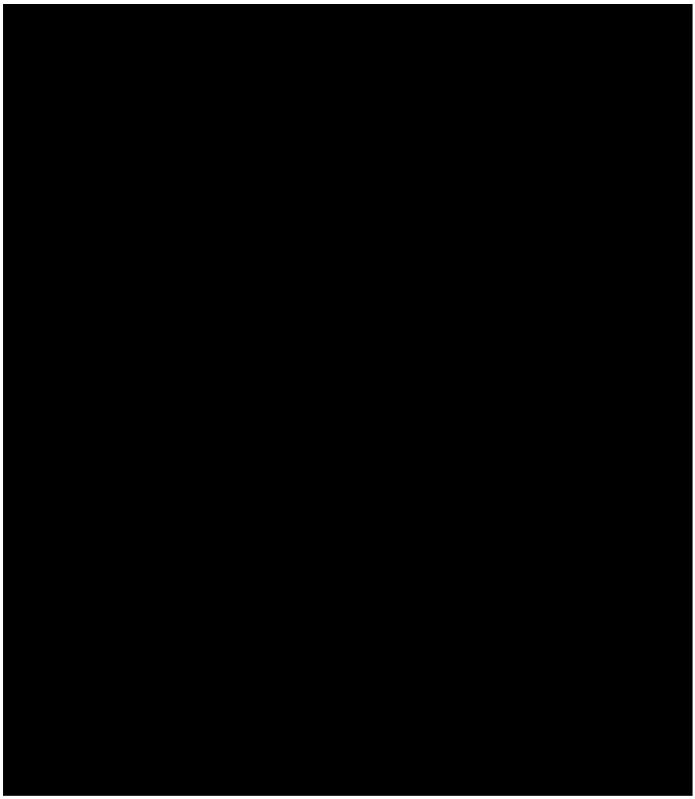

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Troy Lee DORN, Jr. *v.* STATE of Arkansas

CR 04-158 199 S.W.3d 647

Supreme Court of Arkansas
Opinion delivered December 9, 2004

Robinson & Associates, by: *Greg Robinson* and *Luke Zakrzewski*, for appellant.

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Troy Lee Dorn Jr. appeals the order of the Jefferson County Circuit Court convicting him of possession of a controlled substance with intent to deliver in violation of Ark. Code Ann. § 5-64-401 (Repl. 1997). On appeal, he argues that it was error for the trial court to deny his motion for a mistrial after the State improperly commented on his failure to testify at trial. This case was certified to us from the Arkansas Court of Appeals, as involving an issue that requires clarification or development of the law; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(5). We find no error and affirm.

On or about June 15, 2000, members of the Tri-County Drug Task Force obtained a search warrant for a house located at 806 South Washington in Pine Bluff, which was owned and occupied by Appellant's parents. At the time of the search, Appellant, his parents, and his girlfriend were all present. The search uncovered approximately thirty-four pounds of marijuana, weighing scales, a trash can containing items contaminated with marijuana residue, and approximately $14,000 in cash. When asked about the cash, Appellant admitted that it belonged to him. Appellant was subsequently arrested.

The next morning, Sergeant Kelvin Sergeant, a member of the Task Force transported Appellant from the Jefferson County Detention Center to the detective offices in order to interview him. After being advised of his *Miranda* rights, Appellant declined to make a statement and asked to speak with his attorney. Sergeant then began to fingerprint Appellant and, while doing so, informed Appellant that his parents and girlfriend could also be charged in connection with the search. Appellant denied that they had any involvement with the drugs.

While Sergeant was returning Appellant to the detention center, Appellant began to cry. Sergeant asked him why he was crying, and he responded, "Man, I f'd up. I f'd up." He then asked to use Sergeant's cell phone to call his girlfriend. Sergeant dialed

the phone number and held the phone up to Appellant's ear. Appellant then said to his girlfriend, "I'm not going to let anything happen to you. I'm not going to let anything happen to you. I f'd up. I f'd up."

A jury trial was held on August 21, 2003. During the course of the State's closing argument, the prosecutor argued that the State's evidence against Appellant was uncontroverted. After he concluded his argument, counsel for Appellant asked for permission to approach the bench. Appellant's counsel then asked the court to declare a mistrial because the State's comment was an impermissible comment on Appellant's failure to testify at trial. The court denied Appellant's motion. The jury subsequently found Appellant guilty as set forth above and sentenced him to a term of five years' imprisonment in the Arkansas Department of Correction. This appeal followed.

For his only point on appeal, Appellant argues that the trial court erred in denying his motion for a mistrial after the State improperly commented on his failure to testify at trial by stating during closing argument that the evidence against Appellant was uncontroverted. Appellant further contends that it cannot be shown beyond a reasonable doubt that the statement did not influence the verdict. The State counters that Appellant's argument is procedurally barred as his motion for mistrial was not made at the first opportunity. The State alternatively argues that the evidence was not of a type that could only be controverted by Appellant testifying and, thus, it was not error to deny the motion for a mistrial. We agree with the State that Appellant's argument is not preserved for our review, but for a different reason.

In the present case, the record reflects the following colloquy:

> [THE STATE]: . . . Mr. Robinson breaks down different parts of the case, and he tried to make you not rely on your common sense. He tried [to] make you say, "Well, the State is just relying on the fingerprint, this one fingerprint. That's the State's whole case." But don't be confused, and don't be misled because that's not right. In addition to the print, in addition to the marijuana, in addition to the scales, in addition to the bags, in addition to the duffel bag, you have all of these statements, every single one of them where this defendant claimed responsibility for all of this marijuana. That is uncontroverted, absolutely uncontroverted.

> And, ladies and gentlemen, I submit to you that the State has well proven that this defendant is a drug dealer and that he should be found guilty of possession with intent to deliver here in this county. Thank you for your time and attention.
>
> [DEFENSE COUNSEL]: May we approach?
>
> THE COURT: You may.
>
> . . . .
>
> [DEFENSE COUNSEL]: While the jury is back in deliberation, I need to move for a mistrial on the argument of the prosecution.
>
> THE COURT: All right.

Immediately thereafter, the court instructed the jury and deliberations began. Only after the jury began deliberating, did Appellant explain his basis for seeking a mistrial.

The law is well settled that motions for mistrial must be made at the first opportunity. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000). The policy reason behind this rule is that a trial court should be given an opportunity to correct any error early in the trial, perhaps before any prejudice occurs. *Id.* Moreover, in order to preserve an argument for appeal, there must be an objection to the trial court that is sufficient to apprise the court of the particular error alleged. *Ellison v. State*, 354 Ark. 340, 123 S.W.3d 874 (2003). Thus, an objection must be both contemporaneous and specific. *Id*; *Robinson v. State*, 348 Ark. 280, 72 S.W.3d 827 (2002).

In the present case, even though Appellant moved for a mistrial almost immediately after the prosecutor's comment about the evidence, he did not state any grounds in support of a mistrial at that time. Instead, he waited until after the jury was instructed and deliberations were underway. In short, he failed to apprise the trial court of the alleged error, thereby failing to give the trial court an opportunity to correct the alleged error. Thus, this issue is not preserved for our review.

Affirmed.

THORNTON, J., not participating.

Terese Marie MEADOWS *v.* STATE of Arkansas

CR 04-331 199 S.W.3d 634

Supreme Court of Arkansas
Opinion delivered December 9, 2004

[Rehearing denied January 13, 2005.*]

* HANNAH, C.J., and CORBIN, J., would grant rehearing.

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Dudley & Compton, by: *Cathleen V. Compton*, for appellant.

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

ROBERT L. BROWN, Justice. Appellant Terese Marie Meadows appeals from an order of the Carroll County Circuit Court convicting her of capital murder, arson, and tampering with evidence and sentencing her to a term of life imprisonment without parole, ten years' imprisonment, and three years' imprisonment, respectively, to be served concurrently. Meadows argues on appeal that (1) the circuit court erred in denying her motion for directed

verdict, because there was insufficient evidence to support her convictions for capital murder and arson; and (2) the circuit court erred in denying her motion for a mistrial, because the jury returned inconsistent verdicts regarding the offenses of capital murder and second-degree murder. Meadows's arguments are without merit, and we affirm.

The record reveals that on November 7, 2001, Lorraine "Lori" Pattison was in a trailer home in Carroll County that she had been sharing with Dale Meadows, Terese Meadows's estranged husband, when it caught fire and was destroyed. Dale Meadows was arrested and charged with capital murder and arson.[1] Investigators received information that Terese "Tracy" Meadows had gone to the scene of the fire and attempted to remove the victim's body. Meadows admitted that she had done this and stated that she did so in an attempt to protect her husband, Dale Meadows. She also told police that Dale Meadows had killed Lori Pattison.

Later, law enforcement received information that Tracy Meadows had also been involved in Lori Pattison's death. Tracy Meadows was subsequently arrested and charged with premeditated capital murder and in the alternative with capital-felony murder with arson as the underlying felony. Meadows was also charged with arson and tampering with physical evidence. A jury trial was held on August 5-7, 2003. Following presentation of the State's evidence, Meadows moved for a directed verdict on the charges of capital-felony murder and arson, which the court denied. Thereafter, Meadows presented her case and then renewed her directed-verdict motions, which the circuit court again denied.

The State requested that the circuit court instruct the jury on first-degree and second-degree murder as lesser-included offenses of capital murder. Meadows's counsel objected to these instructions, because she reasoned that "if [the jury is] going to find her guilty of any homicide, it would be of capital murder and not anything that they might compromise on." The court overruled Meadows's objection and instructed the jury on the offenses of premeditated capital murder, capital-felony murder, first-degree murder, second-degree murder, and tampering with evidence.

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[1] Dale Meadows was convicted of capital murder and arson on August 14, 2003. This court affirmed his judgment of conviction. *See Meadows v. State*, 358 Ark. 396, 191 S.W.3d 527 (2004).

After administering the instructions, the judge and counsel engaged in the following conversation about an arson instruction:

> THE COURT: I did read two instructions that were not discussed in chambers. That is, the standard concluding instructions on findings, I added the instruction for arson and the instruction for tampering that were not presented to me. I just read it off of this one.[2]
>
> [DEFENSE COUNSEL]: That's fine, Your Honor.
>
> THE COURT: We'll prepare those and have them available to go into the jury room. Anything further to be placed on the record, at this point, [Prosecutor]?
>
> [PROSECUTOR]: Not that I'm aware of, Your Honor.
>
> THE COURT: [Defense Counsel]?
>
> [DEFENSE COUNSEL]: No, sir.

Defense Counsel made no objection pertaining to the arson instruction.

After closing arguments, the judge sent the jury into deliberations. After some deliberation, the jury sent a note to the judge asking the following questions:

> Are we supposed to decide?
>
> 1) Capitol [*sic*] Murder
>
> 2) Capitol [*sic*] Murder 1rst [*sic*] Degree
>
> 3) Capitol [*sic*] Murder 2nd Degree
>
> One, Two, or Decide between all 3?

The court reinstructed the jury on *all* the instructions, including the following:

> If you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will then consider the charge of

[2] Though the circuit judge indicates that he read an arson instruction to the jury, no arson instruction is found in the record on appeal.

> murder in the first degree. If you have a reasonable doubt of the defendant's guilt on the charge of murder in the first degree, you will consider the charge of murder in the second degree.

The jury returned verdicts finding Meadows guilty of capital murder, second-degree murder, arson, and tampering with physical evidence.

The prosecutor then stated to the court that sentencing Meadows to capital murder and second-degree murder was double jeopardy and suggested finding Meadows guilty of capital murder, the higher offense. Meadows's counsel stated she thought that "they've got inconsistent verdicts." The court polled each juror on whether his or her verdict was that Meadows was guilty of capital murder beyond a reasonable doubt. After all twelve jurors responded affirmatively, the court found that Meadows was guilty of capital murder. The court subsequently polled the jury on its findings of guilt for the offenses of arson and of tampering with evidence. Each juror again responded affirmatively for each verdict. The penalty phase of the trial commenced, and the court sent the jury to deliberate Meadows's sentences. It returned sentences for life imprisonment without parole for capital murder, ten years' imprisonment for arson, and three years' imprisonment for tampering with evidence.

After the sentencing phase was completed, Meadows's counsel moved for a declaration of a mistrial on account of inconsistent jury verdicts regarding the capital murder and second-degree murder convictions. The court postponed sentencing so that it could research the issue. On August 29, 2003, the court held a hearing on Meadows's sentencing after receiving briefs from the parties. At the conclusion of the hearing, the court denied Meadows's motion for a mistrial, disregarded the second-degree murder verdict, and sentenced Meadows to life imprisonment without parole. Subsequently, the circuit court entered its judgment of conviction and its order denying the motion for a mistrial.

I. Motion for Directed Verdict

Meadows first argues on appeal that the circuit court erred in denying her motion for directed verdict, because the State failed to establish sufficient proof to support the jury's verdicts on the offenses of capital murder and arson. Specifically, Meadows argues that the evidence was insufficient, because the testimony was inherently improbable, physically impossible, and unbelievable. The State responds that sufficient evidence supports Meadows's

conviction for capital murder and arson. We agree with the State and hold that the circuit court did not err in denying Meadows's motion for directed verdict.

A motion for directed verdict is a challenge to the sufficiency of the evidence. *See Barrett v. State*, 354 Ark. 187, 119 S.W.3d. 485 (2003). The test for such motions is whether the verdict is supported by substantial evidence, direct or circumstantial. *See id.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Id.* On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict. *Id.* Moreover, the credibility of witnesses is an issue for the jury and not for this court. *Id.* 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.*

Because Meadows failed to argue that the State had not presented sufficient evidence on the alternative charge of premeditated capital murder, she failed to preserve this argument.[3] *See* Ark. R. Crim. P. 33.1. Therefore, we will only address Meadows's arguments regarding capital-felony murder and arson. A person commits capital-felony murder with arson as the underlying felony if:

> (2) Acting alone or with one (1) or more other persons, he commits or attempts to commit arson, and in the course of and in furtherance of the felony or in immediate flight therefrom, he or an accomplice causes the death of any person[.]

Ark. Code Ann. § 5-10-101(a)(2) (Repl. 1997). Under capital-felony murder, the State must first prove the felony, so the felony becomes an element of the murder charge. *See Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002). In this case, to prove that Meadows commit-

[3] Tracy Meadows's counsel specifically moved for directed verdict on "capital murder" and on arson, arguing that no evidence was presented to prove arson or to prove capital-felony murder. She then explained that she would not move for directed verdict on the tampering charge because Meadows admitted to such tampering. The State in its response discussed arson and premeditated capital murder.

ted capital-felony murder, the State was required to prove arson as the underlying felony. A person commits arson if he starts a fire or causes an explosion with the purpose of destroying or otherwise damaging:

> (1) An occupiable structure or motor vehicle that is the property of another person; or
>
> . . .
>
> (3) Any property, whether his own or that of another person, if the act thereby negligently creates a risk of death or serious physical injury to any person[.]

Ark. Code Ann. § 5-38-301(a)(1) & (3) (Repl. 1997).

Evidence presented at trial revealed that Meadows arrived at the trailer home of Diane Sprague in Green Forest on November 7, 2001, at approximately 4:30 p.m. Meadows subsequently left Sprague's home and returned between 8:00 and 8:30 p.m. to collect $20 that Sprague owed Meadows. To satisfy the debt, Sprague instead agreed to buy groceries for Meadows at the Wal-Mart in Harrison. Each took her own car, and the women met in the Wal-Mart parking lot. After purchasing groceries, the women went their separate ways. Sprague bought gas for her car and made a few telephone calls at a pay phone before driving back to Green Forest. When she returned home, Sprague found Tracy and Dale Meadows in her home. Dale Meadows told Sprague that his trailer home had exploded and that he tried but failed to remove Lori Pattison from the fire.

Around 12:30 a.m. on November 8, 2001, Gay Lynn Easter passed the trailer home owned by Bob Trigg and occupied by Dale Meadows and Lori Pattison. Easter testified that the trailer home had collapsed and was burning around the edges. She tried to notify Trigg but was unable to contact him. She then telephoned the Carroll County Sheriff's Department to report the fire. Kim Marshall, a dispatcher with the sheriff's department, took Easter's call. According to Marshall, no one reported the fire except for Easter during her shift, which was from 12:00 a.m. until 8:00 a.m. on November 8, 2001.

After being notified of the fire, Gary Coleman, Captain of the Green Forest Volunteer Fire Department, was the first to arrive at the scene. According to Coleman, no one was around the trailer home when he arrived and the structure was "already completely

burned down." Coleman testified that he attempted to see if there was anyone in the trailer home, but he could not see anything because it was too dark in the area.

Patty Lively testified that Tracy and Dale Meadows arrived at her home early in the morning of November 8, 2001. Lively testified that Tracy Meadows told her that Dale Meadows had killed Lori Pattison and asked Lively to go with her to the fire scene. When they arrived at the scene, Tracy Meadows walked directly to the area where Lori Pattison's body was located. She then told Lively that the body's remains were Lori Pattison's and then touched them, causing a piece of bone to break. Lively testified that she convinced Meadows to leave the area by promising her that she would later return and help her move the body. The women returned to Lively's home, and Tracy and Dale Meadows left. Lively then contacted her neighbor Brice Sneed and told him about going to the fire scene with Tracy Meadows and about Tracy Meadows touching the body. At about 9:30 a.m., Sneed contacted the Carroll County Sheriff's Department to inform them that Lori Pattison had died in the trailer home fire.

Investigator Alan Hoos with the Carroll County Sheriff's Department testified that he received Sneed's call. Investigator Hoos and Lieutenant Leighton Ballard visited the scene to search for any human remains, which they found near the remnants of a bed frame. The officers then contacted Arkansas State Police for assistance in the investigation.

According to Investigator Hoos, while at the fire scene, he noticed Tracy Meadows drive by in her vehicle. He conducted a traffic stop on Meadows and she was subsequently transported to the sheriff's department for an interview. According to Lieutenant Ballard, Meadows admitted that she found and touched the body but stated that Dale Meadows was responsible for whatever had happened. Tracy Spencer, an investigator with the Arkansas State Police who conducted Meadows's interview, also testified that Tracy Meadows stated that she had nothing to do with Lori Pattison's death or with the fire.

A forensic pathologist with the Arkansas State Crime Lab, Dr. Steven Erickson, testified that he examined the remains of Lori Pattison. Due to the condition of the remains, Dr. Erickson was unable to determine whether the victim had suffered stab wounds. But Dr. Erickson stated that she was alive at the time of the fire and died from smoke inhalation.

At the jury trial, Thomas Conner testified that he was in the trailer home with Dale Meadows and Lori Pattison on November 7, 2001, and that they had been drinking alcoholic beverages all day. According to Conner, Tracy Meadows arrived with a folding knife in her hand and asked where Lori Pattison was. Meadows then went into the bedroom where Lori Pattison was hiding from her. Shortly thereafter, Conner heard Lori Pattison scream for help. Dale Meadows next went into the bedroom. He later returned to the living room and stated that Tracy Meadows had killed Lori Pattison. Conner testified that Dale Meadows had blood on his forearms and on his blue jeans and told him to leave. As he was leaving, Conner saw Dale Meadows take a can of kerosene from the front porch and enter the trailer home with it. In addition, Earl Lee Sewell testified at trial that he overheard Tracy Meadows say that she killed Lori Pattison. Eddie Craig Monarch also testified that Tracy Meadows told him that she killed Lori Pattison, that Dale Meadows poured kerosene throughout the trailer home, and that he and Tracy Meadows lit it on fire.

Reviewing the presented evidence in the light most favorable to the State and considering only the evidence that supports that jury's verdict, there was substantial evidence presented to compel the jury's conclusion that Meadows was guilty of capital murder and of arson. The jury heard testimony that Meadows admitted killing Lori Pattison and that she was involved in starting the fire in the trailer home that eventually caused Lori Pattison's death. Meadows's arguments that the testimony was inherently improbable, physically impossible, and unbelievable are unpersuasive. It falls within the province of the jury to resolve questions of conflicting testimony and inconsistent evidence, and the jury chose in the instant case to believe the witnesses supporting the State's theory of the case rather than the defendant's. Meadows's argument regarding sufficiency of the evidence is without merit.

II. Mistrial Motion

For her second point, Meadows argues that the circuit court abused its discretion in denying her motion for a mistrial, because the jury returned inconsistent verdicts for capital murder and second-degree murder. Meadows also argues that the inconsistency was not cured by the court's reinstructing the jury or by its

polling the jury on the capital murder verdict alone, because the court should also have polled the jury on its verdict for second-degree murder.

We have said that a mistrial is an extreme remedy that should be used only when the error is beyond repair and cannot be corrected by any curative relief. *See, e.g., Ray v. State*, 342 Ark. 180, 27 S.W.3d 384 (2000). A circuit court's decision to grant or deny a mistrial will not be disturbed absent a showing of an abuse of discretion. *See id.*

As an initial matter, we question whether this point was preserved for appeal. After the jury's verdicts regarding capital murder and first-degree murder were first read, defense counsel said: "I think they've got inconsistent verdicts." Meadows contends that this was enough to preserve the issue, but this is all that was said. No express objection was made; nor did Meadows's counsel move for a mistrial. After the judge polled the jury on capital murder, he announced: "The Court finds that the defendant has been found guilty of capital murder." Meadows again made no objection to the capital-murder decision; nor did she move for a mistrial. Indeed, no motion for a mistrial was made on inconsistent verdicts until after the jury had returned its verdicts for sentencing after the penalty phase. Hence, the mistrial motion does not appear to have been made at first opportunity. *See Ferguson v. State,* 343 Ark. 159, 33 S.W.3d 115 (2000) (motion for mistrial procedurally barred when not made at first opportunity). Certainly stating defense counsel's mere *belief* that the verdicts were inconsistent is not enough.

But in addition to the preservation point, Meadows's arguments on appeal are without merit. *See Ferguson v. State, supra* (legitimacy of denying mistrial motion addressed, although motion appeared to be made late). She contends that the verdicts of capital murder and second-degree murder were inconsistent and should not be allowed to stand. This court has found "inconsistent" verdicts to be those verdicts with some logical impossibility or improbability implicit in the jury's findings. *See Ray v. State, supra.*

In the case at hand, any ostensible confusion on the jury's part evidenced by the completion of the verdict forms for both capital murder and second-degree murder was cured when the circuit judge polled the jurors individually on whether each juror had found that Meadows was guilty of capital murder beyond

a reasonable doubt. Each juror responded affirmatively that he or she had. The sentencing phase then followed the finding of guilt, and the jury sentenced Meadows to life in prison without parole.

Polling individual jurors on whether this was each juror's verdict is an entirely reasonable method for confirming a verdict. Indeed, this court recently affirmed a death sentence where each juror confirmed that that was his or her decision. *See Robbins v. State*, 356 Ark. 225, 149 S.W.3d 871 (2004). Furthermore, in a case with facts very analogous to those of the instant case, the Wyoming Supreme Court held that where the jury found the defendant guilty of both greater and lesser offenses, polling the jury on the greater offenses and sentencing the defendant accordingly was the appropriate way to proceed. *See Johnson v. State*, 695 P.2d 638 (Wyo. 1985).

In addition, polling the jurors on second-degree murder as well as capital murder was not required. The jury had already assured the circuit judge that each member had determined Meadows was guilty of capital murder beyond a reasonable doubt, which, of course, is a homicide two degrees higher than second-degree murder. Moreover, this court discussed Ark. Code Ann. § 5-1-110(b) (1987) (lesser-included offenses), in a case involving prosecution for more than one offense for the same conduct under Ark. Code Ann. § 5-1-110(a) (1987):

> . . . We have repeatedly interpreted this statute to mean that a defendant may be prosecuted for more than one offense, but, under specified circumstances, a judgment of conviction may only be entered for one of the offenses. *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984); *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981). Perhaps the best example of the way the statute is intended to work is in the case where a prosecutor is entitled to go to the jury and ask for conviction on the greater or the lesser offense, and the jury might find a defendant guilty of both the lesser included offense and the greater offense. Under the statute, the trial court should enter the judgment of conviction only for the greater conviction. The purpose of the statute in such a case is to allow a conviction of the lesser included offense when the accused is not convicted of the greater offense, but the trial court is clearly directed to allow prosecution on each charge.

Hill v. State, 314 Ark. 275, 282, 862 S.W.2d 836, 840 (1993). *See also Johnson v. State, supra.* The quoted language specifically discusses what

a circuit judge should do when a jury returns a verdict for a greater and lesser-included offense. It says the judge shall enter judgment for the greater offense, which is precisely what the circuit judge did here. Indeed, the circuit judge specifically referred to the *Hill* decision and relied on it before pronouncing sentence.[4]

As a final point, we note an arson instruction was not included in the record, even though the circuit judge specifically announced, as quoted in this opinion, that he had instructed the jury on arson. Of course, it is the obligation of the appellant to present this court with a complete record for purposes of appeal. *See, e.g., Shankle v. State*, 309 Ark. 40, 827 S.W.2d 642 (1992); *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992). We further observe that even if the arson instruction had not been given, the jury still was instructed, in the alternative, on capital murder committed with premeditated and deliberated purpose. The jury could well have convicted Meadows of premeditated capital murder since it was instructed on that offense, all of which would render the arson instruction irrelevant. We certainly find no reversible error in this regard.

In short, the circuit judge entered judgment for the greater offense found by the jury after polling the jurors individually to be certain of their guilty verdict as an additional precaution. The jury subsequently returned a sentence in the penalty phase of life without parole, which relates to capital murder — not second-degree murder. We hold that the circuit judge did not abuse his discretion in denying the motion for a mistrial.

This record has been reviewed for any errors prejudicial to Meadows in accordance with Arkansas Supreme Court Rule 4-3(h), and we find there are none.

Affirmed.

CORBIN, THORNTON, and HANNAH, JJ., dissent.

DONALD L. CORBIN, Justice, dissenting. I must respectfully dissent. I am both baffled and distressed by the conclusions

[4] As a final point in her inconsistency argument, Meadows presents this court with two sentences that state that her arson conviction should be dismissed, because no evidence was presented for support. We have already determined in this opinion that substantial evidence was presented to support a verdict that Meadows was guilty of arson.

reached by the majority in the instant case. I simply do not understand how the majority can determine that no error resulted from the jury finding Appellant guilty of both capital murder and second-degree murder for a single crime. Likewise, it is beyond my realm of comprehension as to how the majority can conclude that it was appropriate for the jury to convict Appellant of arson, and possibly, capital felony murder, in the complete absence of an arson instruction. Quite honestly, I am distressed by the trend I see emerging in this court to uphold criminal convictions, despite serious trial defects, as long as it appears that there is ample evidence pointing to a defendant's guilt. Justice is not being served, and dangerous precedents are being established with cases such as the present one.

I must first address the majority's erroneous conclusion that no error occurred when the trial court convicted Appellant of capital murder after the jury returned guilty verdicts on both capital murder and second-degree murder. In support of its conclusion, the majority avers that the trial court cured any possible irregularity when it polled the jury on the verdict of capital murder. This conclusion ignores two critical facts. First, there is absolutely no way of knowing whether the jury would have unanimously agreed that they had found Appellant guilty of second-degree murder if the court had also polled them on this verdict. Second, and more importantly, the note sent to the trial court during deliberations indicated that the jurors believed each of the murder charges to be varying types of "capital" murder. Thus, when the trial court polled the jury simply on "capital" murder, who knows if they even understood that each of the charges were not "capital" murder. It cannot be assumed, as the majority does, that the jury intended to impose the harshest conviction. In so doing, the majority ignores the fact that the jury found Appellant not guilty of the offense of first-degree murder. Unlike the majority, I do not believe that the trial court's action sufficiently clarified the inconsistent verdicts.

Furthermore, the majority's reliance on *Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1993), is nothing more than a thinly veiled attempt to justify the erroneous result it reaches in this case. *Hill* is wholly inapplicable, as demonstrated by the lack of discussion of the case in the majority opinion. There, the defendant was charged with manufacturing or possessing with intent to manufacture or deliver a controlled substance and using or possessing with intent to use drug paraphernalia. He was convicted and sentenced for both offenses. On appeal, this court reversed both convictions

on the basis of an error in the admission of evidence. This court, in dicta, went on to examine other issues, including the defendant's contention that he could not be prosecuted and convicted of both charges because they constituted a continuing course of conduct. This court disagreed and discussed the fact that a defendant may be prosecuted for both a greater and a lesser-included offense and if found guilty of both could be sentenced for the greater offense. It is clear that the majority chooses to rely on this case in an attempt to confuse the real issue, namely that the jury did not understand the instructions given to them and, thus, returned inconsistent verdicts.

Equally misplaced is the majority's reliance on *Johnson v. State*, 695 P.2d 638 (Wyo. 1985). Again, this is a case that involved a defendant who was convicted of a greater offense after the jury returned guilty verdicts on both the greater and the lesser-included offenses. It has absolutely nothing to do with inconsistent verdicts. Because there is no Arkansas case precisely on point, it is understandable that the majority looks for guidance from other jurisdictions, but the guidance sought should be from cases where the issue is one of inconsistent verdicts. Such a case is *People v. Porter*, 659 N.E.2d 915 (Ill. 1995). There, a jury returned verdicts of guilty but mentally ill on two counts of first-degree murder, as well as verdicts of guilty but mentally ill on two counts of second-degree murder for a single offense. The trial court rejected the jury's findings on one of the counts of first-degree murder and both of the counts of second-degree murder and entered judgment on the remaining count of first-degree murder.

The defendant appealed to the Illinois Supreme Court, arguing that the jury verdicts were inconsistent and that it was improper for the trial court to disregard three of the convictions. The court agreed and ordered that the defendant was entitled to a new trial, stating that a single murder cannot be both provoked and unprovoked. In so ruling, the court noted that under Illinois law, second-degree murder is first-degree murder plus mitigation. In other words, first-degree murder is committed without any provocation, while second-degree murder results when the defendant is provoked in some manner. Otherwise, all the elements of first and second-degree murder are identical.

After determining that the verdicts were inconsistent, the Illinois Supreme Court then determined that the trial court erred in simply rejecting three of the verdicts. According to the court, the trial court should have provided additional jury instructions

that would resolve the inconsistency and then sent the jury back for further deliberations. In explaining this rule, the court stated:

> Under such circumstances, it is improper for a trial court to enter judgment on one or more of the verdicts and vacate the other verdicts. The rationale behind this rule is that a trial court may not usurp a jury's function to determine innocence or guilt by second-guessing which guilty verdict was intended by the jury and which was the result of some misconception.

Id. at 921 (citing *People v. Alamo*, 483 N.E.2d 203 (Ill. 1985)).

Just as in *Porter*, the trial court in the instant case second-guessed which verdict was intended, thereby usurping the jury's function of determining guilt. Yes, the trial court's poll of the jury resulted in an unanimous agreement that the jury intended a guilty verdict on the charge of capital murder. Again, I must reiterate, we have no way of knowing whether the jury would have also unanimously agreed that they had found Appellant guilty of second-degree murder. With regard to the verdict of capital murder, the jury determined that Appellant murdered Lori Pattison with premeditated and deliberated purpose or, alternatively, that she killed her in the course of committing the felony of arson. The jury also determined that Appellant committed second-degree murder by knowingly causing the death of Ms. Pattison under circumstances manifesting an extreme indifference to the value of human life. Despite these two findings, the jury found that Appellant did not purposely cause Ms. Pattison's death when it acquitted her on the charge of first-degree murder. When the jury returned these inconsistent verdicts, the trial court should have provided further instructions and ordered the jury to continue deliberations. There is certainly precedent for such action, as a similar situation was addressed by the trial court in *Barnum v. State*, 268 Ark. 141, 594 S.W.2d 229 (1980). There, this court affirmed the trial court's denial of a mistrial after the court clarified any ambiguity in the jury's verdicts by ordering them to continue deliberations until the verdicts were consistent. Because no such action was taken in this case, it is impossible to ascertain the jury's true intent.

Before leaving this point, I must note one final irregularity in the majority's logic. As another basis supporting its conclusion, the majority notes that the jury subsequently sentenced Appellant to life imprisonment without parole, a term consistent with capital

murder, not second-degree murder. This fact has no bearing whatsoever on the jury's intent. The death penalty was never sought in this case. Moreover, the record reflects that once the trial court determined that Appellant had been convicted of capital murder, it instructed the jury's foreperson to sign a form sentencing Appellant to life imprisonment, the only permissible sentence remaining for capital murder. In other words, the jury did not deliberate Appellant's sentence for the murder conviction.

Turning now to the issue of the missing arson instruction, I must point out that this court has usurped the jury's function of determining whether or not Appellant committed the felony of arson, as well as capital felony murder. It is clear from the record that the trial court never instructed the jury on the offense of arson, either as the underlying felony for capital murder or standing alone. In short, there is no instruction to the jury providing them with the elements that the State was required to prove in order to find Appellant guilty of arson. As the majority points out, the trial court *stated* that it added both an arson instruction, as well as an instruction for tampering with evidence. However, the record reflects that the jury instructions were read twice and, both times, the tampering instruction was given but the arson instruction was not read. It is highly improbable, as the majority implies, that the reading of the arson instruction was the only thing left out of the record, not once, but twice. A better conclusion is that it was not given.

In determining that there was sufficient evidence supporting the jury's determination that Appellant committed arson and capital felony murder, the majority is engaging in rank speculation. Without knowing the elements of the crimes, there is simply no way that the jury could have properly determined that Appellant committed those offenses. It is axiomatic that it is not for this court to weigh the evidence or assess the credibility of the witnesses, as that determination lies within the province of the trier of fact. *See, e.g.*, *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004); *Strom v. State*, 348 Ark. 610, 74 S.W.3d 233 (2002); *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000). Yet, that is precisely what the majority is doing in this case. If it is acceptable for a jury to determine guilt without knowing the elements of the crime, then this court should do away with the Arkansas Criminal Jury Instructions.

I anticipate that the majority would conclude that this issue is not preserved for our review, as it was not raised in the trial court

or on appeal. Indeed, in *St. Clair v. State*, 301 Ark. 223, 783 S.W.2d 835 (1990), this court refused to consider for the first time on appeal an allegation that the trial court erred by refusing to give a particular instruction. *St. Clair*, however, is distinguishable from the instant case. The instruction at issue in that case involved the weight to be given to a hearsay statement. Moreover, this court refused to consider the argument because the trial court was not given the opportunity to correct the error. Here, the missing instruction sets forth the elements that the State is required to prove in order to obtain a conviction. In addition, the trial court stated on the record that he added the arson instruction, but for whatever reason, it was never read to the jury. Thus, the trial court had an opportunity to correct the error.

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the United States Supreme Court reversed a defendant's conviction for first-degree murder because the reasonable-doubt instruction given to the jury was constitutionally deficient. In so ruling, the Court pointed out that the right to trial by jury in criminal cases is a fundamental right. The Court further noted that the most important element of this right is to have the jury, rather than the judge, reach the requisite finding of guilt. *Id.* In further elaborating on this principle, the Court stated:

> What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements. This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings.

Id. at 277-78 (citations omitted).

Appellant in this case has been denied her right to a trial by jury as guaranteed her by the Sixth Amendment. It cannot be said that the State proved beyond a reasonable doubt all of the elements of arson and capital felony murder because the jury was never instructed on those elements and the State's burden in proving them. Instead, the majority has improperly assumed the role of factfinder and determined that there was sufficient evidence to support Appellant's convictions. In so doing, the majority has

violated both constitutional principles, as well as the dictates governing our role as an appellate court.

For the above-stated reasons, I respectfully dissent.

THORNTON and HANNAH, JJ., join in this dissent.

Charles Gentry RODGERS *v.* STATE of Arkansas

CA 04-534 199 S.W.3d 625

Supreme Court of Arkansas
Opinion delivered December 9, 2004

Don R. Etherly, for appellant.

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

ROBERT L. BROWN, Justice. Appellant Charles Rodgers appeals from his conviction for rape and his sentence to life imprisonment. He asserts three points on appeal. We find no error and affirm the judgment of conviction.

The facts are garnered from the testimony at trial. On June 8, 2002, at 3:30 a.m., Lillian Adams was awakened by a knock on the door of her home. When she opened the door, she found Rodgers, her live-in boyfriend for two years. Following some discussion between the two regarding Rodgers's hunger, Ms. Adams convinced Rodgers to stay at her home and get some sleep. They both fell asleep on the couch downstairs. Afterwards, they awoke and went upstairs to Ms. Adams's bedroom. At that time, Rodgers again pressed Ms. Adams to go out and get something for him to eat. She declined and returned downstairs to sleep on the couch, leaving Rodgers in her bedroom to sleep.

At some point later that night, Ms. Adams awoke again, sensing that something was wrong with her then-twelve-year-old daughter, S.A. She went upstairs, entered S.A.'s room, and saw S.A. lying sideways on her bed and Rodgers lying behind her, but facing her. When Ms. Adams called Rodgers's name, he slid off the bed. He was wearing only his underwear, and he wrapped a blanket around him. After asking S.A. whether he had done anything to her, Ms. Adams removed the covers from her daughter and saw that her shorts and underwear were pulled down. Rodgers continuously denied that he had done anything to the child and stated that he loved both of them and that he had only come to S.A.'s room to check on a pet rabbit he had given to S.A.

S.A. initially told her mother that she did not know if anything had happened while she was asleep. However, a few minutes later, she told her mother that Rodgers had touched her and that her "private part" was hurting "[a] little bit." Ms. Adams sent S.A. to the bathroom to check herself, and S.A. came back and told her that she was not bleeding but that a "white glup" came out. At that point, Ms. Adams took S.A. to the hospital where a rape kit was performed. Rodgers was arrested later that morning by police. He was subsequently tried, convicted of rape, and sentenced to life imprisonment.

For his first point on appeal, Rodgers argues that during his cross-examination of S.A., he was prevented from inquiring about

prior statements she made to medical personnel and police officers about what Rodgers had apparently done to her. He maintains that the circuit court erred in ruling that his cross-examination was beyond the scope of the redirect examination and that it should be limited based upon S.A.'s age. He asserts that as a result, he was prevented from fully cross-examining his accuser.

A review of the record reveals that during redirect examination, the prosecutor asked S.A. if she knew what was "going in and out of [her]" to which she responded, "[h]is penis." Defense counsel, on recross examination, asked S.A. whether she remembered telling the nurse and people at the hospital that it was either a finger or a penis. S.A. responded that she did not remember that. At that time, the prosecutor objected to defense counsel's question on the basis that he was mischaracterizing the evidence.

At the ensuing bench conference on the objection, the circuit court ruled that defense counsel's question was outside the scope of the prosecutor's redirect examination and that the prosecutor's question only related to previous testimony that Rodgers "put his stuff back in his underwear." The circuit court told defense counsel that that was the only area it was going to let both sides question S.A. about, and it emphasized the fact that S.A. was only thirteen years old.[1] The circuit court added that it was not going to allow defense counsel's recross examination to confuse either S.A. or the jury. Defense counsel then replied that he was merely "expounding on the question that at the time she didn't know and when she got to the hospital it became penis or hand." The circuit court repeated that it had made its ruling.

This court reviews matters concerning the scope of cross-examination under an abuse-of-discretion standard. *See Woodruff v. State*, 313 Ark. 585, 856 S.W.2d 299 (1993). This court has stated that the use of cross-examination is an important tool in bringing the facts before the jury and that wide latitude should be afforded by the trial court. *See id.* That being said, this court has also held that a circuit court must determine when the matter has been sufficiently developed and when the outer limits of cross-examination have been reached, and unless the trial court's discretion has been abused, this court will not reverse. *See id.* In addition, when determining whether cross-examination restrictions have infringed upon an appellant's confrontation rights, this court looks

[1] S.A. was thirteen at the time of the trial.

to the record as a whole to ascertain if the restrictions imposed created a substantial danger of prejudice to the appellant. *See Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000). This prejudice is not presumed, but must be demonstrated. *See id.*

In the case at hand, S.A. testified, on recross-examination, that she did not remember telling hospital personnel that it was either a finger or a penis which Rodgers used. Despite that fact, testimony from a previous witness, Mary King, a nurse at Helena Regional Hospital, demonstrates that S.A. told her that Rodgers had been "messing with [her]." When questioned as to what that meant, S.A. told Ms. King that Rodgers had started touching her bottom and that he had gotten on top of her and inserted his penis into her. On cross-examination of Ms. King, defense counsel questioned her as to a statement that was contained in the notes from S.A.'s treatment at the hospital:

> DEFENSE COUNSEL: Now, one of your statements was that "patient alleges that assailant inserted a penis or hand into her vagina." Is that correct?
>
> MS. KING: No, sir. That's not my statement.
>
> DEFENSE COUNSEL: That's not your statement?
>
> MS. KING: No, sir.
>
> DEFENSE COUNSEL: Whose statement was that?
>
> MS. KING: That was written by Dr. Yende.

This discussion demonstrates that the information sought to be admitted by defense counsel, which was that S.A. told hospital personnel that she was assaulted by a penetrating hand or penis, was already admitted at the time defense counsel sought to recross S.A. Defense counsel apparently recognized this based on his arguments to the circuit court:

> DEFENSE COUNSEL: . . . Now, the medical records have already been testified to by Ms. King that the patient alleges that the assailant inserted a penis or hand into her vagina. She is the patient. Now, she said he inserted a penis and I am merely expounding on the question he asked in cross-examination that at the time she didn't

> know and when she got to the hospital it became penis or hand. And for her to sit here today and say penis — definitively say "penis," is contrary to what she said — the statements she's made. And I can — (inaudible).

[redacted] Despite Rodgers's contentions to the contrary, adequate evidence was presented that S.A. had at one time told Ms. King that her assailant had inserted a penis into her and that at another time she told hospital personnel that it was either a hand or a penis. Moreover, we are cognizant of the fact that the insertion of either a penis or finger into the vagina of a twelve year old constitutes rape. *See* Ark. Code Ann. § 5-14-103(a)(1)(C)(i) (Supp. 2003); Ark. Code Ann. § 5-14-101(1), (10) (Supp. 2003). Accordingly, we need not reach the issue of whether the circuit court cut off cross-examination prematurely, because we hold that Rodgers was not prejudiced by the circuit court's ruling and, hence, the circuit court did not abuse its discretion in limiting Rodgers's recross-examination of the thirteen-year-old witness.

Rodgers next claims that the circuit court erred by preventing him from questioning Detective Billy Williams when called as a defense witness. Detective Williams was called for purposes of impeaching S.A.'s allegedly inconsistent trial testimony. Rodgers asserts that he should have been able to ask Detective Williams about S.A.'s statements to him, which differed from her trial testimony. The circuit court disallowed this line of questioning of Detective Williams on the basis that it was hearsay.

A review of the record reveals that defense counsel sought to impeach S.A. by demonstrating that in her statement to Detective Williams she failed to mention that she told Rodgers to "get off of her." At trial, S.A. testified as follows:

> DEFENSE COUNSEL: Do you remember telling Billy Williams that you told Charles Rodgers to get off of you?
>
> S.A.: Yes, sir.
>
> DEFENSE COUNSEL: Do you remember telling Billy Williams that?
>
> S.A.: Yes, sir.
>
> DEFENSE COUNSEL: When you went down there to the police department, do you remember them recording the interview — regarding the statement on the tape recorder?

S.A.: Yes, sir.

DEFENSE COUNSEL: So if you said that, it should be on that tape?

S.A.: I'm not sure.

DEFENSE COUNSEL: When you talked to him, did he have the tape playing?

S.A.: Yes, sir.

DEFENSE COUNSEL: Thank you. Pass the witness.

Later on, Detective Billy Williams was called to testify by Rodgers. Defense counsel sought to ask him about certain statements S.A. told him Rodgers made to her. The prosecutor objected on grounds of hearsay, and the circuit court sustained the objection in part because the solicited testimony did not comply with Arkansas Rule of Evidence 613(b), in that S.A. had not first been given an opportunity to admit or deny the alleged statement.

However, we must confess to some confusion about which statement Rodgers is challenging as inconsistent. The circuit court sustained the hearsay objection with respect to a statement *made by Rodgers* to S.A. and then defense counsel made a proffer of proof to the effect that Detective Williams would have testified that S.A. told him that Rodgers made no statements to her. This was an apparent reference to S.A.'s allegedly inconsistent testimony at trial that Rodgers "told me to be quiet." However, Rodgers made no proffer relating to her "get off me" statement. Nevertheless, it is only the "get off me" statement by S.A. that Rodgers challenges in his brief.

When challenging the exclusion of evidence, a party must make a proffer of the excluded evidence at trial so that this court can review the decision, unless the substance of the evidence is apparent from the context. *See Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003). Here, no proffer was made by Rodgers with respect to whether S.A. told Williams that she had told Rodgers to "get off of her." Instead, his proffer was premised upon whether S.A. told Williams that Rodgers told her to be quiet. A party cannot change his grounds for an objection or motion on appeal but is bound by the scope and nature of the arguments made at

trial. *See Otis v. State*, 355 Ark. 590, 142 S.W.3d 615 (2004). Because Rodgers failed to proffer this argument below, we decline to address the argument on appeal. *See id.*

For his last issue, Rodgers contends that the circuit court erred in giving the dynamite instruction, AMI Crim. 2d 8102, and in denying his motion for declaration of a mistrial which was premised on that misreading and how the court gave that instruction. Rodgers asserts that while the circuit court read AMI Crim. 2d 8102 to the jury, it added its own language which overemphasized the need for a verdict. He claims that this was prejudicial to him, because it had the ultimate effect of forcing the one juror holding out on a guilty verdict to change his or her vote. The State responds that Rodgers's claim is barred under our contemporaneous-objection rule in that Rodgers failed to object to the circuit court's giving of the instruction until after the jury had already returned to its deliberations and the court had recessed.

Here, a review of the record reveals that after the jury began deliberations at 3:24 p.m., on December 3, 2003, it informed the circuit court at 7:30 p.m. that it was deadlocked at eleven jurors to one in its decision. The next morning, the circuit court gave the jury the "dynamite" instruction, AMI Crim. 2d 8102, in the presence of both parties. Following that instruction, defense counsel inquired as to whether the jury would be given a copy of the instruction.

The court answered in the negative and then recessed the court. Later, after being notified that the jury had reached a verdict, but before the jury was brought back into the courtroom, defense counsel moved for a declaration of a mistrial on the basis that the circuit court had erroneously supplemented the dynamite instruction which was given to the jury. This, according to Rodgers, was unduly prejudicial.

This court has been resolute in holding that a motion for mistrial must be made at first opportunity. *See, e.g., Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000). The reason for this is that a trial court should be given an opportunity to correct any perceived error before prejudice occurs. *See id.* Here, instead of objecting after the circuit court instructed the jury on the dynamite charge, defense counsel waited to move for a mistrial until after the jury had completed its deliberations following the

instruction. Because the motion was not made at the first opportunity, we hold that Rodgers's argument is procedurally barred. *See id.*

The record in this case has been reviewed for reversible error in accordance with Supreme Court Rule 4-3(h), and none has been found.

Affirmed.

THORNTON, J., not participating.

ARKANSAS TOBACCO CONTROL BOARD *v.*
SANTA FE NATURAL TOBACCO COMPANY, Inc.

04-273 199 S.W.3d 656

Supreme Court of Arkansas
Opinion delivered December 9, 2004

Mike Beebe, Att'y Gen., by: *Arnold M. Jochums*, Ass't Att'y Gen., for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Leigh Anne Shults*; and *Enns & Archer LLP*, by: *Rodrick J. Enns*, for appellee.

ANNABELLE CLINTON IMBER, Justice. This case involves the judicial review of a decision by Appellant Arkansas Tobacco Control Board ("the Board") to deny the petition of Appellee Santa Fe Natural Tobacco Company ("Santa Fe") for a retail cigarette and tobacco permit for its New Mexico and North Carolina locations. The Board based its denial on its interpretation of Ark. Code. Ann. § 26-57-203(11) (Repl. 1997) as requiring a physical location in Arkansas for the sale of cigarettes. The only issue in this case is the propriety of the Board's interpretation of that statutory provision, which issue is a matter of first impression for this court. Thus, we have jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(b)(1).

The Arkansas Tobacco Control Board issues and renews retail cigarette licenses pursuant to The Tobacco Act, Ark. Code. Ann. §§ 26-57-201 *et seq.* (Repl. 1997). As Santa Fe is a licensed wholesaler of cigarettes in Arkansas, it sells cigarettes to retailers in Arkansas, who then sell the cigarettes to consumers. Since 1996, Santa Fe has also been licensed as a retailer in Arkansas and has sold cigarettes to Arkansas smokers by direct mail. In 2001, however, the Board denied Santa Fe's application for renewal of its retail cigarette permits, stating that the Board staff had discovered that Santa Fe's locations were not in Arkansas, and the company was in violation of the Board's interpretation of § 26-57-203(11) as requiring a physical counter location in Arkansas. Santa Fe filed an action in Pulaski County Circuit Court seeking judicial review of

the Board's decision and a declaratory judgment on the constitutionality of the statute. The circuit court found that the Board incorrectly interpreted the statute as limiting retail sales to physical locations in the state. The court further held that an interpretation of the statute as barring direct-to-consumer sales of cigarettes would violate the dormant Commerce Clause of the United States Constitution. The Board filed a timely notice of appeal. We agree with the Board's interpretation of section 26-57-203(11) and reverse the circuit court.

This case turns on an analysis of Ark. Code Ann. § 26-57-203(11) (Repl. 1997), which defines retailer as "any person who purchases tobacco products from licensed wholesalers for the purpose of selling them over the counter at retail to consumers." The Board contends the phrase "over the counter" in this provision requires cigarette retailers to sell from a physical location in Arkansas. Sante Fe, on the other hand, argues that such an interpretation is contrary to the common interpretation of the phrase "over the counter" and is a violation of the dormant Commerce Clause. We review issues of statutory interpretation *de novo*. *Brewer v. Fergus*, 348 Ark. 577, 79 S.W.3d 831 (2002).

1. Statutory Construction

The basic rule of statutory construction to which all interpretive guides must yield is to give effect to the intent of the Legislature. *American Casualty Company v. Mason*, 312 Ark. 166, 647 S.W.2d 392 (1993). Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (2003). 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. When a statute is ambiguous, we must interpret it according to the legislative intent. *Id.* 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. We also look to the legislative history, the language, and the subject matter involved. *Id.*

In this case, we must discern the meaning of the phrase "over the counter" as applied to cigarette sales. Although a definition of the phrase is not included in the Act, "over-the-counter" is defined in *Webster's Third New International Dictionary (2002)* as:

> **1 a :** not traded on an organized securities exchange : traded in direct negotiations between buyers and sellers or their representatives : unlisted **b :** not effected on an organized securities exchange
>
> **2 :** capable of being sold legally without the prescription of a physician, dentist, or veterinarian.

Id. at 1611. Clearly, the dictionary applies the phrase "over-the-counter" to *only* the sale of stocks or securities (in part 1) and drugs (in part 2).[1] These definitions, when applied to the sale of cigarettes, are ambiguous. Thus, we must try to discern what the legislature intended when it passed the statute.

To reiterate, in determining the legislative intent, we review the entire act and reconcile the provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part. *Bank of Eureka Springs v. Evans, supra.* Notably, the statute repeatedly suggests retailers will be located within Arkansas. First, section 26-57-203(7) defines "manufacturer" as "any person who produces any tobacco product for sale and includes, but is not limited to, importers and distributors who deal in tobacco products as manufacturers and who are required under this sub-chapter to sell only to licensed wholesalers or *licensed retailers located in Arkansas.*" Ark. Code Ann. § 26-57-203(7) (Repl. 1997) (Emphasis added). Section 26-57-203(19) allows an Arkansan doing business in an adjoining city to qualify as a wholesaler if "that person is regularly engaged in the sale of tobacco products to *licensed retailers within Arkansas* . . . ." Ark. Code Ann. § 26-57-203(19) (Repl. 1997). Section 26-57-234(a)(6) directs the retailer to allow inspection of "his stock of merchandise and premises, including any room or building used in connection with his business." As such, the statute additionally indicates that the legislature intended for retailers to conduct sales from a location within the State, as

[1] Similarly, the cases cited by Sante Fe on the common usage of the phrase "over the counter" are all cases dealing with the sale of stocks or drugs.

inspection of merchandise and premises of retailers outside the state would be a difficult task for the Arkansas Tobacco Control Board. Ark. Code Ann. § 26-57-234(a)(6) (Repl. 1997).

Furthermore, notwithstanding Santa Fe's argument to the contrary, the inclusion of an explicit residency requirement for *wholesalers* in the original drafting of the statute does not necessarily suggest that the legislature did not intend a residency requirement for *retailers*. In fact, noting the fundamental differences in retailers and wholesalers, the legislative silence actually lends more credibility to the Board's interpretation. The underlying rationales, such as the ability to collect taxes and inspect goods for contamination, which compelled the legislature to enact a residency requirement for wholesalers, are just as powerful when applied to retailers. However, arguably, the legislature could have assumed retailers would be physically located in Arkansas, making an explicit statement on the residency of a retailer unnecessary, and in fact redundant. In 1977, when the statute was enacted by the legislature, such an assumption would have made sense. It is only after the technological developments of the last twenty-five years that new and different avenues for the marketing of goods to consumers have emerged. In 1977, when the statute was originally drafted, consumers would simply drive to their local grocery store or gas station to purchase cigarettes. Unlike modern-day consumers, consumers in 1977 were not given the option to e-mail or fax an order to an out-of-state retailer. By contrast, the legislature would have been aware that it was possible and even probable that wholesalers would be located outside of the state and would ship goods into the state to retailers for sale. Thus, while the legislature made a specific residency requirement for wholesalers, we conclude based on our review of the entire statutory scheme that there is also an implied residency requirement for retailers.

2. Dormant Commerce Clause

Santa Fe also argues that a requirement making retailers sell cigarettes from physical locations within Arkansas violates the dormant Commerce Clause of the United States Constitution. The Commerce Clause of the Constitution empowers Congress to "regulate Commerce . . . among the several states," U.S. Const. Art. 1, § 8, cl. 2, and "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on [interstate] commerce." *South-Central Tim-*

ber Dev., Inc., v. Wunnicke, 467 U.S. 82, 87 (1984). The United States Supreme Court has adopted a two-part test in analyzing state regulations under the dormant Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the Supreme Court has generally struck down the statute without further inquiry. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986). However, when the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Thus, the first crucial question in the instant case is whether requiring retailers to have a physical location inside the state discriminates against interstate commerce.

As Santa Fe correctly notes, we have twice previously struck residency requirements for tobacco wholesalers as unlawfully discriminating against interstate commerce. *Wometco Services, Inc. v. Gaddy*, 272 Ark. 452, 616 S.W.2d 466 (1981); *Ragland v. McLane Company, Inc.*, 287 Ark. 216, 697 S.W.2d 892 (1985). In *Ragland*, we characterized the statute in question as facially discriminatory and stated, "the statutory scheme under consideration is not merely a burden on interstate commerce, it brings tobacco commerce to a halt at our borders. . . ." *Id.* at 218, 697 S.W.2d at 894. In contrast to the residency requirements for wholesalers, a residency requirement for retailers would not "bring tobacco commerce to a halt at our borders," as out-of-state wholesalers such as Santa Fe can sell their products to in-state retailers. Moreover, out-of-state retailers can simply establish a physical location within Arkansas from which to sell cigarettes. Thus, as opposed to the provision in *Wometco* and *Ragland* where the Santa Fe cigarettes could not have been for sale in Arkansas, the current provision still allows the cigarettes to be sold in Arkansas and merely regulates the sales of all cigarettes.

Furthermore, the statute applies equally to in-state retailers and out-of-state retailers. In its July 19, 2001 Order, the Board stated, "Only sales that are made face-to-face can provide the protection that is intended by these statutes." Thus, *any* sale of cigarettes in the state of Arkansas must be made in a face-to-face transaction at a physical location. All retailers, both in-state and

out-of-state, will be required to maintain a physical location in Arkansas and to conduct all their sales from that location.[2] As the statute regulates in-state and out-of-state retailers equally, we hold that it is not facially discriminatory.

Moreover, the statute does not discriminate against interstate commerce in its effects. Though the Supreme Court has recognized that a facially-neutral statute can still be discriminatory if its effects discriminate against out-of-state retailers, *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977), the Arkansas statute does not suggest such discrimination. In *Hunt*, the Court was faced with a North Carolina statute that mandated that all graded apples follow the USDA grading system. While, as here, the statute applied evenhandedly to interstate retailers and in-state retailers, the North Carolina restriction placed a large burden on Washington State retailers, who used a different grading system and would be forced to conform to the North Carolina system by one of several costly methods or not grade their apples sold in North Carolina. Furthermore, as Washington had adopted an arguably superior grading system, the North Carolina regulation operated to "strip from the Washington apple industry the competitive and economic advantages it ha[d] earned for itself through its expensive inspection and grading system." *Id.* at 351. Because North Carolina apple growers and dealers were already using the USDA grading system, the law had no effect on their practices. Due to this disparate impact against the Washington apple dealers, the Court found the state "ha[d] the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them." *Id.* at 350. Conversely, the Arkansas statute at issue in this case places the same burden of maintaining a physical location on all cigarette retailers. While it is true that out-of-state retailers like Santa Fe who previously did not have a physical location will now be forced to set up such a location, the same is true of any Arkansas retailers who does not have a physical location. Similarly, neither Arkansas nor out-of-state retailers who have established physical locations will be affected by the Board's interpretation. The statute does not have a disparate impact on out-of-state retailers but affects *all* retailers who do not currently

[2] Consequently, Santa Fe's argument that the Board's interpretation allows retail permit holders to ship cigarettes directly to consumers is unfounded.

maintain a physical location, regardless of their classification as in-state or out-of-state. We therefore hold that the statute does not discriminate in its effects.

Because the statute is neither facially discriminatory nor discriminatory in its effect, we must follow the balancing test stated in *Pike v. Bruce Church, supra.* In *Pike,* the Supreme Court stated,

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Pike v. Bruce Church, 397 U.S. at 142. Here, the legislative purpose can be found in Ark. Code Ann. § 26-57-202, which establishes the legislative findings and purposes. Section 26-57-202 states:

> (a) It is recognized, found, and determined by the General Assembly that:
>
> (1) The Surgeon General of the United States has determined that the smoking of cigarettes is detrimental to the health of the smoker;
>
> (2) The Arkansas General Assembly had already recognized this hazard many years ago when it enacted § 5-27-227 regulating the sale of tobacco to minors, §§ 20-27-201 – 20-27-703 establishing a policy for public smoking, and this subchapter to provide for close supervision ad control of the sale of cigarettes and other tobacco products;
>
> (3) The state has a very valid governmental interest in preserving and promoting the public health and welfare of its citizens; and
>
> (4) It is the responsibility of the General Assembly to enact legislation to protect and further this essential governmental interest.
>
> (b) It is therefore the intent of this subchapter to:
>
> (1) Provide for the close supervision and control of the licensing of persons to sell cigarettes and other tobacco products in this state in order to assure that cigarettes and other tobacco products distrib-

> uted in the state are fresh, not contaminated, and are properly taxed, stamped, stored, and distributed only to persons authorized to receive these products; and
>
> (2) Impose licenses, fees, taxes, and restrictions on the privilege of dealing in or otherwise doing business in tobacco products in order to promote the public health and welfare of the citizens of this state and to protect the revenue collection procedures incorporated within this subchapter.

Ark. Code Ann. § 26-57-202 (Repl. 1997). As this section notes, the legislature has advanced an interest in the protection of minors from being sold cigarettes illegally. Though we previously denounced this interest in *Wometco, supra,* and *Ragland, supra,* as not a legitimate aim of the statute, the legislature has enacted significant changes in the statutory scheme since those cases were decided. For example, the legislature created the Arkansas Tobacco Control Board, which is charged with the responsibility of promulgating regulations for the proper enforcement and implementation of the tobacco laws, including licensing of wholesalers and retailers. Ark. Code Ann. § 26-57-256 (Repl. 1997). Additionally, amendments to the Arkansas Sales to Minors Act have instituted increasingly stringent requirements to curb the sale of cigarettes to minors and to punish violations of the Act. In 1991, the legislature made significant additions to Ark. Code Ann. § 5-27-227, which originally contained only one provision reading, "It shall be unlawful for any person, other than the parent or guardian, to give, barter or sell to a minor under eighteen (18) years of age, tobacco in any form or cigarette papers." Ark. Code. Ann. § 5-27-227 (Repl. 1987). The 1991 amendment added the following six sections:

> (b) It shall be unlawful for any person who has been issued a permit or a license under the Arkansas Tobacco Products Tax Act of 1977, § 26-57-201 et seq., as amended, to fail to display prominently, at each retail sales counter or each vending machine, a sign that meets the following requirements:
>
> (1) The sign shall contain in red lettering at least one-half inch (1/2") high on a white background "IT IS A VIOLATION OF THE LAW FOR CIGARETTES OR OTHER TOBACCO PRODUCTS TO BE SOLD TO A PERSON UNDER THE AGE OF 18" and

(2) The sign shall include a depiction of a pack of cigarettes at least two inches (2") high defaced by a red diagonal diameter of a surrounding red circle

(c) It shall be unlawful for any manufacturer whose tobacco products are distributed in this state and any person who has been issued a permit or license under the Arkansas Tobacco Products Tax Act of 1977, § 26-57-201 et seq., to distribute free samples of any tobacco product or coupons that entitle the holder of the coupon to any free sample of any tobacco product;

(1) In or on any public street or sidewalk within five hundred feet (500 ft.) of any playground, public school, or other facility when such facility is being used primarily by persons under eighteen (18) years of age for recreational, education, or other purposes; or

(2) To any person under eighteen (18) years of age.

(d)(1) Except as provided in subdivision (d)(2) below, it shall be unlawful for any person who owns or leases tobacco vending machines to place a tobacco vending machine in a public place. For purposes of this subdivision, "public place" means a publicly or privately owned place to which the public or substantial numbers of people have access.

(2) Tobacco vending machines may be placed in restricted areas within a factory, business, office, or other structure to which members of the general public are not given access; in permitted premises which have a permit for the sale of [sic] dispensing of alcoholic beverages for on-premises consumption which restrict entry to persons age twenty-one (21) or older; or places where the vending machine is under the supervision of the owner or an employee of the owner.

(e) Any person who violates any of the provisions in this section shall be deemed guilty of a misdemeanor and subject to the following penalties:

(1) A fine of one hundred dollars ($100) for the first violation;

(2) A fine of two hundred fifty dollars ($250), plus revocation and suspension of the permit or license to distribute or sell tobacco products from the site and vending machine for seven (7) days where the violation occurred, for a violation occurring within two (2) years of the first violation

(3) A fine of five hundred dollars ($500), plus revocation and suspension of the permit or license to distribute or sell tobacco products from the site and vending machine for not less than one (1) month nor more than six (6) months, for a third violation occurring within two (2) years of the first violation;

(4)(A) A fine of one thousand dollars ($1,000), plus revocation and suspension of the permit or license to distribute or sell tobacco products from the site and vending machine for not less than nine (9) months nor more than eighteen (18) months, for each additional violation occurring within two (2) years of the first violation;

(B) Upon any revocation or suspension of a permit or license under the provisions of subsection (f) of this section, the person shall not be issued any new permit or license to distribute or sell tobacco products during the period of suspension or revocation.

(f) In addition to the penalties in subsection (e) of this section, upon the fourth or subsequent violation of subsection (a) within a two-year period, all of that person's licenses or permits to distribute or sell tobacco products at all sites, locations, and vending machines shall be suspended or revoked and shall not be renewed for a period of not less than nine (9) nor more than eighteen (18) months. Further, that person shall not be issued any new permit or license for not less than nine (9) nor more than eighteen (18) months. It shall be a defense to the penalty imposed under this subsection if the person affirmatively demonstrates that the person has an effective system in place to prevent violations of the prohibition of subsection (a).

(g) The person convicted of violating any provision of this section whose permit or license to distribute or sell tobacco products is suspended or revoked shall, upon conviction, surrender to the court all such permits or licenses, and the court shall transmit those permits and licenses to the Director of the Department of Finance and Administration to suspend or revoke, and not renew, the person's permit or license to distribute or sell tobacco products, and not to issue any new permit or license to that person for the period of time determined by the court in accordance with this section.

Ark. Code Ann. § 5-27-227 (Supp. 1991). This amendment constituted a dramatic expansion of the Act. The added sections — the requirement of a prominent sign, the addition of a fine for a violation

of the Act, and location restrictions for vending machines — are all aimed at decreasing access to cigarettes for minors. These substantial changes to the statutory scheme signify an appreciable shift in the import of the legislative purpose of preventing the sale of tobacco to minors. Moreover, the legislature has shown its dedication to this purpose by continuing to strengthen the regulations that discourage the sale of tobacco to minors. In 1999, the legislature amended section 5-27-227, making several notable changes to the law. Ark. Code Ann. § 5-27-227 (Supp. 1999). For example, the amended section makes it unlawful for *any* person to provide tobacco products to minors, whereas the old section excepted parents and guardians. Ark. Code Ann. § 5-27-227(a). The new section also holds minors themselves accountable, by making it unlawful for minors to use, possess, purchase or attempt to purchase tobacco, with limited exceptions for minors acting within the scope of their employment. Ark. Code Ann. § 5-27-227(b). Most significantly, the 1999 amendment removed the notation that violations were "misdemeanors" and provided harsher penalties for violations. Ark. Code Ann. § 5-27-227(i)(1). Under the most recent version of the statute, the minimum fine is two-hundred and fifty dollars ($250), and the two-year period for measuring cumulative violations has been increased to four years. Ark. Code. Ann. § 5-27-227(i)(1) (Supp. 2003). Thus, since 1985, the statute has grown from a one-section prohibition on sales with an exception for parents or guardians of the minor to a complete statutory scheme with harsh fines and penalties that holds retailers, parents and guardians, and the minor accountable. It is impossible to look at these legislative changes without recognizing that the governmental interest in protecting minors from cigarettes has changed since our decisions in *Wometco, supra,* and *Ragland, supra.* In enacting the foregoing amendments to the Arkansas Sales to Minors Act, it is clear that the legislature has explicitly expressed a substantial governmental interest in the prevention of sale of tobacco to minors.

Santa Fe further argues that the Board's interpretation will not significantly curb the purchase of tobacco by minors. When evaluating a facially-neutral statute, however, the only question is whether the regulation is rationally related to the achievement of the statutory purpose. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981). As in *Minnesota v. Clover Leaf Creamery*, the appellees in this case do not seem to challenge the theoretical connection between the direct sale of cigarettes and minors' access to tobacco. Instead, they are challenging the em-

pirical evidence presented at the Board hearing, arguing that direct sales are not a primary method used by minors to purchase cigarettes. Yet, "states are not required to convince the courts of the correctness of their legislative judgments." *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. at 464. Here, Santa Fe only requires the purchaser to submit a *photocopy* of the front and back of a government-issued identification as verification of age. Even Santa Fe's vice-president of distributing admitted it would be easy for a minor to simply submit a photocopy of a fake identification. While there was testimony that only two percent of underage smokers purchased cigarettes through this manner, the legislature nonetheless has the right to take measures to close off that avenue for minors. *Id.* at 466 ("This Court has made clear that a legislature need not 'strike at all evils at the same time or in the same way. . . a legislature may implement [its] program step by step . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.' "). Likewise, the Second Circuit Court of Appeals, when addressing a similar statute, has noted that, "the prevention of even this small percentage of cigarette sales to minors constitutes a putative local benefit that is sufficient to survive the *Pike* balancing test." *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 217 (2d Cir. 2003).

Having recognized the governmental purpose and benefits, we now turn to the burden this interpretation places on interstate commerce. Although we recognize that the Board's interpretation will place some burden on retailers, we do not believe this burden is sufficient to invalidate the statute under the dormant Commerce Clause. Though there was testimony that the Board's interpretation would "severely hamper [Santa Fe's] ability to market [its] product in Arkansas," Santa Fe cigarettes are currently carried by at least 40 retailers within Arkansas. In this case, the burden on commerce is notably less than the burden in *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978), where the Court upheld a Maryland gasoline regulation, despite evidence that the requirements would force at least three refiners to stop selling entirely in Maryland. Here, Santa Fe cigarettes will still be available and sold in Arkansas. Based upon the Supreme Court's holding in *Exxon*, we conclude that this burden is not sufficient to outweigh the State's significant interest in limiting the sale of cigarettes to minors. Accordingly, we hold that the Board cor-

rectly interpreted Ark. Code Ann. § 26-57-203(11) to require cigarette retailers to sell face-to-face and such interpretation does not violate the dormant Commerce Clause. The decision of the circuit court is therefore reversed.

Circuit Court Reversed; Arkansas Tobacco Control Board Affirmed.

BROWN, J., concurs.

ROBERT L. BROWN, Justice, concurring. I concur with the majority opinion and particularly am in agreement that the General Assembly has enacted significant measures to curb the purchase of tobacco by minors. The over-the-counter legislation is one such effort. See Ark. Code Ann. § 26-57-203(11) (Repl. 1997). Contrary to the assertion by Santa Fe, I am convinced that direct-mail sales of tobacco products to minors are more difficult to police than over-the-counter sales where the seller and customer meet face-to-face. Accordingly, the public policy in favor of face-to-face sales is one of singular importance. That public policy justifies, in my opinion, the added regulation for tobacco sales in Arkansas.

The one reservation I have, regarding the Board's enforcement of § 26-57-203(11), concerns whether in-state Arkansas retailers with fixed locations are engaging in direct-mail sales to Arkansas customers. The record is murky on this point. Obviously, if Santa Fe and other out-of-state retailers are foreclosed from direct-mail sales, in-state retailers should suffer the same prohibition. Otherwise, the spectre of discrimination and protectionism rears its head. It would not ring true to permit an Arkansas retailer to engage in direct-mail sales to customers in Arkansas simply because the retailer has a fixed location in this state, when out-of-state concerns are not afforded the same opportunity. To the extent in-state direct-mail sales are transpiring, the burden was on Santa Fe to illuminate that point. My reading of the briefs and record tells me it is only guesswork at this point as to whether in-state, direct-mail sales are indeed taking place.

On the overarching issue of state regulation of out-of-state retailers, the United States Supreme Court is hearing three cases this term involving the Commerce Clause and whether out-of-state shipments of alcohol into a state that allows sales only through state-licensed retailers violates that clause. *See Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004), *cert. granted*, 124 S. Ct. 2391 (U.S. May 24, 2004) (No. 03-1274); *Granholm v. Heald*, 342 F.3d 517

(6th Cir. 2003), *cert. granted*, 124 S. Ct. 2389 (U.S. May 24, 2004) (No. 03-1116); *Michigan Beer & Wine Wholesalers Ass'n v. Heald*, 342 F.3d 517 (6th Cir. 2003), *cert. granted*, 124 S. Ct. 2389 (U.S. May 24, 2004) (No. 03-1120). In those cases, protection of minors is also an issue. Hence, what constitutes an impermissible burden on commerce in the context of tobacco and alcohol is an area of topical concern where it is anticipated that the law will soon be clarified.

Richard A. PERKINS *v.* CEDAR MOUNTAIN SEWER IMPROVEMENT DISTRICT NO. 43 of Garland, County, Arkansas

04-79 199 S.W.3d 667

Supreme Court of Arkansas
Opinion delivered December 9, 2004

Rose Law Firm, by: *Michael N. Shannon*, for appellant.

Perkins & Trotter, PLLC, by: *Scott C. Trotter* and *Julie DeWoody Greathouse*, for appellee.

ANNABELLE CLINTON IMBER, Justice. This appeal arises out of a lawsuit in which Richard A. Perkins, an engineer, sued the Cedar Mountain Improvement District of Garland County for breach of contract when the district abandoned a contemplated improvement project. The trial court awarded Perkins damages and ruled that he was entitled to recover the entire amount of damages through a tax levy pursuant to Ark. Code Ann. § 14-92-238 (Repl. 1998). The trial court also awarded post-judgment interest, but declined to award prejudgment interest. Finally, the trial court awarded attorney's fees to Perkins as a prevailing party, but then ruled that those fees were not "preliminary expenses" under section 14-92-238. On appeal, Perkins contends that he was entitled to prejudgment interest and should be able to recover his attorney's fees through a tax levy. On cross appeal, the District contends that the trial court erred when it awarded Perkins damages under the contract as payment was contingent on actual construction of the improvement. As an alternative argument on appeal, the District claims that, even if the contract was not contingent, the trial court erred in ruling that all of the damages awarded to Perkins were "preliminary expenses" under section 14-92-238.

We agree with the District's alternative argument and, therefore, reverse and remand for the trial court to determine the portion of compensatory damages awarded that qualify as "preliminary expenses" under Ark. Code Ann. § 14-92-238. The trial court's judgment is affirmed on all other points.

1. *Factual Background*

In 1996, Cedar Mountain Sewer Improvement District of Garland County ("District") was created pursuant to Ark. Code Ann. §§ 14-92-201 *et. seq.* (2004), for the purpose of constructing

a complete sewer collection and treatment system in the Cedar Mountain area located in Hot Springs, Arkansas.[1] The District initially entered into a contract with Malone & Associates for the engineering services required for the design and construction of the sewer facility. The District's Board of Commissioners ("Board") subsequently voted on June 24, 1997, to terminate the contract with Malone & Associates, and selected a new civil engineering firm, Perkins & Associates, to design the sewer collection and treatment system.[2] On August 21, 1997, Perkins entered into a contract with the District, whereby he agreed to perform various professional engineering services for the design and construction of the District's proposed sewer collection system. The contract indicated that time was of the essence in completing the engineering work. Perkins agreed to perform the engineering work within 150 calendar days or pay liquidated damages of $150 per day for every day after the 150th day. The 150-day provision could, however, be extended for delays caused by regulatory agencies in providing information necessary to complete the engineering work on the project. This contract is the subject of the instant appeal.

On September 12, 1997, the Board sent a letter to the property owners in the District informing them of the contract between the District and Perkins for the design and preparation of the sewer collection system. By November 6, 1997, Perkins wrote a letter to the District's chairman, Billy Wilson, advising him that the work was 75% completed, and attaching a preliminary estimate for the cost of the project in the amount of $1,512,957. In the same letter, Perkins stated that his work should be completed within 30 days; however, because he was still waiting to hear about the possible formation of a Fountain Lake Sewer Improvement District, the Hot Springs portion of the project could potentially be affected. In addition, he had not been notified as to whether the Assembly of God Camp Ground and the Fountain Lake School

[1] The County Court of Garland County granted the petition to form the District on February 28, 1996. The District consists of approximately a four-mile stretch on Highway 7 North in Hot Springs.

[2] In November 1999, Richard A. Perkins ("Perkins") transferred his stock in Perkins & Associates to Crafton, Tull & Associates. All of the rights and interest in the contract were assigned to Perkins pursuant to the Stock Purchase Agreement. In addition, an assignment of contract rights was executed transferring and assigning all contractual rights and claims with and/or against the District to Perkins.

District wanted to be included in the sewer design, which would in turn have an impact on the final line locations and sizes in that area.

Communications between the District and Perkins continued over the next several months. On November 20, 1997, Perkins sent a letter advising the District that the major portion of the engineering work with the District was completed, but Perkins needed to know whether treatment of the sewage would be handled by transporting it to the City of Hot Springs or by the District constructing its own treatment plant. In order to avoid further delay, a deadline of January 5, 1998, was given to the District to resolve that issue.[3] In addition, on November 26, Perkins sent a pre-application package to the Arkansas Department of Pollution Control and Ecology that was signed by the District's chairman, Billy Wilson. Attached to the pre-application package was the preliminary engineering report that listed a total estimated price of $1,934,000 for the cost of building the sewer within the district boundaries and a total estimated price of $1,107,000 for the cost of transporting sewage to Hot Springs, or a total price of $3,041,000 for the entire project.

On January 16, 1998, Perkins sent another letter to Billy Wilson asking for authorization to conduct additional engineering services pursuant to Section D of the Contract, which granted Perkins the express authority to perform additional engineering services when approved by the Board. The Board unanimously approved the request. On January 21, 1998, Perkins sent applications signed by Billy Wilson to the Arkansas Soil and Water Commission with an attached preliminary engineering report. Although the 150-day period had already expired,[4] the District sent a letter to Perkins on January 26, 2004, thanking him for his continued work on the project.

On May 1, 1998, Perkins sent a letter and a revised cost estimate to the District stating that the total project cost, including

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[3] On December 15, 1997, the Board met with the mayor and city manager for the City of Hot Springs regarding the District's options for disposing of its sewage. On January 7, 1998, the Board met and discussed the advantages and disadvantages of connecting into the Hot Springs sewer system.

[4] Over the entire 150-day period established by the contract for performance, Perkins frequently advised the District that the deadline had become unrealistic due to the fact that the negotiations were continuing with the City of Hot Springs, the Assembly of God Camp Ground, and the Fountain Lake School District.

the connection fee for transporting the sewage to the City of Hot Springs, would be $3,533,000. On June 9, 1998, the Board discussed bids from bond houses for financing. Final approval for transporting the sewage to the City of Hot Springs was given by that city's board of directors on July 6, 1998. On July 27, 1998, Ray Owen, the District's assessor, reported to the Board that the final assessments would be available within two weeks.[5] Also on July 27, the Board authorized Perkins to advertise for construction bids. Perkins then sent out the advertisement for bids on August 12, 1998.

On October 1, 1998, the Chancery Court of Garland County[6] entered a temporary restraining order prohibiting the District from selling any bonds or executing any contracts on behalf of the District for a 75-day period, or until the County Court of Garland County had an opportunity to consider a petition for removal filed by a resident of the District on September 23, 1998. Following a recall vote held on November 11, 1998, the County Court ordered the removal of the members of the Board on November 23, 1998. With one exception, a whole new Board was elected, and, by December 14, 1998, the new Board had voted to rescind the assessment. The County Court entered an order rescinding the levy of tax on January 4, 1999.

Meanwhile, Perkins had sent invoices to the District on December 1, 1998, and January 4, 1999, which contained additional charges for interest. He met with the new Board on January 12, 1999, to answer any questions, and on January 14, 1999, he advised the District that if the project were to be discontinued, 100% of the design fee would become due and payable. On February 8, 1999, the Board unanimously voted to dismiss Perkins and Owen from the project, and the District subsequently made no payment to Perkins.

On June 13, 2000, Perkins filed a lawsuit against the District for breach of contract and a lien for "preliminary expenses" pursuant to Ark. Code Ann. § 14-92-238 (Repl. 1998). His complaint also requested prejudgment interest and attorney's fees.

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[5] The amount of preliminary assessments is not indicated in the minutes. Owen filed the official assessment with the County Clerk of Garland County on September 1, 1998.

[6] By virtue of Amendment 80 to the Arkansas Constitution, which became effective on July 1, 2001, our state courts are no longer chancery and circuit courts. These courts have merged and now carry the designation of "circuit court."

Following a bench trial, the trial court awarded Perkins damages in the principal amount of $212,151.39 and awarded first-lien status to the entire amount under section 14-92-238, thereby insuring payment through a tax levy. In addition, the court ruled that Perkins was entitled to post-judgment interest at the rate of 10% per annum pursuant to Ark. Code Ann. § 16-65-114 (Repl. 2004), but declined to award prejudgment interest. Lastly, Perkins, as the prevailing party, was awarded attorney's fees in the amount of $87,901 and costs of $1,216.01 pursuant to Ark. R. Civ. P. 54(e), with interest on that amount to accrue at the rate of 10% per annum. Although the trial court concluded that the attorney's fees and costs awarded to Perkins were not "preliminary expenses" contemplated by section 14-92-238, and therefore could not be collected through a tax levy, it also ruled that the attorney's fees in the amount of $118,179.50 awarded to the District's attorneys were collectible as "preliminary expenses" under section 14-92-238.

In the instant appeal, Perkins contends that prejudgment interest is a "preliminary expense" under Ark. Code Ann. § 14-92-238. In addition, he claims that his attorney's fees and costs are "preliminary expenses" under Ark. Code Ann. § 14-92-238.

On cross appeal, the District contends that the trial court erroneously awarded Perkins damages for breach of contract because payment under the contract was contingent upon the actual construction of the sewage system. The District also argues that even if the contract was not contingent, the trial court erred in finding that all of the damages awarded to Perkins were "preliminary expenses" under Ark. Code Ann. § 14-92-238. The Arkansas Court of Appeals certified this case to us as an issue of first impression. Thus, this court has jurisdiction pursuant to Rule 1-2(b)(1) of the Arkansas Rules of the Supreme Court.

2. Standard of Review

In bench trials, the standard of review on appeal is not whether there is substantial evidence to support the findings of the court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Chavers v. Epsco*, 352 Ark. 65, 98 S.W.3d 421 (2003) (citing Ark R. Civ. P. 52(a); *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. *Id.* (citing *Sharp v. State*, 350 Ark. 529, 88 S.W.3d 848 (2002)).

This appeal also involves an issue of statutory interpretation. We review issues of statutory interpretation *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); *Reding v. Wagner*, 350 Ark. 322, 86 S.W.3d 386 (2002). This court recently set forth its standard of review for statutory construction:

> When reviewing issues of statutory interpretation, we are mindful that 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. *Yamaha Motor Corp. v. Richard's Honda Yamaha*, 344 Ark. 44, 38 S.W.3d 356 (2001); *Dunklin v. Ramsay*, 328 Ark. 263, 944 S.W.2d 76 (1997). When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997). A statute is ambiguous only where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning. *ACW, Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997). When a statute is clear, however, it is given its plain meaning, and this court will not search for legislative intent; rather, that intent must be gathered from the plain meaning of the language used. *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999); *State v. McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994). This court is very hesitant to interpret a legislative act in a manner contrary to its express language, unless it is clear that a drafting error or omission has circumvented legislative intent. *Id.*

Cave City Nursing Home, Inc. v. Arkansas Dep't of Human Servs., 351 Ark. 13, 21-22, 89 S.W.3d 884, 888-89 (2002).

3. Interpretation of Agreement for Engineering Services

The District first contends that the trial court erred when it awarded Perkins compensatory damages in the amount of $212,151.39. Specifically, the District asserts that no money was due and owing to Perkins under the contract because the contract awarded compensation based on the "actual construction costs," and construction did not occur. In reply, Perkins states the contract was not contingent upon actual construction of the

sewage system; rather, the payment provisions within the contract provided a time outline for when payment would be due should construction begin.

The contract contemplates the performance of certain engineering services by Perkins. Those services are specifically listed in Section A of the contract. The dispute at issue here arises under Section B of the contract. That provision states in relevant part:

> 1. The Owner shall compensate the Engineer for design and contract administration engineering services in the amount as shown in Attachment 1
>
> When Attachment 1 is used to establish compensation for the design and contract administration services, the actual construction costs on which compensation is determined shall exclude legal fees, administration costs, engineering fees, land rights, acquisition costs, water costs, and interest expense incurred during the construction period.
>
> 2. The compensation for preliminary engineering services, design and contract administration services shall be payable as follows:
>
> (a) a sum which equals eighty percent (80%) of the compensation payable immediately after the construction contracts are awarded.
>
> (b) A sum equal to fifteen percent (15%) of the compensation will be paid on a monthly basis for general engineering review of the contractor's work during the construction period on percentage ratios identical to those approved by the Engineer as a basis upon which to make partial payments to the contractor(s). However, payment under this paragraph and of such additional sums as are due the Engineer by reason of any necessary adjustments in the payment computations will be in an amount so that the aggregate of all the sums paid to the Engineer will equal ninety-five percent (95%) of the compensation. A final payment to equal 100 percent shall be made when it is determined that all services required by the Agreement have been completed except for the services set forth in Section A-20 hereof.

In connection with these payment provisions under the contract, the trial court made the following findings:

> There is no provision in the Contract stating that the engineer would be paid for engineering services contemplated by Section A of the Contract if, for any reason, the project was not constructed. Nor is there a provision providing for payment of various services rendered prior to construction contract's [sic] being awarded. There is also no provision in the Contract stating that the engineer would not be paid for engineering services if the project was not constructed. From the evidence presented it is obvious to the court that Perkins' [sic] expected to be paid and that the district intended to pay Perkins for his work. Further, the District did pay Mr. Malone, the first engineer for his work in a reduced agreed upon amount.

Based on these findings, the court awarded Perkins compensatory damages in the amount of $212,151.39.

We conclude that under the express terms of the contract, Perkins was entitled to be compensated for his services. *The Restatement (Second) on Contracts § 227* (2004) provides explicit standards of preference regarding the interpretation of express conditions located within contracts:

> (1) In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk.

The following commentary explains the rationale for such standards of preference:

> The non-occurrence of a condition of an obligor's duty may cause the obligee to lose his right to the agreed exchange after he has relied substantially on the expectation of that exchange, as by preparation or performance. The word "forfeiture" is used in this Restatement to refer to the denial of compensation that results in such a case. The policy favoring freedom of contact requires that . . . the agreement of the parties should be honored even though forfeiture results. When, however, it is doubtful whether or not the agreement makes an event a condition of an obligor's duty, an interpretation is preferred that will reduce the risk of forfeiture. *For example, under a provision that a duty is to be performed "when" an event occurs, it may be doubtful whether it is to be performed only if that event occurs, in which case the event is a condition, or at such time as it would*

> *ordinarily occur, in which case the event is referred to merely to measure the passage of time.* In the latter case, if the event does not occur some alternative means will be found to measure the passage of time, and the non-occurrence of the event will not prevent the obligor's duty from becoming one of performance. If the event is a condition, however, the obligee takes the risk that its non-occurrence will discharge the obligor's duty . . . If the event is within his [obligee's] control, he will assume this risk. If it is not within his [obligee's] control, it is sufficiently unusual for him to assume the risk that, in case of doubt, an interpretation is preferred under which the event is not a condition.

The Restatement (Second) on Contracts § 227, comment b (2004) (emphasis added). Likewise, another well-recognized treatise on contracts, *Corbin on Contracts*, states "one who unjustly prevents the performance or the happening of a condition of promissory duty thereby eliminates it as a condition. Thus, that party cannot escape liability by preventing the happening of the condition on which it was promised." 8-40 Arthur L. Corbin, *Corbin on Contracts* § 40.17 (2004). *See also* Am. Jur.: 17A Am. Jur. 2d *Contracts* § 687 (2004) ("One who prevents or makes impossible the performance or occurrence of a condition precedent, upon which that person's liability depends under the contract, cannot insist or rely on the condition . . . A promisor who prevents or hinders the occurrence or fulfillment of a condition in a contract excuses the condition, and the liability of the promisor is fixed regardless of the failure to perform the condition.").

Our case law also supports this same principle of law in the enforcement of private contracts. In *Ingham Lumber Co. v. Ingersoll & Co.*, 93 Ark. 447, 125 S.W. 139 (1910), Ingersoll entered into a written contract with Ingham whereby Ingham employed Ingersoll to cut and manufacture lumber on its land. After Ingersoll began to perform under the contract, the manager of Ingham notified Ingersoll to stop cutting and manufacturing the timber on account of a shortage of money. In short, Ingersoll wanted to continue its work under the contract, but was prevented from doing so by Ingham. In holding in favor of Ingersoll, we said, "[a] contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect because it turns out to be difficult or burdensome to perform." *Id.* We find no reason why the same principle of law should not also extend to a written contract entered into by an improvement district for the purpose of securing the services of an engineer. After all, our case law has never allowed an improvement district to negotiate contracts with

parties, abandon the improvement, and then be wholly relieved from its duty to pay for completed preliminary work. *Gould v. Sanford,* 155 Ark. 304, 244 S.W. 433 (1922) ("preliminary expenses" can be imposed on the property owners of the district, but services performed as part of the issuance for bonds are not services preliminary in nature); *Elkins v. Huntington-Midland Highway Dist.*, 161 Ark. 556, 256 S.W.825 (1923) (allowing recovery of engineering fees as "preliminary expenses").

In this case, Perkins had no control over whether construction contracts would be awarded or whether the improvement would in fact be constructed. Nevertheless, the District asks us to find that Perkins assumed the risk when he entered into the agreement because payment under the contract was contingent upon actual construction of the sewage system. As explained earlier, when it is doubtful whether or not an agreement makes an event a condition of an obligor's duty, an interpretation is preferred that will reduce the obligee's risk of forfeiture unless the event is within the obligee's control. *The Restatement (Second) on Contracts § 227,* comment b (2004). Here, the trial court examined the payment provisions of the contract and, in resolving any doubt as to whether construction of the improvement was a condition of the District's obligation to pay for engineering services performed by Perkins, the trial court adopted an interpretation that reduced the risk of forfeiture. In other words, because construction of the proposed improvement was not within Perkins's control, he did not assume the risk of forfeiting payment if the project was not constructed. We cannot say that the trial court clearly erred in ruling that payment under the contract was not contingent upon actual construction of the sewage system.

The District nonetheless contends that it had a right to abandon the proposed improvement project. While we certainly agree with the District that an improvement district has a right to terminate construction of a proposed improvement project, Arkansas law imposes an obligation on improvement districts to pay "preliminary expenses" for contemplated improvement projects that are for any reason not made. Arkansas Code Annotated § 14-92-238 (Repl. 1998) specifically provides as follows:

> Preliminary Expenses
>
> (a) In case, *for any reason*, the *improvement* contemplated by any suburban improvement district organized under this subchapter *is*

> not made, the *preliminary expense shall* be a first lien upon all the land in the district and shall be paid by a levy of a tax thereon upon the assessed value for county and state taxation.
>
> (b) The levy shall be made by the chancery court of the county and shall be collected by a receiver to be appointed by the court.

Ark. Code Ann. § 14-92-238 (emphasis added). The purpose of this statute is to provide a means for payment of "preliminary expenses" incurred by improvement districts in connection with improvements contemplated by such districts even if those improvements are, for whatever reason, abandoned. Thus, to the extent that the engineering services performed by Perkins are deemed to be "preliminary expenses," construction is not a condition of payment for those expenses under Arkansas law.

4. "Preliminary Expenses" under Ark. Code Ann. § 14-92-238

While we conclude that payment under the contract was not contingent upon construction of the project, we agree with the District that the trial court erred in finding that *all* of the damages awarded to Perkins were "preliminary expenses" under Ark. Code Ann. § 14-92-238. Though all the work performed by Perkins was indeed preliminary to the construction phase of the project, Perkins had yet to complete all the work required by the contract. Under the contract, Perkins was obligated to perform an extensive list of engineering services for the District, with certain services to be performed prior to construction and other services to be performed during the course of construction and for a certain period of time thereafter.

[redacted] As stipulated by both parties, the $212,151.39 fee would have been the payment made by the District had the entire construction project been completed and the contract performed. Although the trial court correctly ruled that payment for engineering services under the contract was not contingent upon actual construction of the project, it erred in finding that the entire sum of $212,151.39 awarded to Perkins was a "preliminary expense" under section 14-92-238. Despite testimony by the District's expert, William Malone, that "all of the work done or the majority of the work done by the Plaintiff [Perkins] was necessary to determine the cost of the project and the benefits to be derived from the project," the work performed by Perkins did not consti-

tute all of the work contemplated under the contract. Moreover, to equate payment of the entire contract price with a "preliminary expense" defies common sense. Section 14-92-238 only provides for payment of "preliminary expenses" when an improvement is *abandoned*, not fully performed. As we held in *Wofford v. Bettis*, 169 Ark. 487, 275 S.W.903 (1925), once construction of the improvement begins and the contract is completed, the "preliminary expenses" merge into the general cost of the improvement. We, therefore, reverse and remand for the trial court to determine the portion of compensatory damages awarded that qualify as "preliminary expenses" under Ark. Code Ann. § 14-92-238.

5. Prejudgment Interest

Pursuant to Section E of the contract, Perkins and the District agreed that

> [i]f Owner fails to make any payment due Engineer within 60 days for services and expenses and funds are available for the project then the Engineer shall be entitled to interest at the rate of 10% per annum from said 60th day.

Perkins contends on appeal that the trial court erred when it declined to award prejudgment interest as a "preliminary expense" under section 14-92-238. In response, the District asserts that the contract expressly precludes payment of prejudgment interest if funds are not "available" for the project.

Prejudgment interest is compensation for recoverable damages wrongfully withheld from the time of the loss until judgment. *Ozark Unlimited Resources Co-op., Inc. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169 (1998). Perkins urges this court to award him prejudgment interest based on either the above-quoted contractual provision or our common law. Beginning with the contract, we must first determine whether funds are "available for the project," as required by Section E of the contract. If funds are available for the project, we must then determine whether prejudgment interest would be recoverable as a "preliminary expense" under section 14-92-238. Both parties agree that an improvement district is an entity that has no assets until it exercises its power to levy a tax. As noted by both the District and Perkins, the Arkansas Soil and Water Conservation Commission set aside $3.5 million in funds from a specific bond program for this

improvement project. Upon cancellation of the project, however, those funds were "deobligated." Thus, no funds "are available for the project." We therefore hold that Perkins is not entitled to prejudgment interest under the terms of the contract.

Arkansas common law also allows for the recovery of prejudgment interest. In *TB of Blytheville v. Little Rock Sign & Emblem,* 328 Ark. 688, 697, 946 S.W.2d 930, 934 (1997), we stated the common law rule that a party may recover prejudgment interest where damages are ascertainable with reasonable certainty. *Id.* However, any attempt by Perkins to rely upon our decision in *TB of Blytheville v. Little Rock Sign & Emblem, supra,* is misplaced. The terms for payment of prejudgment interest negotiated by Perkins and the District represent a modification of the common law standard for awarding prejudgment interest. As such, we give effect to the plain language of the contract. *Chamberlin v. State Farm Mut. Auto Ins. Co.*, 343 Ark. 392, 36 S.W.3d 281 (2001); *Pardon v. Southern Farm Bureau Cas. Ins. Co.*, 315 Ark. 537, 868 S.W.2d 468 (1994). *See also Hancock v. Tri-State Ins. Co.,* 43 Ark. App. 47, 858 S.W.2d 152 (1993). Thus, we affirm the trial court on this point.

6. Attorney's Fees

In his last point on direct appeal, Perkins claims that the trial court erred when it awarded him attorney's fees and costs[7] as the prevailing party under Ark. Code Ann. § 16-22-308 (Repl. 1999), but then ruled that those fees were not recoverable as a "preliminary expense" under section 14-92-238 (Repl. 1998). Arkansas law allows a prevailing party to recover reasonable attorney's fees in a breach-of-contract action unless Arkansas law or the contract that is the subject matter of the action provides otherwise. *See* Ark. Code Ann. § 16-22-308. In this case, the circuit court did award attorney's fees to Perkins as the prevailing party. The issue, however, is whether these fees should be a tax lien against district land as "preliminary expenses."

To reiterate, section 14-92-238 mandates that "preliminary expenses" resulting from an improvement that was contemplated by an improvement district but was not made for whatever reason

[7] $87,901.50 in attorney's fees and $1,216.01 in costs for work performed by The Rose Law Firm and $3,750.00 in attorney's fees for work performed by The Laws and Murdock Law Firm.

shall be a first lien on the district's land. The statute also mandates that the "preliminary expenses" shall be paid by a tax levied on the district's land upon the assessed value for county and state taxation. This court in *Elkins v. Huntington-Midland Highway Dist.*, 161 Ark. 556, 256 S.W. 835 (1923), defined "preliminary expenses." First, we held that an engineer may recover the $250 that he loaned an improvement district as "preliminary expenses." *See Elkins, supra.* We then went on to say that "preliminary expenses" include:

> *attorney's fees as counsel to the board* in the preliminary work of organization, etc., such costs as expenses for maps, plats, surveys of land and for engineering expenses in preparing the plans and specifications. In other words, all expenses incident to the investigation by which it is sought to determine whether the value of the benefits to the lands by the improvement contemplated would exceed the cost of such improvement and thereby warrant its completion.

Elkins, 161 Ark. At 570-71, 256 S.W. at 839 (quoting *Thibault v. McHaney*, 119 Ark. 188, 177 S.W. 877 (1917)) (emphasis added). Thus, we sanctioned payment of attorney's fees incurred by the *improvement district's board* as "preliminary expenses." This court, however, has never intimated that attorney's fees *incurred by the engineer* in a lawsuit against the district would be a lien against the district's land.

[6] Levying a tax on the district's land (ultimately to be paid by the district's landowners) for payment of the board's attorney's fees is a categorically different matter from taxing the improvement district for the engineer's attorney's fees when that engineer is suing the district. The General Assembly has never provided for such a tax lien; nor has our case law; nor did the contract between the parties in the instant case. Accordingly, we agree with the circuit court that Perkins's attorney's fees and costs were not "preliminary expenses" as contemplated by section 14-92-238, and hence, are not subject to a tax levy against the district's land.

Affirmed in part; Reversed and Remanded in part.

THORNTON, J., dissents.

RAY THORNTON, Justice, dissenting. I can find no provision in the contract for payment of engineering fees

except upon the condition that such payments become due during construction of the project. Construction work on this project did not commence. Because I believe that the language in the contract precludes payment to Mr. Perkins unless work on the project commenced, I must respectfully dissent.

The pertinent language from the contract is as follows:

> SECTION B — COMPENSATION FOR ENGINEERING SERVICES
>
> 1. The OWNER *shall compensate the ENGINEER* for design and contract administration engineering services *in the amount as shown in Attachment 1.*
>
> *When Attachment 1 is used to establish compensation* for the design and contract administration services, *the actual construction costs on which compensation is determined shall exclude* legal fees, administration costs, engineering fees, land rights, acquisition costs, water costs, and interest expense incurred *during the construction period.*
>
> 2. The compensation for preliminary engineering services, design and contract administration services shall be payable as follows:
>
> (a) A sum which equals *eighty percent (80%) of the compensation payable* immediately *after the construction contracts are awarded.*
>
> (b) A sum equal to *fifteen percent (15%) of the compensation will be paid on a monthly basis for general engineering review of the contractor's work during the construction period* on percentage ratios identical to those approved by the ENGINEER as a basis upon which to make partial payments to the contractor(s). However, payment under this paragraph and of such additional sums as are due the ENGINEER by reason of any necessary adjustments in the payment computations will be in an amount so that the aggregate of all sums paid to the ENGINEER will equal ninety-five (95%) of the compensation. *A final payment to equal 100 percent* shall be made *when it is determined* that all *services required by the Agreement have been completed* except for the services set forth in Section A-20 hereof. [Emphasis added.]

We have explained that when contracting parties express their intention in a written instrument in clear and unambiguous language, it is our duty to construe the written agreement accord-

ing to the plain meaning of the language employed. *C & A Constr. Co. v. Benning Constr. Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974).

Applying that principle to the case now before us, I believe that the plain language of the contract provides that Mr. Perkins would not be compensated unless certain events occurred. First, section B1 of the contract provides that "[t]he OWNER shall compensate the ENGINEER for design and contract administration engineering services in the amount as shown in Attachment 1." A review of attachment 1 reveals that the fee schedule for basic engineering services is based on "total actual construction cost." According to the clear language of the contract, Mr. Perkins's compensation is based upon total actual construction costs. There were no actual construction costs, and therefore, Mr. Perkins is not entitled to compensation for a project that was never built.

Next, according to Section B2(a), Mr. Perkins, as engineer, would be entitled to "[a] sum which equals eighty percent (80%) of the compensation payable immediately after the construction contracts are awarded." In this case, a construction contract was not awarded. Thus, Mr. Perkins was not entitled to compensation pursuant to Section B2(a).

Finally, Section B2(b) provides that Mr. Perkins would be compensated for reviewing the "contractor's work during the construction period." Because there was no construction project for Mr. Perkins to review, he was not entitled to compensation under this provision of the contract.

After reviewing the plain language of the contract, I believe that Mr. Perkins was not entitled to payment because the events that would give rise to his compensation never occurred. Accordingly, I would reverse the trial court.

I respectfully dissent.

COMMITTEE ON PROFESSIONAL CONDUCT *v.*
Paul E. REVELS

04-808 199 S.W.3d 630

Supreme Court of Arkansas
Opinion delivered December 9, 2004

Stark Ligon, Executive Director, and *Nancie M. Givens*, Deputy Director, for appellant.

No response.

JIM HANNAH, Justice. Stark Ligon, as Executive Director of the Office of Professional Conduct, appeals a decision of Panel A of the Arkansas Committee on Professional Conduct. Panel A imposed a sanction of a reprimand against attorney Paul E. Revels for violation of the Model Rules of Professional Conduct relating to his trust account. Ligon argues that Panel A abused its discretion in failing to impose a suspension of Revels's attorney's license.

We hold that the decision to impose a reprimand rather than a suspension is clearly against the preponderance of the evidence

presented in this case. We modify Panel A's decision and in lieu of the reprimand impose a suspension of three months. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(5).

Facts

On June 30, 2002, the Committee on Professional Conduct served Revels with a "Formal Complaint" under section 9 of the Arkansas Procedures Regulating Professional Conduct (Procedures). In that complaint, Revels was accused of violating Model Rule of Professional Conduct 1.15(a) by failing to hold property belonging to his clients and third persons separate from his own property, by having a balance in the trust account below the amount of client and third party funds held by Revels, and by use of trust account funds for personal purposes. Revels was also accused of violating Model Rules of Professional Conduct 1.15(b) in failing to timely pay medical providers money due from settlement and Model Rules of Professional Conduct 8.4(c) in converting property owned by his clients and third persons to his own use.

Revels responded in writing to the "Formal Complaint," and upon consideration of his response by Committee Panel B, Revels was found to have violated Rule 1.15(a) and (b) as well as rule 8.4(c). Revels appealed the decision of Panel B, and a hearing was held before Panel A on March 19, 2004. After hearing testimony and considering other evidence, including trust account documents and case files, Panel A unanimously found a violation of Rule 1.15(a) and Rule 8.4(c). No violation of Rule 1.15(b) was found. The sanction imposed by a majority vote of four was a reprimand, a $2500 fine and $50 costs. The remaining three members of the panel would have imposed a three-month suspension rather than the reprimand. The trust account records presented to Panel A by the Executive Director were incomplete and far from clear.

Standard of Review

Pursuant to Section 12(B) of the Procedures, on appeal, this court carries out a *de novo* review on the record. *Lewellen v. Sup. Ct. Comm. on Prof'l Conduct*, 353 Ark. 641, 110 S.W.3d 263 (2003). A *de novo* review on the record determines whether the factual findings were clearly erroneous, or whether the result reached was arbitrary or groundless. *Id.* Due deference is given to the Committee's superior position to determine the

credibility of the witnesses and the weight to be accorded to their testimony. *Colvin v. Sup. Ct. Comm. on Prof'l Conduct,* 309 Ark. 592, 832 S.W.2d 246 (1992); *see also Neal v. Matthews,* 342 Ark. 566, 30 S.W.3d 92 (2000). However, conclusions of law are given no deference on appeal. *See Montgomery v. Bolton,* 349 Ark. 460, 79 S.W.3d 354 (2002). The Committee's findings of fact will not be reversed unless the findings are clearly erroneous, and the action taken by the Committee will be affirmed unless it is clearly against the preponderance of the evidence. *Fink v. Neal,* 328 Ark. 646, 945 S.W.2d 916 (1997).

Trust Account

This case concerns the use of a trust account. A trust account is used by an attorney to hold client funds, funds in which a client has an interest, and funds of third parties. *See In re Compliance with Rule 1.15,* 315 Ark. Appx. 753, 870 S.W.2d 394 (1993). Relevant to this case, Rule 1.15 requires that no funds belonging to the attorney or the attorney's firm be deposited in the trust account. Further, Rule 1.15 requires that an attorney keep complete records of a trust account for five years after the termination of representation, and that upon receipt of any funds belonging to a client or a third party, the client or third party shall receive prompt notice from the attorney that he or she holds funds in which such parties hold an interest. Additionally, funds are to be promptly delivered to clients and third parties when due, and property in which an attorney and a client have an interest is to be kept separate until there is an accounting and severance of the interests.

Rule 1.15(a) provides:

> (a) All lawyers shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

Panel A found that:

> Revels deposited cash in his trust account that was unsupported by documents showing that the deposited cash constituted funds properly held in the trust account;
>
> Revels deposited personal checks in his trust account that appear to be checks made payable to Revels for attorney's fees;

Revels deposited settlement checks in his trust account without thereafter writing a check to himself to take his fee, leaving the impression that he kept fees in his trust account;

Revels deposited checks into his trust account from the city paying Revels for work as city attorney;

Revels made cash withdrawals as well as withdrawals by cashier's check made payable to himself;

Revels commingled his funds with client and third-party funds;

Revels failed to keep funds in the trust account that belonged there; and,

Revels apparently used trust funds for his own personal use.

In part, the confusing nature of this case is due to Revels's failure to keep sufficient records. The records do not permit one to fully understand what activity was occurring in his trust account. The decision that Revels violated Rule 1.15(a) was not clearly erroneous.

Rule 1.15(b)

Rule 1.15(b) provides:

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Panel A did not find a violation of Rule 1.15(b). The record appears to show that Revels held funds due third parties that were not timely disbursed. However, the testimony taken at the hearing is far from clear. Although the record would support a finding that Revels violated Rule 1.15(b), we cannot say that the decision declining to find a violation was clearly erroneous.

Rule 8.4(c)

Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The Committee found that Revels failure

to maintain the proper balance in the trust account constituted conversion. Further, Revels allowed the balance in his trust account to repeatedly drop below the amount of funds held in trust, and for two months his trust account showed a negative balance. Additionally, the evidence showed checks drawn on the trust account, such as a check written to a convenience store, that appear to constitute personal use of trust funds by Revels.

Clearly client and third-party funds were not in the account when they should have been there. Just where the funds went in the period that the balance was too low is unclear; however, it is clear that Revels was bound by the Rules to hold client and third-party funds in trust and failed to do so. The Panel's conclusion that Revels converted the funds is not clearly erroneous.

Sanction

The committee stated in its Finding and Order:

> WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that, Arkansas Bar ID # 91110, be, and hereby is, **reprimanded** for his conduct in this matter, fined $2500.00 and assessed costs of $50.00.

Section 17 of the Arkansas Procedures Regulating Professional Conduct provides that serious misconduct "is conduct in violation of the Model Rules that would warrant a sanction terminating or restricting the lawyer's license to practice law." Procedures, section 17(B). Section 17(B)(1) and (3) provide that misappropriation of funds as well as misconduct that involves dishonesty constitute "serious misconduct." Among other findings of failing to properly use and maintain his trust account, Revels was found to have misused and converted client and third-party funds that should have been kept safe in his trust account. This constitutes serious misconduct which warrants termination or restriction of the lawyer's license. However, Panel A imposed a reprimand which is warranted for "lesser misconduct." Section 17(C) provides that lesser misconduct "is conduct in violation of the Model Rules that would not warrant a sanction terminating or restricting the lawyer's license to practice law." Panel A's imposition of a reprimand for conversion and dishonesty constitutes an action taken by the Committee which is clearly against the

preponderance of the evidence. Revels was guilty of severe misconduct, and his conduct warrants a sanction under section 17(B). The reprimand is modified to a three-month suspension.

THORNTON, J., not participating.

GLAZE, J., concurs but would impose a six-month suspension because the Committee on Professional Conduct found that Revels had engaged in serious misconduct involving dishonesty, fraud and because he converted his clients' funds for his personal use.

Richard WEISS, Director of the Arkansas Department of Finance and Administration *v.* Jimmy R. McFADDEN, William W. Joplin and James T. French, On Behalf of Themselves and All Taxpayers Similarly Situated

04-696 199 S.W.3d 649

Supreme Court of Arkansas
Opinion delivered December 9, 2004

[redacted]

[redacted]

[redacted]

[redacted]

William E. Keadle, Revenue Legal Counsel, for appellant.

Nichols & Campbell, P.A., by: *H. Gregory Campbell* and *Mark W. Nichols*, for appellees.

JIM HANNAH, Justice. The Arkansas Department of Finance & Administration (DF&A) appeals a decision of the Pulaski County Circuit Court entered after this case was remanded to the circuit court in *Weiss v. McFadden,* 356 Ark. 123, 148 S.W.3d 248 (2004) (*McFadden II*). DF&A argues that the circuit court erred in ordering a "front-end loaded" refund method for class members who retired after the lawsuit was filed in 1999, and that the circuit court erred in ordering a refund method for taxes paid prior to the lawsuit that was different than the refund method to be used for taxes paid after the lawsuit was filed.

The appeal in *McFadden II* involved assertions by DF&A that the refund method fashioned by the circuit court was in error. Under the doctrine of law of the case, this same issue may not be raised again on the present appeal. Further, the decision of the circuit court to use a different refund method for taxes paid prior to filing the lawsuit in 1999 is not clearly erroneous. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(1) and (7).

Facts

This case concerns an attempt by DF&A to tax return of capital as if it were income. In *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003) (*McFadden I*), this court held that the return to a retiree of after-tax contributions made to a retirement plan is not income subject to income tax because it constitutes return of capital rather than income. We further held that an income tax levied against after-tax contributions constituted an *ad valorem* tax in violation of Amendment 47 of the Arkansas Constitution. Therefore, the tax constituted an illegal exaction under article 16, section 13 of the Arkansas Constitution.

In *McFadden II*, this court held that the circuit court erred in failing to apply the voluntary payment rule in formulating its refund plan to benefits paid to retirees prior to the filing of the complaint in this case in 1999. This court further held that the circuit court did not err in refusing to apply 26 U.S.C. § 72 in fashioning the remedy in this case. The case was remanded for application of the voluntary payment rule.

Standard of Review

This case was tried with the circuit court sitting as the trier of fact. The standard of review on appeal is not whether there is substantial evidence to support the finding of the court, but whether the circuit court's findings were clearly erroneous or clearly against the preponderance of the evidence. *Farm Credit Midsouth, PCA v. Reece Contractors, Inc.*, 359 Ark. 267, 196 S.W.3d 488 (2004). 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. *Farm Credit, supra.* Disputed facts and determinations of credibility are within the province of the fact-finder. *Id.* At issue on this case is whether the circuit court erred in fashioning a remedy. In *Lotz v. Cromer,* 317 Ark. 250, 253, 878 S.W.2d 367 (1994), this court

correctly stated that "[i]n fashioning a remedy, a Chancellor has broad power, limited only to the extent that the remedy must be reasonable and justified by the proof."

Law of the Case

[redacted] In *Cadillac Cowboy, Inc. v. Jackson*, 347 Ark. 963, 69 S.W.3d 383 (2002), this court discussed law of the case and stated:

> The venerable doctrine of law of the case prohibits a court from reconsidering issues of law and fact that have already been decided on appeal. The doctrine serves to effectuate efficiency and finality in the judicial process. *Frazier v. Fortenberry*, 5 Ark. 200 (1843); *see also*, 5 AM. JUR. 2d *Appellate Review* § 605 (1995). We have said the following with regard to the law-of-the-case doctrine:
>
> > The doctrine provides that a decision of an appellate court establishes the law of the case for the trial upon remand and for the appellate court itself upon subsequent review. *Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998). On the second appeal, the decision of the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented. *Griffin v. First Nat'l Bank*, 318 Ark. 848, 888 S.W.2d 306 (1994).
>
> *Clemmons v. Office of Child Support Enforcement*, 345 Ark. 330, 346, 47 S.W.3d 227, 237 (2001). The rationale for the adherence to a strict application of the rule — the avoidance of the disorder and unpredictability that would follow a departure from the doctrine — has not changed.

Cadillac Cowboy, 347 Ark. at 970. The doctrine is conclusive only where the facts on the second appeal are substantially the same as those involved in the prior appeal. *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (2002). It does not apply if there is a material change in the facts. *Id.* In the case before us, there is no change of fact with respect to the retirees and their pensions. The only change on the present appeal is the application of the voluntary payment rule.

Front-End Loaded Method

The issue of whether the circuit court erred in applying a front-end loaded method to taxes paid after filing of the lawsuit

in 1999 was already raised by DF&A in *McFadden II.* In *McFadden II,* this court stated that the appeal concerned "the refund mechanism fashioned by the trial court upon remand of *Weiss I* (*McFadden I*) as well as the issue of the constitutionality of Act 380 of 1991." *McFadden II,* 356 Ark. at 126. This court also stated:

> Both the appellee taxpayers and the DF&A proposed refund mechanisms as a remedy for taxes that had been illegally exacted from the appellees. The trial court opted for the appellees' methodology, which allows retirees to recover the full benefit of their after-tax contributions. The DF&A appeals this ruling, asserting that the trial court erred in (1) refusing to apply the voluntary-payment rule to any illegally-exacted taxes that were paid prior to the filing of the lawsuit in 1999, and (2) refusing to apply 26 U.S.C. § 72, which prorates recovery of after-tax contributions on federal tax returns.

Id. Therefore, according to this court in *McFadden II,* DF&A was appealing the circuit court's decision on the refund method and alleged that the circuit court erred in adopting the "appellee's methodology." The "appellee's methodology," as noted in the opinion in *McFadden II,* was the "front-end loaded" method.

After considering the arguments of the parties, this court held in *McFadden II* that with respect to the refund method, "the trial court did not err in refusing to apply 26 U.S.C. § 72 to employment-related retirement plans." Further we held, "Because the trial court erred in refusing to apply the voluntary-payment rule to illegally-exacted taxes paid in the years prior to 1999, we reverse and remand on this point with instructions to fashion a remedy consistent with this opinion." *McFadden II,* 356 Ark. at 131. As the circuit court correctly stated in its May 13, 2004, Order Upon Remand: "The only issue remanded to this court was the application of the voluntary payment rule to illegally exacted taxes paid in years prior to 1999."

Voluntary Payment Rule

There is no error in the circuit court's application of the voluntary payment rule in this case where the refunds for taxes paid prior to filing the lawsuit in 1999 are handled differently than refunds for taxes paid after the lawsuit was filed. No authority is cited which requires the circuit court to utilize the same methods

for both periods in this case. The circuit court was clearly attempting to exercise equity to assure that retired pensioners receive the refund due within a time frame that provides some reasonable form of actual relief. Some retirees may have passed away since this action was begun almost five years ago, and such retirees have been effectively denied relief.

■ There is no showing that the remedy ordered by the circuit court is unreasonable or not justified by the proof. Upon remand, the circuit court did precisely what it was ordered to do by this court in *McFadden II*. The findings of the circuit court are not clearly erroneous. We find no error and affirm.

DICKEY, C.J., BROWN and THORNTON, JJ., dissent.

ROBERT L. BROWN, Justice, dissenting. It is passing strange that this court is invoking the doctrine of law of the case to prevent our consideration of the front-end loaded method for tax years 1999 - 2002. The reason this is so strange is that in *Weiss v. McFadden,* 356 Ark. 123, 148 S.W.3d 248 (2004) (*McFadden II*), we specifically laid out an alternative to the front-end loaded method for tax years 1999-2002:

> However, there are other equitable ways by which a refund may be effected while still acknowledging the voluntary-payment rule. One such way would be for the appellees to file amended returns for 1999 through 2002, attaching copies of their federal income tax returns. They could adjust their income on the Arkansas returns by the amount of after-tax contributions claimed on their federal returns for those years. In this way, all taxes paid on after-tax contributions received prior to 1999 would be considered voluntarily paid; while, at the same time, the appellees would receive the benefit of a refund of those taxes illegally exacted in 1999-2002 because they were not allowed to recover their after-tax contributions during those years.

McFadden II, 356 Ark. at 131, 148 S.W.3d at 253-54. We reversed and remanded for the trial court to "fashion a remedy consistent with our opinion." That language clearly relates to a remedy for the period in question — 1999 through 2002.

Are we saying now we did not mean what we said? Apparently so. We now issue an opinion that says we cannot espouse an alternative procedure to the front-end loaded method to effect the

refund for 1999 through 2002 and we are locked in to the front-end loaded method, even though this court laid out a road map for precisely such an alternative procedure in *McFadden II.* It makes no sense.

Turning to the merits of this appeal, DFA correctly maintains that the trial court found an illegal exaction for tax years 1999 through 2002 and calculated the refund based on contributions made to retirement plans during this period. In other words, total contributions for the four-year period could be deducted against total retirement benefits for 1999. To the extent those contributions exceed 1999 retirement income, the overage would be passed on as a deduction to retirement income for 2000 and so forth. The front-end loaded method, thus, provides a refund remedy even when no tax has been levied on the retirement benefits and no tax has been paid. Again, this is passing strange. Should we be calculating a refund for an illegal tax when it is not known when the benefits resulting from the contributions will be paid, when the tax will be applied, and whether the taxpayer will even receive the benefits?

This brings me back to what this court set out as a proper way to effect the refund in *McFadden II.* We said file an amended return for each year, 1999 through 2002, and claim a deduction against income for after-tax contributions paid out as benefits in each year. Then, claim your refund for the excess tax paid. This procedure provides a refund for taxes that were actually illegally exacted as opposed to an estimated refund based purely on contributions made to a plan. The trial court disregarded our clear direction.

The majority argues that the trial court was trying to *do equity* and allow deductions of as much of the total contributions against retirement income as could be made in the first year and then in successive years. The front-end loaded method certainly favors the taxpayers in permitting deductions for contributions to be taken in one fell swoop, but it confounds our illegal exaction law by permitting deductions against income for retirement benefits not yet received. Most importantly, the front-end loaded method does not tie the refund to after-tax benefits paid out in a given year.

In sum, I question the fairness and reasonableness of hinging the majority opinion on law of the case in light of our specific language in *McFadden II* and then calculating a tax refund based on

after-tax retirement benefits not yet received and which may not be received at all. For these reasons, I respectfully dissent.

DICKEY, C.J., and THORNTON, J., join in this dissent.

RAY THORNTON, Justice, dissenting. Because I believe that the majority misapplies the law-of-the-case doctrine and fails to reach the issues properly before this court, I respectfully dissent.

The majority inconsistently holds that we may not rule on the front-end loaded method in this appeal, claiming such rulings would be barred by the law-of-the-case doctrine while simultaneously approving the trial court's abandonment of the front-end loaded method for contributions returned prior to 1999. The majority also inconsistently allows application of 26 U.S.C. § 72 to pre-1999 returns without making that rule applicable to all returns. The majority's opinion applied the law-of-the-case doctrine. This doctrine prevents a court from reconsidering issues of law or fact that have already been decided on a previous appeal. *Jones v. Double "D" Properties, Inc.*, 357 Ark. 148, 161 S.W.3d 839 (2004). This doctrine serves to effectuate the efficiency and finality of the judicial process and is meant to maintain consistency while avoiding reconsideration of issues once decided during the course of a single, continuing lawsuit. *Jones, supra* (citing *Cadillac Cowboy, Inc. v. Jackson*, 347 Ark. 963, 69 S.W.3d 383 (2002)). An exception, however, to the law-of-the-case doctrine is when there is materially different evidence presented after the issuance of the appellate court's mandate to the trial court. *Wilson v. Wilson*, 301 Ark. 80, 781 S.W.2d 487 (1989).

In this case, subsequent to the decision in *Weiss v. McFadden*, 356 Ark. 123, 148 S.W.3d 248 (2004) ("*McFadden II*"), the trial court held a hearing to take further evidence and preserve the subsequent record for appeal. At this hearing, new testimony was taken concerning the availability of data from the federal government, the methodology of wide-scale refunds, and the nature and ratio of post-tax contributions in retirement accounts under federal law. Quite simply, there was new evidence regarding the very issue that appellants now bring to this court's attention. Specifically, there is now testimony before the trial court that, under federal law, even if a retiree chooses to recover a lump-sum amount of post-tax contributions in the initial payments from their benefit system, the balance still contains post-tax contributions over the life of the retiree. This is directly related to our statement

in *McFadden II, supra* that "either the appellees have received their post-tax contributions or they have not."

There is sufficient new evidence that the record on this appeal is materially different from the previous records, and the issues argued by appellants are squarely within the above-noted exception to the law-of-the-case doctrine. *See, e.g. Wilson, supra.*

Furthermore, the majority relies on the circuit court's decision about what was to be decided on remand. This is error and violative of the mandate rule under our jurisprudence. The mandate rule is the legal principle that a lower court is bound to follow the dictates of a superior court and that the jurisdiction conferred on the trial court upon remand is bounded by the mandate and decision of the superior court. *City of Dover v. A.G. Barton*, 342 Ark 521, 29 S.W.3d 698 (2000). When we remand with specific instructions, those instructions must be followed as found in both the mandate and opinion. *Id.* A lower court is bound to follow both the letter *and spirit* of the opinion and mandate of the appellate court. *Id.* (emphasis added). In working equity, a trial court should look beyond the mere words of affirmance or reversal and look to the effect of the opinion in proceeding upon remand. *Glover v. Woodhaven Homes, Inc.*, 346 Ark. 397, 57 S.W.3d 211 (2001) (quoting *Kneeland v. American Loan & Trust Co.*, 138 U.S. 509 (1891)).

In the matter under review, I believe that our holding in *McFadden II, supra*, was not followed. Appellees proposed a remedy that ignored the effect of our ruling, and that remedy was accepted by the trial court. The mandate rule should require us to clarify that holding now. In examining both the mandate and opinion of *McFadden II*, it is clear that we did not approve of the trial court's remedy. We found that the remedy did not apply the voluntary-payment rule to any of the taxes in the case when illegal exaction jurisprudence requires the application of the voluntary-payment rule to taxes paid before the illegal-exaction suit was filed. *See e.g., McFadden II, supra.* We remanded based on this issue, but only after noting that the appellees' suggested remedy was not viable. Furthermore, we stated that there were equitable solutions to this remedial quagmire and gave one example that allowed a recovery of income tax paid on the portion of benefits that were the return of post-tax contributions and took into account the voluntary-payment rule. In *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003) ("*McFadden I*"), we noted that the parties agreed that some portion of the benefits paid to the retirees was post-tax contribu-

tions being returned. If the trial court did not follow the letter and spirit of our previous opinions, the mandate rule is not a bar to adjudicating the issues. Our instruction to fashion a remedy providing for a harmonious treatment of federal and state tax laws was not followed by the trial court.[1]

I believe that it was reversible error to reject our conclusion in *McFadden II* that the state-tax treatment must be harmonious with that of federal taxation. Accordingly, I would reverse and remand this case with instructions to the trial court to craft a remedy that is harmonious as to the state and federal treatment of the post-tax contribution corpus in the retirees annuity accounts.

For the forgoing reasons, I respectfully dissent. I am authorized to state that Chief Justice DICKEY and Justice BROWN join in this dissent.

ARKANSAS DEPARTMENT of HUMAN SERVICES *v.*
Charlie Von GARRETT and Dyana Garrett

04-1184 199 S.W.3d 685

Supreme Court of Arkansas
Opinion delivered December 9, 2004

[1] I note that appellees have discovered and seek to call to the attention of the court a statutory provision approving the use of 26 U.S.C. § 72. This statute was not cited to us in the original appeal and the law of the case prevents us from considering it now.

Gray Allen Turner, for appellant.

No response.

PER CURIAM. The Arkansas Department of Human Services ("DHS") submitted a motion for rule on the clerk when the clerk of this court refused to accept the record tendered in this case. The record in this appeal includes a transcript that was prepared by Megan Smith. Ms. Smith was assigned as a temporary court reporter. Ms. Smith was not a licensed court reporter when the transcript was prepared. The clerk of the court correctly refused to accept the record. *See Cranfill, M.D. v. Union Planters Bank, N.A.*, 354 Ark. 397, 123 S.W.3d 122 (2003). DHS moved that we accept the transcript as proffered in this case or that we remand this case to the trial court to settle the record. Appellees did not file a response.

We hereby remand this case to the trial court to settle the record. The specific facts of this case require a record to be lodged so that we can properly decide the case. In the interest of justice, we also direct the clerk of this court to accept the transcript if the attorneys for both parties certify by affidavit that the transcripts are true, accurate, and complete. *Cranfill, supra.*

Case remanded to settle the record.

Victoria CRENSHAW, Elmer Boater, Willie Bean Mary Agnew, et al.
v. EUDORA SCHOOL DISTRICT, Dermott School District,
Forrest City School District

04-1291 199 S.W.3d 679

Supreme Court of Arkansas
Opinion delivered December 9, 2004

PER CURIAM. In accordance with § 2(D)(3) of Amendment 80 to the Arkansas Constitution and Rule 6-8 of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas, Judge J. Leon Holmes of the United States District Court for the Eastern District of Arkansas has by proper motion and certifying order filed a motion and certifying order with our clerk on November 29, 2004. The certifying court requests that our court answer one question of Arkansas law which may be determinative of several similar causes now pending in the certifying court, and it appears to the certifying court that it is presented with an undecided or uncertain question of Arkansas law. The question involves the effect of this court's decision in *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (2002), and the subsequent action by the Arkansas General Assembly on the relationship between the State and its public school districts. After a review of the certifying court's thorough analysis and explanation for the need for this court to answer the questions of law presently pending in that court, we accept certification of the following question:

> Whether in light of *Lake View Sch. Dist. No. 25 v. Huckabee*[, *supra*] and the subsequent action of the legislative and executive branches

> of government of the State of Arkansas, *Dermott Special Sch. Dist. v. Johnson*[, 343 Ark. 90, 32 S.W.3d 477 (2000)] accurately states the current legal status of the Arkansas school districts, or whether the *Lake View* decision and subsequent actions of legislative and executive branches of government of the State of Arkansas have changed the legal status of Arkansas public school districts such that Arkansas school districts are now arms of the State of Arkansas that would be entitled to invoke sovereign immunity.

This *per curiam* order constitutes notice of our acceptance of the certification. For purposes of the pending proceeding, the following requirements are imposed:

> A. Time limits under Rule 4-4 will be calculated from the date of this *per curiam* order accepting certification. The plaintiffs in the underlying actions, Victoria Crenshaw, Elmer Boatner, Willie Bean, and Mary Agnew, et al., are designated the moving parties and will be denoted as the "Petitioners," and their brief is due thirty days from the date of this *per curiam*; the defendants, Eudora School District, Dermott School District, and Forrest City School District, shall be denoted as the "Respondents," and their brief shall be due thirty days after the filing of the Petitioners' brief. Petitioners may file a reply brief within fifteen days after the Respondents' brief is filed.
>
> B. The briefs shall be as in other cases except for the content. Only the following items required in Rule 4-2(a) shall be included:
>
> (3) Point on appeal which shall correspond to the certified question in the federal district court's Certification Order.
>
> (4) Table of Authorities.
>
> (6) Statement of the Case which shall correspond to those facts set forth in the federal district court's Certification Order.
>
> (7) Argument.
>
> (8) Addendum, if necessary and appropriate.
>
> (9) Cover for briefs.
>
> C. Oral argument will only be permitted if the Court concludes that it will be helpful for a full presentation of the issues.

D. Rule 4-6, with respect to amicus curiae briefs will apply.

E. This matter will be processed as any case on appeal.

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

GLAZE, J., not participating.

Teresa EDWARDS *v.* STATE of Arkansas

CR 04-1127 199 S.W.3d 684

Supreme Court of Arkansas
Opinion delivered December 9, 2004

Jeff Rosenzweig, for appellant's counsel

No response.

PER CURIAM. We previously directed attorney Jerome Green to appear before this court on December 2, 2004, and show cause as to why he should not be held in contempt for failing to perfect the appeal of Appellant Teresa Edwards and for representing her during a time that he was delinquent in the payment of his bar dues and was therefore not in good standing. *See Edwards v. State*, 359 Ark. 409, 198 S.W.3d 120 (2004) (*per curiam*).

Mr. Green did appear as ordered and entered a plea of *nolo contendere* to the contempt charges. He admitted that he had filed a notice of appeal on Appellant's behalf, but then failed to perfect the appeal and had not sought this court's permission to withdraw from her case. He also admitted that he had not paid his bar dues for the years 2003 and 2004. He then offered a statement in mitigation on both grounds.

Regarding his representation of Appellant while not in good standing for failure to pay his bar dues, Mr. Green stated that he had not received any notice and was not aware that he had been delinquent. He stated that he had appeared in courts throughout the state, but had never been informed that he was delinquent. The records of our Clerk, however, show that Mr. Green was placed on the list for delinquent bar dues for the years 2003 and 2004, and these lists were sent to all the circuit courts in the state. Our Clerk's records also show that since the date of our previous order, Mr. Green has paid his dues in full.

As for the charge of failing to perfect the appeal, Mr. Green stated that he had made arrangements with the court reporter to complete the transcript. He stated that Appellant's family indicated that they would pay for the transcript. Despite their assurances, he stated that he was not able to secure the money from them, and they eventually ceased communicating with him. At some point, he stated that he became aware that Appellant's family had retained another attorney. Thereafter, he took no further action on the appeal. He admitted, however, that he did not at any time file a motion in this court seeking permission to withdraw from Appellant's appeal, as required in Ark. Sup. Ct. R. 4-3(j)(1).

Based on the foregoing, we find Mr. Green in contempt for representing Appellant during a time that he was not in good standing before the bar. We also find him in contempt for failing to perfect Appellant's appeal and for failing to file a motion in this court seeking permission to withdraw from her appeal. His inaction on the case, even though another attorney had been retained on her behalf, is inexcusable under the circumstances. Accordingly, we impose a fine of $250, which shall be paid within thirty days from the date of this order. A copy of this opinion will be forwarded to the Supreme Court Committee on Professional Conduct.

DICKEY, C.J., not participating.

Patrick D. ELLIS *v.* STATE of Arkansas

CR 04-1245 199 S.W.3d 683

Supreme Court of Arkansas
Opinion delivered December 9, 2004

Griffin, Rainwater & Draper, P.L.C., by: *Paul S. Rainwater*, for appellant.

No response.

PER CURIAM. Appellant Edrick D. Ellis, by and through his attorney, has filed a motion for rule on clerk. His attorney, Paul S. Rainwater, states in the motion that the record was tendered late due to a mistake on his part.

This court 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. Rainwater 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.

Keela McGAHEY *v.* STATE of Arkansas

CR 04-1041 199 S.W.3d 682

Supreme Court of Arkansas
Opinion delivered December 9, 2004

Hubert Alexander, for appellant.

No response.

PER CURIAM. Appellant, Keela McGahey, filed a motion for rule on the clerk, which we granted in *McGahey v. State*, 359 Ark. 252, 195 S.W.3d 922 (2004). In *McGahey*, we stated that "the motion and accompanying record fail[ed] to reveal plainly whether there was an attorney's error," on the part of appellant's former counsel, Mr. Jimmy Doyle. We remanded the matter of attorney error to the circuit court to make findings of fact. *Id.*

On November 19, 2004, an order from the Desha County Circuit Court containing those findings was filed with our court. At the hearing, evidence was presented that is consistent with *McGahey*, *supra*, where we stated:

> 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.

Id.

The trial court further ruled that there was no motion or order in the file that indicates that Mr. Doyle requested or was relieved as attorney of record for appellant.

We hereby relieve Mr. Doyle as attorney of record *sua sponte* and order Mr. Doyle to appear before this court at 9:00 a.m., on Thursday, January 13, 2005, to show cause as to why he should not be held in contempt for his conduct in representing appellant in failing to secure the record for appellant's appeal.

We note that in *McGahey, supra*, we granted appellant's motion to substitute counsel. Mr. Hubert W. Alexander is the attorney of record in appellant's case.

It is so ordered.

Tyshawn MIMS a/k/a Laeries Hayes *v.*
STATE of Arkansas

CR 04-973 199 S.W.3d 681

Supreme Court of Arkansas
Opinion delivered December 9, 2004

Appellant, pro se.

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

PER CURIAM. The State of Arkansas has filed a motion to dismiss the appeal of Appellant Tyshawn Mims, a/k/a Laeries Hayes. The motion reflects that Appellant pled guilty to aggravated robbery in the Crittenden County Circuit Court on November 10, 2003, and a judgment and commitment order was entered the same date. On February 17, 2004, Appellant filed a petition under Ark. R. Crim. P. 37 in the trial court. On August 2, the trial court entered an order dismissing the petition as untimely under Ark. R. Crim. P. 37.2(c). Appellant timely filed a notice of appeal.

The State now seeks dismissal of the appeal on the ground that the Rule 37 petition filed by Appellant in the trial court was outside the time limits of Rule 37.2(c), which provides that such a postconviction petition must be filed within ninety days of the judgment. Appellant's petition was filed ninety-nine days after the judgment. The State is correct in asserting that the time limitations

imposed in Rule 37 are jurisdictional in nature, such that the circuit court cannot grant relief on an untimely petition. *See Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (*per curiam*); *Shoemate v. State*, 339 Ark. 403, 5 S.W.3d 446 (1999) (*per curiam*). Because Appellant's Rule 37 petition was untimely, the State asserts that the circuit court was correct to dismiss the petition and that this court should, in turn, dismiss the appeal.

In his *pro se* response, Appellant states that he filed a timely motion to withdraw his plea, and that he "never received a response back from the court." Attached to his response is a file-marked copy of the motion to withdraw plea, dated December 3, 2003. In that motion, Appellant asserted that he pled guilty "unknowledgeably" and that he had received incompetent and ill-advised counseling from his attorney.

Arkansas Rule of Criminal Procedure 26.1(a) provides in pertinent part: "A plea of guilty or nolo contendere may not be withdrawn under this rule after entry of judgment." This court has previously held that a motion to withdraw a plea filed after entry of judgment will be treated as a postconviction motion under Rule 37, where the defendant is in custody. In *Johninson v. State*, 330 Ark. 381, 953 S.W.2d 883 (1997), this court explained:

> If a sentence has been entered and placed in execution prior to the filing of a motion to withdraw the guilty plea upon which it was based, the motion must be treated as having been made pursuant to Ark. R. Crim. P. 37, and the provisions of that rule govern timeliness of the motion.

Id. at 385, 953 S.W.2d at 884 (citing *Shipman v. State*, 261 Ark. 559, 550 S.W.2d 454 (1977)). *See also McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997) (holding that after sentencing, a motion to withdraw guilty plea may be treated as one for postconviction relief under Rule 37, regardless of its title).

Based on the foregoing, we grant the State's motion to dismiss the instant appeal, as Appellant's petition was not filed within the jurisdictional time limitations of Rule 37.2(c). As for Appellant's claim that he timely filed a motion to withdraw his guilty plea, which would be treated as a Rule 37 petition if filed after entry of judgment, we cannot resolve that issue at this time, as the record on appeal does not contain the motion or any ruling on it. Accordingly, that matter is not now properly before us.

Motion to dismiss granted.

Stark LIGON, Executive Director, Committee on Professional Conduct *v.* Michael Anthony PRICE, Arkansas Bar ID Number 81133

02-1328 200 S.W.3d 417

Supreme Court of Arkansas
Opinion delivered December 16, 2004

[Rehearing denied January 20, 2005.]

[redacted]

[redacted]

[redacted]

Stark Ligon, for petitioner/appellee.

Appellee, pro se, for respondent/appellant.

BETTY C. DICKEY, Justice. This is an original action under the Arkansas Supreme Court Procedures Regulating Professional Conduct (Procedures). The Executive Director of the Arkansas Supreme Court Committee on Professional Conduct (Ligon) filed an action for disbarment against Michael Anthony Price, based on two specific complaints, that of: (1) Timothy Stallings, a former client; and, (2) Federal Judge Susan Weber Wright, involving Price's representation of Anthony J. Vance. After Committee Panel A voted to proceed with disbarment, this court appointed retired Circuit Judge, Jack L. Lessenberry, to sit as special judge pursuant to Procedure 13(A). Judge Lessenberry's findings of fact and conclusions of law, as well as his recommendation for sanction have been filed with this court pursuant to Procedure 13(D). We conclude that those findings of fact and conclusions of law are not clearly erroneous and accept Judge Lessenberry's report and the order is hereby issued.

The Committee served Price with a formal complaint, under Section 9 of the Procedures, alleging violations of the Model Rules of Professional Conduct (Model Rules), based on the complaints of Timothy Stallings and Federal Judge Susan Weber Wright. In addition to the two formal complaints, Panel A also had information of Price's previous disciplinary sanctions including complaints from Judge James Mixon, Cleotis Gatson, and David Scott Curtis. Finally, the panel had other information, including that of a loan Price fraudently obtained from Marsha Hampton. After hearing testimony and considering the evidence, Committee Panel A voted by a majority paper ballot to initiate disbarment proceedings.

This court then appointed Jack Lessenberry special judge, pursuant to Section 13(A) of the Procedures, and on April 3, 2003, he began a five-day hearing on the complaints. The judge first

addressed a file-marked letter, dated a day earlier, in which Price asked to take inactive status under Rule 25 of the Rules of Professional Conduct, saying he did not have the "capacity to defend myself in these proceedings." Judge Lessenberry denied his request, finding that Price had violated numerous Model Rules, and recommended his disbarment. The findings of fact, conclusions of law, and recommendation of sanction were then filed with this court, along with a transcript of the proceedings. Procedures, Section (D). The special judge's findings of fact are accepted by this court unless they are clearly erroneous. *Id.* This court imposes the appropriate sanction as warranted by the evidence. *Id.* There is no appeal from this court except as may be available under federal law. *Id.*

A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Neal v. Hollingsworth,* 338 Ark. 251, 992 S.W.2d 771 (1999). The court must view the evidence in a light most favorable to the respondent, resolving all inferences in favor of the respondent. *Id.* Disputed facts and determinations of the credibility of witnesses are within the province of the fact-finder. *Id.* The purpose of disciplinary actions is to protect the public and the administration of justice from lawyers who have not discharged their professional duties to clients, the public, the legal system, and the legal profession. *Neal v. Hollingswoth, supra.* Applying the clearly erroneous standard of review mandated by the Procedures, we now consider Price's assertion that the special judge erred when he recommended disbarment.

Stallings Complaint

The first complaint was that of Timothy Stallings, who testified that he was in the Arkansas Partnership Program at the State Hospital when he hired Price, on the recommendation of another patient, to help him move to a less-restrictive environment nearer his home in Hot Springs. Stallings' girlfriend, Summer Emley, sent Price $1,250 by Western Union on August 21, 2001, to get a doctor to testify at the hearing scheduled September 5, 2001. While Price attended the hearing, he brought no doctor, and, in fact, suggested that a public defender represent Stallings, which was done. After the hearing, Price said he would refund Emley's money, but failed to do so. Stallings did not hear from Price again until March 7, 2002, when Stallings called Price and

told him he no longer needed his services. Later, on April 17, 2002, Stallings received a letter from Price stating that he had located a doctor.

In this complaint, Price was alleged to have violated Model Rules 1.3, 1.4(a), 1.4(b), 1.15(a), 1.16(d), 3.2, 5.5(a), 7.3(a), 8.4(a), and 8.4(d). Judge Lessenberry found Price violated these rules with the exception of Model Rules 5.5(a) and 7.3(a).

Special Judge Lessenberry found that Price violated Rule 1.3, Diligence, which states:

> A lawyer shall act with reasonable diligence and promptness in representing a client.

Price argues that he acted with reasonable diligence and promptness, that Stallings' cross-examination and Price's own direct testimony reveal that he made diligent inquires, but that he had no success obtaining a psychiatrist. Price admitted delay, but claims he tried to contact approximately sixty (60) psychiatrists during a six (6) month period in an effort to find a forensic psychiatrist to evaluate his Arkansas Partnership Program clients. There is, however, no evidence in the record showing Price actually employed a doctor to examine Stallings. If he did, it was after Stallings had released him as his attorney. Therefore, the judge did not err in finding that Price failed to act with reasonable diligence and promptness in representing his clients.

Rule 1.4(a), Communication, provides:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

Judge Lessenberry concluded Price violated this rule because "the record supports perhaps one visit of respondent [Price] with Stallings over a long period." The violation of Rule 1.4(a) is well-supported by the record, which indicates Price made no effort to contact Stallings between Price's brief non-appearance at the September 5, 2001 hearing, and Price's letter of April 17, 2002 letter saying he had located a doctor to evaluate Stallings. Under Model Rule 1.4(b):

> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Judge Lessenberry concluded that Stallings' "appeared to have a good grasp of what was going on and what he expected of [Price]." Because Price failed to explain the delay in finding a doctor, or any other matter to Stallings, he violated this rule.

Price admitted that he never had a trust account, so clearly, he violated Rule 1.15(a), Safekeeping of property, which provides in part:

> (a) All lawyers shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.
>
> (1) Funds of a client shall be deposited and maintained in one or more identifiable trust accounts in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. The lawyer or law firm may not deposit funds belonging to the lawyer or law firm in any account designated as the trust account, other than the amount necessary to cover bank charges, or comply with the minimum balance required for the waiver of bank charges.

Price concedes that he did not have an IOLTA trust account, but that "he maintained [a] separated, segregated account into which he deposited unearned flat fees in the cases like Stallings." Again, Price never hired a doctor to evaluate Stallings and never refunded any of the money Emley paid for that purpose. Therefore, the judge's findings are not clearly erroneous.

Model Rule 1.16(d), Declining or terminating representation, states:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Price violated Rule 1.16(d) in that once Stallings informed him that he no longer required his services, Price failed to refund the money that Emley paid him for a doctor to evaluate Stallings.

Model Rule 3.2, Expediting litigation, states that:

> A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Price failed to make any efforts to expedite the Stallings' matter. Price's failure to timely locate a doctor to evaluate Stallings is obviously not in the interest of Stallings, who wanted to be transferred to a less-restrictive facility closer to home.

Judge Lessenberry found no evidence to support the allegation that Price violated Rule 5.5(a), Unauthorized practice of law:

> A lawyer shall not:
>
> (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

Ligon argues that the judge "must have overlooked page 11 of Exhibit 4-A. This is a trial exhibit of pleadings from the Judge Wright/Vance complaint, containing . . . an affidavit from the Supreme Court Clerk's office showing Mr. Price failed to pay his 2002 law license fee by the March 1 deadline. His law license went into administrative suspension status then and remained there until May 13, 2002, when he paid his 2002 license fee." Ligon points to the testimony of Beti Gunter and Timothy Stallings, who testified Price dealt with Stallings as late as March 7, 2002, or April 17, 2002. However, Ligon directs this court to an affidavit on file in the Judge Wright complaint, not the Stallings' complaint. Judge Lessenberry's finding that there was "no evidence to support the allegation of misconduct," is not clearly erroneous.[1]

The judge also found no evidence that Price violated Model Rule 7.3(a), Direct contact with prospective clients:

> (a) A lawyer shall not solicit, by any form of direct contact, in-person or otherwise, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

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[1] We note that Judge Lessenberry considered the evidence in each complaint separately.

The testimony of Stallings clearly indicated that he had heard of Price through Edward King, another resident at the Arkansas Partnership Program, not that Price had solicited Stallings as a client.

The judge found that, cumulatively, Price is guilty of violating Model Rule 8.4(a), Misconduct, which states:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another.

Price argues that there is insufficient evidence that he either attempted to violate any of the Model Rules or induced anyone else to do so. We disagree. Finally, Model Rule 8.4(d) states that it is professional misconduct for a lawyer to:

> (d) engage in conduct that is prejudicial to the administration of justice.

Again, having been found to have violated other Model Rules, Price also becomes guilty of this violation.

Judge Susan Weber Wright Complaint

The second complaint was that of Federal District Judge Susan Weber Wright, who testified she was assigned *Anthony J. Vance vs. St. Vincent Infirmary Medical Center*, in which Price represented Mr. Vance. St. Vincent filed a motion to compel responses to interrogatories and requests for production, but Price did not respond. The following is a chronology of events:

> April 17, 2002, Judge Wright granted a motion to compel and directed Price to respond, but Price filed no response;
>
> May 9, 2002, St. Vincent filed a motion to dismiss;
>
> May 31, 2002, St. Vincent filed a motion for summary judgment;
>
> June 5, 2002, Judge Wright denied the motion to dismiss without prejudice, giving Price until June 14, 2002, to respond to the motion to dismiss, and to timely respond to a motion for summary judgment;

June 17, 2002, Price told Judge Wright's secretary he had been ill and would file that day asking for more time to respond;

July 1, 2002, Judge Wright's law clerk telephoned Price, who assured her he would file something by July 2, 2002;

July 8, 2002, Judge Wright's law clerk called and left a message for Price;

July 9, 2002, Price returned the phone call, and again, promised to file something;

July 16, 2002, A show cause order was entered, giving Price ten (10) days to explain why he should not be removed as counsel;

July 19, 2002, Price signed for the certified mail containing the show cause order.

July 31, 2002, Judge Wright removed Price from the case and directed him to immediately provide Vance with a copy of the order, continued the trial to an unstated date, and stayed any action on the summary judgment motion until Vance obtained another attorney;

September 24, 2002, Judge Wright responded to an undated letter from Vance, indicating Price had telephoned him on September 19, 2002, informing him of the order;

December, 2002, Judge Wright received a letter from Vance requesting his case be dismissed because he did not have the money to hire another attorney; and,

December 19, 2002, Judge Wright entered a voluntary dismissal without prejudice.

[redacted] Based on Judge Susan Weber Wright's complaint, Price was alleged to have violated Model Rules 1.1, 1.16(d), 3.2, 3.3(a), 3.4(c), 5.5(a), 8.4(c), and 8.4(d). Judge Lessenberry found that Price violated Model Rule 1.1:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Price argues that the record is "replete with evidence that respondent had a general intention to comply with Judge Wright's orders but between bouts with hypertension and competing disciplinary activity, respondent simply dropped the ball in the Vance case." Price did not provide competent representation to Vance by repeatedly failing to file responsive pleadings.

In Judge Wright's order of July 31, 2002, Price was removed as attorney and was directed to provide his client with a copy of the order by September 16, 2002, so that Vance would know of the matters pending, obtain other representation, or proceed *pro se.* Vance wrote Judge Wright a letter stating that Price had telephoned him on September 19, 2002, three days later than Judge Wright's July 31 order directed Price to do. Price clearly violated Rule 1.16(d), Declining or terminating representation, which states:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Further, Price did not make reasonable efforts to expedite the Vance case, nor did he respond to any orders or pleadings. Model Rule 3.2, Expediting litigation, states:

> A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Judge Lessenberry found that Price violated Model Rule 3.3(a)(1), Candor toward the tribunal, which provides:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal.

Price talked with a secretary in chambers and with Judge Wright's law clerk by telephone, giving repeated excuses for delay and promising that pleadings would be forthcoming, but he failed to file any. Price knowingly made false statements to Judge Wright's staff in June and July about filing pleadings.

The judge found that Price violated Model Rule 3.4(c), Fairness to opposing party and counsel, that a lawyer shall not:

> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

Price contends that the record shows his diminished capacity to comply because of illness and personal hardships, but does not deny he failed to respond to discovery, to an order granting a motion to dismiss, to a summary judgment motion, and to a show cause order from the court. Price's claims of illness and personal hardship are not justification for his repeated failings to obey Judge Wright's order.

Model Rule 5.5(a), Unauthorized practice of law, states:

> A lawyer shall not:
>
> (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

Denise Parks, by an affidavit states that Price failed to pay his 2002 law license fee by the March 1 deadline. Price's law license went into administrative suspension status and remained there until May 13, 2002, when he paid his 2002 license fee. During this time Price practiced law representing Mr. Vance.

Judge Lessenberry found that Price violated Model Rule 8.4(c) and (d), Misconduct, which provides a lawyer shall not:

> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice.

Judge Lessenberry did not err in finding Price's conduct in failing to file pleadings as deceitful or prejudicial to the administration of justice.

Other Evidence

Judge Lessenberry was presented with evidence at the disbarment hearing that Price had violated other Model Rules that were not included in the petition for disbarment. In this appeal,

Price objects "to all the findings of Model Rules violations covered in pages 17 through 22 of the special judge's report," without specificity or authority to support Price's attempts to overturn the findings and conclusions.

Judge James Mixon testified that he conducted a bankruptcy hearing where Price failed to produce records as ordered. Judge Mixon believed Price had received funds from a bankrupt client and had failed to report such payment. Price lied to Judge Mixon, saying that that he had an attorney trust account when he did not. Judge Lessenberry found Price "violated Model Rules."

Cleotis Gatson filed a complaint against Price, and the Committee found Price guilty of violating Model Rules 1.3, 1.4(a), and 1.4(b), and imposing a reprimand and a fine of $750. Price violated 1.3, 1.4(a), 1.15(a), 1.16(d), 3.2, 8.4(a), and 8.4(c), in his representation of David Scott Curtis, who had been committed to the Arkansas Partnership Program. David Ray Curtis paid Price $600 to get his son a doctor to evaluate David Scott, in order to get his son moved closer to home. When Price was fired for failing to obtain a doctor's services, he failed to refund the money to the Curtis family.

Judge Lessenberry found that no violation of a Rule was alleged in the petition for disbarment regarding a personal loan Price obtained through Marsha Hampton. However, the judge found that Price's letter to Hampton contained such misstatements and omissions as to meet the essential elements of the crime of fraud by deception, and violated Model Rule 8.4(c). Finally, Judge Lessenberry found that Price had not complied with continuing legal educational requirements for two years, nor had he ever maintained an attorney trust account since entering private practice in 1999.

Comparability and Proportionality

Price argues that because Judge Lessenberry's findings clearly lack the required comparability and proportionality analysis in determining the appropriate sanctions, this court should reject the recommendations. However, neither Price's abstract nor his addendum contain any mention of comparability or proportionality analysis. This court does not consider issues lacking citation of authority. *Cambiano v. Arkansas State Board of Law Examiners*, 357 Ark. 336, 167 S.W.3d 649 (2004); *Holcombe v. Marts*, 352 Ark. 201,

99 S.W.3d 401 (2003). Neither the petitioner nor this court is required to search the record to find where Price might have raised the issue at trial.

Judge Lessenberry effectively analyzed the thirty-five factors that lent themselves to consideration of comparability and proportionality. Section 17 of the Procedures divides violations of the Model Rules into two separate categories of misconduct: serious misconduct and lesser misconduct. Procedures 17(B) and (C). Serious misconduct warrants a sanction of terminating or restricting a lawyer's license to practice law, whereas the lesser misconduct does not. *Neal v. Hollingsworth,* 342 Ark. 566, 992 S.W.2d 771 (1999). Conduct will be considered serious misconduct if any of the following considerations set forth in Procedure Section 17(B) apply:

> (1) The misconduct involves the misappropriation of funds;
>
> (2) The misconduct results in or is likely to result in substantial prejudice to a client or other person;
>
> (3) The misconduct involves dishonesty, deceit, fraud, or misrepresentation by the lawyer;
>
> (4) The misconduct is part of a pattern of similar misconduct;
>
> (5) The lawyer's prior record of public sanctions demonstrates a substantial disregard of the lawyer's professional duties and responsibilities; or,
>
> (6) The misconduct constitutes a "Serious Crime" as defined in these Procedures.

When Model Rules have been violated by either serious or lesser misconduct, a penalty phase proceeds where the defendant attorney and the Committee's Executive Director are allowed to present evidence and arguments regarding aggravating and mitigating factors to assist in determining the appropriate sanction. *Neal, supra.* Aggravating factors developed by the American Bar Association Joint Committee on Professional Standards and adopted by this court in *Wilson v. Neal,* 332 Ark. 148, 16 S.W.3d 228 (2000), are:

> (a) prior disciplinary offenses;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(e) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with [the] rules or orders of the disciplinary agency;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) refusal to acknowledge [the] wrongful nature of [the] conduct;

(h) vulnerability of [the] victim;

(i) substantial experience in the practice of law;

(j) indifference to making restitution; and,

(k) illegal conduct, including that involving the use of controlled substances.

Mitigating factors include:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify [the] consequences of [the] misconduct;

(e) full and free disclosure to [the] disciplinary board or cooperative attitude towards [the] proceedings;

(f) inexperience in the practice of law;

(g) character or reputation;

(h) physical disability;

(i) mental disability or chemical dependency including alcoholism or drug abuse when;

(1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;

(2) the chemical dependency or mental disability caused the misconduct;

(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and,

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

(j) delay in [the] disciplinary proceedings;

(k) impositions of other penalties or sanctions;

(l) remorse; and,

(m) remoteness of prior offenses.

Wilson v. Neal, supra; Model Standards for Imposing Lawyer Sanctions §§ 9.22 and 9.32 (1992).

Judge Lessenberry specifically discussed the mitigation offered by Price, and the aggravating factors he found in the record, before arriving at a recommendation of disbarment. Price claims his disabilities combined with some comparability and proportionality analyses, should result in either his transfer to inactive status until his disability no longer exists or a sanction considerably less than disbarment.

In *In Re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979), the New Jersey court held that the misappropriation of client or law firm funds will almost invariably result in disbarment. The New Jersey court later established the *Jacob Standard*, holding disbarment is all but certain in misappropriation cases unless there had been a "demonstration by competent medical proofs that respondent suffered a loss of competency, comprehensive or will of such magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful." *In Re Greenberg,* 155 N.J. 138, 714 A.2d 242 (1998).

Here, Price admittedly failed to maintain an attorney trust account and failed to refund monies owed clients. Price has offered no medical evidence of his mental or physical conditions in mitigation, nor any significant support for his character from the community or legal profession. Therefore, the analysis of Judge Lessenberry is not clearly erroneous.

American with Disabilities Act

Price argues that "it is obvious from the record as a whole that respondent would not have violated so many model rules 'but for' a severe emotional impairment which is cognizable under the Americans with Disabilities Act. 42 U.S.C. Sections 121101-12213 and 12131 — Title II of the Act covers disbarment proceedings. *In Re Rose*, 776 P.2d 765-56 (Cal. 1989)."

According to Price, this is essentially what Section 25 of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law allows. The approach protects the public, punishes the disabled lawyer as much as one can do that in good conscience, but at the same time promotes the rehabilitation of an attorney who has fallen on hard times.

First, at 776 P.2d 765, which Price cites, is the case of *In Re Laura Beth Lamb*, decided August 7, 1989, which contains no mention of the Americans With Disabilities Act. Second, the ADA was not enacted until 1990, with the passage of Public Law No. 101-336. In *In Re Lamb*, the California court accepted a disbarment recommendation "for an otherwise talented lawyer whose single act of misconduct was impersonating her husband as she took and passed his California bar exam."

In the case at hand, Judge Lessenberry found that there was "insufficient creditable evidence that the respondent was impaired to the extent that he was not capable of defending himself or that the violations of the Model Rules were caused by the respondent's depression."

In *Slaten v. State Board of California*, 46 Cal.3d 48, 757 P.2d 1 (Cal. 1988), a California court held that the attorney's alleged mental problems, even if they had been sufficiently established, would be entitled to little weight in mitigation of his numerous acts of misconduct. The purpose of disciplinary proceedings is the protection of the public and the need for protection is the same whether or not the attorney is mentally impaired. Further, in

Florida Bar v. Clement, 662 So.2d 690 (Fla. 1995), a Florida court held that "the ADA did not prevent it from disbarring a disabled attorney who suffered from bipolar disorder and had been accused of misuse and misappropriation of client funds. The court in that case held that the ADA did not preclude disbarment because his conduct was not causally related to his disability and, even if it were, the attorney would not be protected under the ADA because he was not a 'qualified' individual with a disability."

In this case, the only proof Price offers in the record of a disability is his reference to a diagnosis of dysthymia, or dysthymic disorder, based on the information in a letter given to him by Kristen Agar, a licensed certified social worker who saw him for an assessment on two occasions. However, the letter also stated that there were other things that needed to be done before an actual diagnosis could be made. Therefore, Price did not establish a disability under the ADA.

Motion to Conform

Ligon argues to this court that Judge Lessenberry erred in denying a motion to conform the petition for disbarment to the proof adduced at trial, and that ruling should be reversed. We disagree. Ligon contends that his evidence at trial fell into four (4) basic divisions:

> That developed and known by December 10, 2002, when the Petition for Disbarment was prepared and filed;
>
> That which came into knowledge of Petitioner up to February 20, 2003, the date of the lengthy deposition of Price, which information was explored with him in detail there, e.g. Carolyn Elliott's two matters;
>
> Information that Petitioner received or developed from February 20 to March 31, 2003, when Price dumped two boxes of his client files on Petitioner, e.g. Dr. Culpepper's unpaid medical liens in three client cases; and,
>
> Information received or developed from March 31 through trial, e.g., the contents and details of many of Price's client files and Ms. Littles' revelation at trial of her financial arrangement with Price.

Ligon contends that he made a prompt and good faith effort to give Price notice of whatever information and documents that came into

his knowledge and possession at each of these stages. According to Ligon, "one must understand and recognize that new complaints often continue to come in to the Office of Professional Conduct on attorneys against whom formal complaints have been filed, and especially against attorneys who the public learns are the subject of disbarment proceedings." Ligon goes on to say that his office "could have spent time and energy filing amended petition after amended petition, but to do so would put form over substance."

At the end of Ligon's case, Ligon moved, as provided by Rule 15, "to amend the pleadings, the petition for disbarment in this case, to conform to the proof that's been placed into the record." Price objected. Judge Lessenberry did not err in denying petitioner's motion to conform the petition for disbarment to the proof adduced at trial.

During the course of the proceedings, a prosecution witness would be called to testify about an incident not set out in the petition for disbarment, and Price would object. Failing to include incidents in the petition for disbarment, then moving at the conclusion of testimony to amend the petition to conform with the proof appears to be a strategy this court finds improper. It is essential that an attorney be given fair notice in a disciplinary proceeding of the charges to be brought against him in order to achieve due process. 7 Am. Jur. 2d., Attorneys at Law § 106. The judge found that "[i]f there was only one instance and the respondent was given an opportunity to talk with the witness, granting the motion might be proper. Here there were several new issues interjected in the prosecution. Therefore, the motion to amend to conform with the evidence must be denied." There was sufficient time for petitioner to amend the petition for disbarment to include the information provided by these witnesses.

Past Misconduct

Ligon argues that the Special Judge erred in holding that it is inappropriate for Petitioner to recite past misconduct of a respondent attorney in the petition for disbarment, and that ruling should be reversed. Again, we disagree. According to Ligon, "[a] Committee panel ballot vote on a complaint is a 'snap-shot in time' on that one matter." The Committee panel members vote on the rule violations in the complaint, and only if one or more rule violations

are found by a majority vote are the panel members provided with information concerning prior discipline of the respondent attorney.

In this case, after finding rules violations in the Stallings and Judge Wright complaints, the panel would have then had his entire disciplinary history available as it deliberated the sanction to recommend on those two cases. Ligon states that "as a result of this procedural directive, the Office of Professional Conduct has been drafting disbarment petitions to include all aggravating factors it knows of at the time the petition is drafted and filed. This procedure gives the respondent attorney notice of aggravating evidence the petitioner will present at trial and a chance to respond or object to it. Since all disbarment proceedings are bench trials, the judge should be able to disregard recitations of aggravating factors from a petitioner, and any mitigating factors from a respondent in any response to the petition or any other pleading."

While this court agrees that special judges are able to disregard certain information, matters used at trial and not included in the petition for disbarment are not to be allowed in that particular disbarment proceeding unless the pleadings are amended and notice given to respondent attorney. There was ample evidence that Price violated numerous Model Rules, as set forth in the Stallings complaint and Judge Wright's complaint, which were the only two Committee complaints receiving a majority vote to initiate disbarment proceedings. Therefore, the other complaints and past misconduct should not have been included in the petition for disbarment. This same evidence, however, may be relevant as aggravating factors to be considered in determining a sanction. Section 13(B) Procedures Regulating Professional Conduct.

Order of Disbarment Issued.

THORNTON, J., not participating.

Joe Alan TAYLOR, Jr. and Steve Hufstedler *v.*
Michael HINKLE and Beiife, Inc.

04-471 200 S.W.3d 387

Supreme Court of Arkansas
Opinion delivered December 16, 2004

Barrett & Deacon, by: *Ralph W. Waddell, D.P. Marshall, Jr.*, and *Andrew H. Dallas*, for appellants.

W. Frank Morledge, P.A., for appellee.

BETTY C. DICKEY, Chief Justice. Alan Taylor and Steven Hufstedler appeal a decision of the St. Francis County Circuit Court finding: (1) that appellants had no reasonable expectation of participation in the management and control of BEIIFE, Inc.; (2) that the corporation's by laws could be amended by the affirmative vote of fifty-one percent of the shares issued and outstanding; and, (3) that the actions of the appellants at the 2000 shareholders/board of directors meeting were a gross abuse of their discretion warranting their removal from the board of directors for a period of two years. Because this appeal involves an issue of first impression and issues of statutory construction, we have jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(b)(1) and (6). We find no error and affirm the trial court.

Facts

Sometime in 1997, appellants Alan Taylor and Steve Hufstedler learned that Honda was planning to open a new franchise in Forrest City, Arkansas. Taylor is the general manager of J.T. Motorsports, which sells Honda motorcycles and ATVs, in Jonesboro, Arkansas. Hufstedler is also employed by J.T. Motorsports. Taylor's father is the owner of J.T. Motorsports. Taylor currently has no ownership interest in J.T. Motorsports, but expects to inherit the business from his father. Honda has an internal rule which prohibits the ownership of adjacent Honda franchises. Because it, too, believed Taylor would inherit J.T. Motorsports from his father, Honda would not allow him to own the Forrest

City franchise outright, and Hufstedler did not have the money to purchase it. Therefore, Taylor and Hufstedler needed a third party to participate in the franchise with them. Taylor and Hufstedler contacted appellee Michael Hinkle regarding the acquisition of the Forrest City franchise. Hinkle owned a business in Aubrey, Arkansas that sold used ATVs and provided some service work on ATVs.

The three men formed BEIIFE, Inc., an Arkansas "S" Corporation, chartered for the sole purpose of acquiring and operating the Forrest City Honda franchise. Initially, Taylor and Hufstedler were to own 51% of the franchise, and Hinkle was to own the remaining 49%. However, due to philosophical differences as to how the business should be run (for example, Hufstedler said that he and Taylor were going to "go down there, stick it in them [the customers] and break it off"), Hinkle determined that he would not pursue the venture without a 51% interest and control of the corporation. Hinkle's demand led to a meeting at the office of Jack Gentry, the corporation's CPA, in November 1997. Following the meeting, the parties reached an understanding that Hinkle was to have a 51% interest in the company and that he would be in charge of the day-to-day operations of the Forrest City franchise. Later that month, Taylor filed BEIIFE's articles of incorporation.

When the parties met with the Honda representative in December 1997 to sign the franchise papers, they were still arguing about ownership percentages. Honda came to the meeting with the original ownership percentages, and Hinkle refused to sign the papers unless he was given 51% interest. Due to all the disagreements, the Honda representative began packing up to leave the meeting. Because he feared that the deal was about to go under, Taylor agreed to allow the Honda representative to switch the percentages and give Hinkle 51%. Later that day, the parties ratified the articles of incorporation and adopted the corporate bylaws. Honda granted BEIIFE a franchise based on certain conditions. Hinkle was to continue to be the president of the corporation with the authority to make all dealership decisions, and any changes in ownership percentages or dealer manager required Honda's prior written approval.

Although Hinkle, Hufstedler, and Taylor all agreed to contribute $10,000 each to capitalize the corporation, Hinkle was the only one who contributed any funds with which to start the business. Taylor refused to contribute because he got mad when

Hinkle wound up with 51%. Hufstedler followed Taylor's lead and likewise refused to contribute anything. Hinkle and his wife loaned the company over $70,000. In addition, because BEIIFE had no money for equipment, Hinkle had to borrow furniture, tools, equipment, and trucks from his business in Aubrey in order to equip the Forrest City Honda franchise. He leased all of this equipment to BEIIFE for $800 per month, less than it would normally cost to rent one of Hinkle's trucks.

The Forrest City Honda franchise opened for business in 1998 and was an instant success. In 1998, the store had $2,900,000 in sales. The next year, the store recorded 4.3 million in sales. In 2000, the store did 5.1 million dollars worth of business, and the next year's sales increased by $300,000. In 2002, the store made 6.5 million dollars in sales. Despite the financial success of the corporation, Taylor, Hufstedler, and Hinkle were in constant discord. Taylor and Hufstedler wanted to sell an in-house warranty, while Hinkle preferred a factory warranty. Taylor and Hufstedler wanted distributions with which to pay their taxes, whereas Hinkle wanted to reinvest the profits in the corporation. Taylor and Hufstedler's goal was to maximize profits, but Hinkle did not think that maximizing profits to the point of gouging the customers was the proper way to do business.

The conflict reached critical mass at a January 2000 board of directors/shareholders meeting. Taylor began the meeting by passing around a checklist of items that he wanted put before the board, and he criticized Hinkle for not generating enough profits. Despite the requirements and conditions of the franchise agreements wherein Hinkle was to remain president and ownership percentages could not change without prior written approval from Honda, Taylor and Hufstedler ousted Hinkle as the president of BEIIFE and replaced him with Taylor. In addition, Taylor and Hufstedler passed a measure requiring the corporation to open a savings account with a Jonesboro bank and another authorizing the issuance of additional corporate stock, which could not be transferred to a non-shareholder. They also passed a measure allowing shareholders to purchase these shares up to their pro-rata ownership percentages, but the shares could only be purchased with cash, not with debt owed by the corporation. Before Taylor could move the corporation's checkbook and mail from Forrest City to Jonesboro, Hinkle adjourned the meeting.

Shortly after the January 2000 board meeting, Hinkle filed this lawsuit seeking Taylor and Hufstedler's removal from the

board for gross abuse of discretion. He alleged their actions violated the Honda agreement, jeopardizing BEIIFE's franchise. Although the parties originally sought the dissolution of the corporation, those claims were disposed of below, and thus are not before this court.

After a summary judgment hearing in December 2002, the trial court dismissed Hinkle's claim for dissolution and lifted a previous stay order that had forced the parties to maintain the status quo. In January 2003, Hinkle noticed another stockholders/board of directors meeting, with the stated purpose of amending the bylaws: to remove the requirement that every director be a shareholder; to remove Taylor and Hufstedler as directors; and, to vote for directors. Taylor and Hufstedler responded with a new counterclaim seeking to enjoin Hinkle from amending the bylaws or removing them as directors, claiming that Hinkle's actions were oppressive and violated their reasonable expectations of participating in managing BEIIFE. At the meeting, Hinkle voted all 51% of his shares and amended the bylaws, removing the requirement that directors be shareholders. He then voted his stock cumulatively and elected his wife, Janet, and himself to the board. She was the operations manager at the Honda dealership in Forrest City and had done the book work for Hinkle's business in Aubrey. Taylor and Hufstedler pooled their votes to elect Taylor. Relying upon financial advice from Jack Gentry, BEIIFE's CPA, regarding the reasonableness of compensation, Hinkle raised his salary from $39,000 to $75,000. Hinkle also increased the rent BEIIFE paid to Hinkle's ATV for equipment and trucks by $2,700 per month, justifying that increase on solicited bids from third party vendors for the lease of like items. The amount quoted by those vendors was $9,491 per month for equipment and $801.82 per month for just one truck. In response, Taylor and Hufstedler sought a temporary restraining order to enjoin Hufstedler's removal. The trial court denied the motion, noting that the issue could be revisited at trial.

Following a two-day trial, the court held that Taylor and Hufstedler's actions at the 2000 board meeting constituted a gross abuse of discretion as directors and ordered their removal from the board for a two-year period. The trial court further held that neither Taylor nor Hufstedler had a reasonable expectation of participating in the management of BEIIFE, emphasizing that Taylor, Hufstedler, and Hinkle did not have an agreement about control. The trial court also held that Hinkle's amendment of the

bylaws was authorized by corporate documents and that all of the actions taken by the newly elected board were valid. This appeal follows.

Standard of Review

[redacted] In bench trials such as this, 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) (2004); *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).

[redacted] Finally, a court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise. *Smith v. Leonard*, 317 Ark. 182, 876 S.W.2d 266 (1994) (citing, *In re Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 473 N.E.2d 1173 (1984)). Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture were not fulfilled. *Id.* Disappointment alone should not be equated with oppression. *Id.*

Closely Held Corporations

[redacted] Closely held corporations are unique creatures. Because of their small size, these corporations require "close cooperation" and "mutual respect" between shareholders. *Meiselman v. Meiselman*, 307 S.E.2d 555 (N.C. 1983). Shareholders in closely held corporations often reasonably expect their ownership to lead to a position in corporate management or corporate employment. *McCauley v. Tom McCauley & Son, Inc.*, 724 P.2d 232 (N.M. Ct. App. 1986); *see also, Action Cmty. Televison Broad. Network, Inc. v. Livesay*, 564 S.E.2d 566 (N.C. Ct. App. 2002); *Longwell v. Custom Benefit Programs Midwest, Inc.*, 627 N.W.2d 396 (S.D. 2001). As one court put it, "the shareholder in a close corporation considers

himself or herself a co-owner of the business and wants the privileges and powers that go with ownership." *Mueller v. Cedar Shore Resort, Inc.*, 643 N.W.2d 56 (S.D. 2002). "Only in the close corporation does the power to manage carry with it the de facto power to allocate the benefits of ownership arbitrarily among the shareholders and to discriminate against the minority whose investment is imprisoned in the enterprise." *Meiselman, supra,* at 559.

A limited market exists for the shares of closely held corporations because investors are extremely reluctant to buy a non-controlling interest when the majority shareholder wields the power to freeze out the minority. *McCauley, supra.* This limited market share means that the minority shareholders are powerless to vindicate their representative expectations by force and they have no way to escape a bad investment. Because of the potential for oppression, several jurisdictions recognize claims by minority shareholders to vindicate their "reasonable expectations."*e.g McCauley, supra.* at 236. Construing Arkansas's statute prohibiting "oppressive" conduct by directors, this state, in 1994, joined these jurisdictions. *Smith, supra.* (interpreting Ark. Code Ann.§ 4-26-1108(a)(1)(B)).

Reasonable Expectations

For their first point on appeal, Taylor and Hufstedler assert that the trial court erred in holding that they had no reasonable expectation in participation in the management of BEIIFE, Inc. We disagree. Despite the fact that the appellants intended to be in control originally, when they were to have 51% of the stock, any expectation of control of the corporation dissipated when Hinkle demanded 51% ownership and control of the day-to-day operations of the company, and both the parties and Honda signed the franchise agreement.

While Taylor and Hufstedler got Hinkle to promise to "consult" with them on all major decisions, indicating an expectation to have some say in managing the corporation, this does not demonstrate that they had an expectation of having an equal say in running BEIIFE, Inc. Furthermore, the minutes of the corporation's annual meeting of shareholder and directors on January 5, 1998, reflected a subjective desire, rather than a reasonable expectation, of having an equal say in managing the corporation. The minutes in question stated:

> The shareholders and directors next discussed ownership and voting requirements with respect to the corporation. It was noted that Michael Hinkle has 51% ownership interest, but that the minority shareholders and two directors would like for any decision to be based upon the decision of a majority of the existing shareholders and directors. Counsel for the parties was instructed to give further consideration to the issue.

In addition, there was a series of letters between Taylor and Hufstedler's lawyer and Hinkle's lawyer, which also showed that Taylor and Hufstedler only had a subjective desire of having an equal say in running the company. In a January 7, 1998 letter from Hinkle's lawyer to Taylor's lawyer, Hinkle's lawyer wrote:

> Michael Hinkle called me this morning and he told me that after thinking the matter over, he does not wish to relinquish 51% ownership in the corporation . . . Michael does assure me that he does not wish to be in a position of making any major changes or expenditures, but that he feels that he must be free to operate the business. As stated previously, he does agree to be required to give notice before any stockholder action is taken.

On May 13, 1998, Taylor's lawyer wrote Hinkle's lawyer and stated,

> I originally forwarded to you a draft of the bylaw amendment back on February 11, 1998. I thought we were in agreement on this issue. It was my understanding that while Michael wanted to retain a majority ownership in the corporation, he was agreeable to corporate decisions being made by a majority vote of all three owners. The bylaw amendment is merely intended to accomplish this goal.
>
> The bylaws already provide that only shareholders may be directors of the corporation. Currently, however, with his majority control, Michael Hinkle could conceivably amend the bylaws to delete this provision, then use his ownership to elect an outside director. All we are intending to do with the bylaw amendment is to make sure that all the owners will remain directors of the corporation, and that they will have an equal voice in any significant decisions regarding the corporate affairs (other than the decisions simply involving day-to-day operations of the business.)

On May 18, 1998, Hinkle's lawyer responded by writing:

> I think we have a misunderstanding about the bylaw agreement. The amendment to section five requires a two thirds majority of the outstanding and issued shares to pass any measure. This would defeat the entire purpose of Michael insisting that he own fifty-one percent of the outstanding shares.

[redacted] Based upon the testimony and exhibits before it, the trial court, in a letter opinion, found that Hinkle went into this deal with the clearly-expressed intent that he would own 51% of the corporation and have control, and he was willing to lose the opportunity if he did not have that percentage and control. In addition, the trial court found that Taylor and Hufstedler decided to proceed with the business opportunity, perhaps believing that later they could get Hinkle to change his position, but this did not occur. As such, the trial judge determined that the appellants did not have a reasonable expectation of participation in management and control of the corporation. We hold that the trial court's findings were not clearly erroneous, and we affirm on this point.

Amendment of Corporate Bylaws

At the January 22, 2003 meeting of shareholders and directors, the directors, *inter alia*, by a vote of Hinkle's 51 shares for and appellants 49 shares against voted to amend Article IV, Section 1, of the bylaws. As a result, the requirement that a director be a shareholder was deleted. Hinkle was then able to use his majority of votes to install his wife, Janet, in Hufstedler's place on the board of directors. Taylor and Hufstedler, meanwhile, pooled their votes in order to keep Taylor on the board. For their second point on appeal, Taylor and Hufstedler contend that the trial court erred in finding that Hinkle had the power to amend the corporation's bylaws. Again, we disagree.

Article 5 of the articles of incorporation provides:

> The power to amend or repeal the bylaws or to adopt a new code of bylaws shall be in the shareholders acting by a majority thereof **and also** in the board of directors acting by a two-thirds (2/3) vote of the directors.

(emphasis added). In their briefs to this court, Taylor and Hufstedler admit that this language could be interpreted as allowing Hinkle to amend the bylaws by a simple majority vote of shares, or, as requiring

a vote of a majority of the holders of the shares. However, they argue that if this language is read in conjunction with the other sections of the bylaws and articles of incorporation, then it is clear that the articles can only be amended by a 2/3 majority of the shareholders. Specifically, they contend that Article 13 of the bylaws, alone, controls the amending of the corporate bylaws. Article 13 provides:

> These bylaws may be altered or amended by a vote of the majority of the holders, in good standing, of the fully paid-up common stock at any annual or special meeting of the stockholders at which a quorum is present, but notice of the proposed change shall be given in the call of the meeting.

While it is true that, as a general rule, the specific provisions of a contract control the general provisions, *see Pate v. Goyne*, 212 Ark. 51, 204 S.W.2d 900 (1947), under the facts of this case, the appellants are mistaken.

In its order, the trial court cited Article 3, Section 5 of the bylaws, which states in pertinent part:

> Only holders of fully paid-up common stock in good standing shall have or exercise voting rights. Each share of common stock shall have one (1) vote.

In addition to Article 3, Section 5 of the bylaws, the trial court relied upon Ark. Code Ann. § 4-27-1020, which provides in part:

> A. A corporation's board of directors may amend or repeal the corporation's by-laws.
>
> B. A corporation's shareholders may amend or repeal the corporation's bylaws even though the bylaws may also be amended or repealed by its board of directors.

Based upon its reading of both the articles of incorporation and § 4-27-1020, the trial court correctly interpreted article five to allow amendment of the bylaws by either the stockholders or the directors. The question then becomes whether, when amending the bylaws, the board of directors vote per shareholder or per share. The trial court determined the latter. We agree.

Article 3, Section 5 of the bylaws goes on to say:

> A quorum shall be constituted when the person owning at least fifty-one percent (51%) of the outstanding and issued shares of stock, as indicated by the stock transfer register of the corporation, are in attendance. This quorum may transact the business of any meeting of the stockholders of this corporation, and a vote of the majority of such stockholders in attendance at such meeting shall be sufficient to pass or reject any properly proposed measure, except for the transaction of business which requires a different quorum or majority either by statute of this state or by the Articles of Incorporation of this corporation.

A quorum is defined by Article 3, Section 5 of the bylaws as the person owning at least 51% of the outstanding shares and issued shares of the stock. Appellants point to the apparent ambiguities between Article 3, Section 5, and Article 13 of the bylaws in asserting that any such ambiguities should be construed against the drafter, Hinkle, under the doctrine of *contra proferentem*. *Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998). However, the *Sturgis* case went on to say that if there is an ambiguity, a court will accord considerable weight to the construction the parties themselves give to it, evidenced by subsequent statements, acts, and conduct. *Id.* It is well-settled that the polestar of contractual construction is to determine and enforce the intent of the parties. *Harris v. Stephens Production Co.*, 310 Ark. 67, 832 S.W.2d 837 (1992). This rule trumps all others, even the doctrine of *contra proferentem*. *Id.* In ascertaining this intention, the court should place itself in the same situation as the parties who made the contract in order to view the circumstances as the parties viewed them at the time the contract was made. *Asimos v. T.L. Rentals & Sons, Inc.*, 244 Ark. 1042, 429 S.W.2d 103 (1968); *Sternberg v. Snow King Baking Powder Co., Inc.*, 186 Ark. 1161, 57 S.W.2d 1057 (1933).

In the case at bar, the copious correspondence between the parties' attorneys indicates that the appellants certainly believed that Hinkle had the authority to unilaterally amend the bylaws. Skip Smith, Taylor and Hufstedler's lawyer, in his May 13, 1998 letter to Bob Donovan, Hinkle's lawyer, stated, in pertinent part:

> The bylaws already provide that only shareholders may be directors of the corporation. Currently, however, with his majority control, Michael Hinkle could conceivably amend the bylaws to delete this provision, then use his ownership to elect an outside director.

After he acquiesced and allowed Hinkle to assume 51% ownership and control of the corporation, Taylor became angry and refused to

help capitalize the corporation, despite an earlier agreement to do so. Furthermore, the long history of discord between the parties indicates that neither Taylor nor Hufstedler truly believed that it would take a 2/3 per capita vote to remove a board member, or carry out other major corporate actions. Accordingly, the appellants could not have reasonably believed their seats on the board of directors were protected by a requirement of per capita voting on amendments to the bylaws.

We have held that documents are to be construed in a manner which gives reasonable and sensible effect to all clauses of the contract, within the entire context of the agreement. *Sturgis, supra.* Based upon the four corners of the corporate contract and parties' subsequent conduct regarding said contract, we cannot say that the trial court erred in finding that Hinkle's actions at the January 23, 2003 shareholders meeting were authorized by the articles of incorporation. In fact, if one were to follow Taylor and Hufstedler's argument to its logical conclusion, a person holding 98% of the shares in a close corporation could be subjugated to the will of other shareholders who collectively hold two percent, resulting in an absurd result. Accordingly, we affirm the trial court on this point as well.

Removal from the Board of Directors

Finally, appellants argue that the trial court erred in finding that Taylor and Hufstedler grossly abused their discretion, thus necessitating their removal from BEIIFE's board of directors pursuant to Ark. Code Ann. § 4-27-809 (Repl. 2001). We hold otherwise.

At the 2000 board of directors/shareholders meeting, Taylor and Hufstedler voted to remove Hinkle as president of BEIIFE, and installed Taylor in his place. In addition, they passed a measure requiring the corporation to open a savings account with a Jonesboro bank, and another measure authorizing the issuance of additional corporate stock, which could not be transferred to a non-shareholder. They also passed a measure allowing shareholders to purchase these shares up to their pro-rata ownership percentages, but the shares could only by purchased with cash, not with debt owed by the corporation. Finally, they intended to move the corporation's checkbook to Jonesboro, and they wanted to have the mail sent there as well, but Hinkle adjourned the meeting before these two measures could be voted upon.

Ark. Code Ann. § 4-27-809 provides, in pertinent part:

> (a) The circuit court of the county where a corporation's principal office (or, if none in this state, its registered office) is located may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholder holding at least ten percent (10%) of the outstanding shares of any class if the court finds that (1) the director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation and (2) removal is in the best interest of the corporation.

The issue is whether Taylor's and Hufstedler's actions constituted a gross abuse of discretion. It is well established that 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 the common language. When a statute is clear, we will not search for legislative intent; rather, that intent must be gathered from the plain meaning of the language used. *Cave City Nursing Home, Inc. v. Arkansas Department of Human Services*, 351 Ark. 13, 89 S.W.3d 884 (2002).

Taylor and Hufstedler argue that all of their actions at the January 2000 board/shareholders meeting were authorized by corporate documents. The stock purchase agreement, item 19 on Taylor's checklist for the January 2000 meeting, provided:

> Motion that each shareholder buy Five (5) or up to their pro rata basis (as included in Article Tenth of the Articles of Incorporation of the corporation) of shares of common stock of BEIIFE, Inc. These shares can be purchased for cash and not for any moneys owed to the shareholder by BEIIFE, Inc. Also, all moneys from this stock sale must be placed in the above savings account at Mid-South Bank in Jonesboro, AR. This offer expires in thirty (30) days from today.

In support of his argument that this move was authorized, Taylor points to Article 4 of the articles of incorporation, which authorizes the corporation to issue 1,000 shares of stock. At the time the measure had passed, the corporation had only issued 100 shares of stock. Article 5 of the articles of incorporation allows the corporation to select a depository bank, and the appellants argue that they were within their rights to pick a bank in Jonesboro, rather than one close to the franchise. Next, the appellants point to

Article 10 of the articles of incorporation, giving each shareholder a first right to purchase shares up to their pro rata percentage of ownership, a right which expires after thirty days.

Hinkle counters by saying that these measures violate the franchise agreement, which cannot be changed without Honda's prior written approval. The franchise agreement provides, in pertinent part:

> B.
>
> Dealer covenants and agrees that this agreement is personal to dealer, to the dealer owner, and to the dealer manager, and American Honda has entered into this agreement based on their particular qualifications and attributes and a continued ownership or participation dealership operations. The parties agree that the ability of the dealer to perform this agreement itself are both conditioned upon the continued active involvement in the ownership of dealer by the following person(s) in the percentage(s) shown:

Name	Title	Percentage of Ownership
Michael Hinkle	President	51%
Steven Hufstedler	Shareholder	25%
Alan Taylor	Shareholder	24%

> C.
>
> Dealer represents and American Honda enters into this agreement in reliance on the representation that Michael Hinkle exercises the functions of dealer manager and is in complete charge of the dealership operations with authority to make all decisions on behalf of the dealer with respect to dealership operations. Dealer agrees that there will be no change in dealership manager without prior written approval of American Honda. Such approval shall not be unreasonably withheld.

First, Hinkle asserts that the stock purchase measure would have forced him to have to purchase his pro rata percentage of stock or else he would no longer have maintained his 51% ownership interest. As stated above, per the franchise agreement, Hinkle is to remain 51% owner unless Honda gives prior approval to a change in the ownership percentages. In the case at bar, Honda gave no such prior approval.

Next, Hinkle points to the intended use of the money from the stock purchase agreement to highlight the alleged misconduct. Items 13 through 21 of the Taylor checklist at the board meeting say: that the stock will be sold; that a used inventory, floor planning and retail financing loan will be secured from Mid-South Bank; and that the stock sale proceeds will be placed in that bank. Taylor's testimony at trial showed that the sale proceeds would be used to establish a deposit relationship with Mid-South Bank. The corporation would then borrow $100,000 from the bank. The loan proceeds would then be put back into the business, and then distributed out to the shareholders in order to give Taylor and Hufstedler some cash out of the corporation. Hinkle contends Taylor's and Hufstedler's purpose in voting for the measure was to generate some cash for themselves, i.e. to benefit their own self-interest, rather than the corporation's best interest.

[redacted] The trial court found that directors of any corporation owe to the corporation certain duties. First, a director owes the duty to act within the bounds of his authority. Second, a director must exercise a standard of care which an ordinary prudent director of a similar corporation would exercise under similar circumstances. Finally, a director may not pursue his own interests in a manner which is injurious to the corporation.

[redacted] While the trial court's finding that the appellants had moved the mail and the checkbook from Forrest City to Jonesboro was in error, the appellants cannot show that they were prejudiced by that finding. We will not reverse absent a showing of prejudice. *Peters v. Pierce,* 314 Ark. 8, 858 S.W.2d 680 (1993). At trial, although he conceded that he could not own the Forrest City dealership, Taylor admitted that if he could wrest control from Hinkle, that would be a good thing for him. He also testified that he intended to take away all record-keeping or accounting-type functions, such as sales, expenses, profits, and that kind of thing, from Hinkle to his dealership in Jonesboro. Taylor admitted that he intended to take the checkbook to Jonesboro, and that he intended to shut down the mail and have it sent to Jonesboro as well. Taylor said that he did not think a person needed a checkbook to run a six or seven million dollar business. The appellants claim that their subjective desire to do several other things that would obviously hurt the corporation, such as moving the books, mail, and checkbook two counties away and keeping it from the person who was supposed to be running the corporation and the

day-to-day operations, does not rise to the level of a gross abuse of discretion. We disagree. The appellants' intent to do those acts, coupled with the actions that appellants did, in fact, carry out, more than constitute a gross abuse of discretion.

In its letter opinion, dated August 4, 2003, the trial court expressly ruled that:

> Here, the Defendant, Taylor was quite candid in admitting that his actions were taken as a result of Plaintiff Hinkle's insistence of having 51% of the corporation. The actions of the Defendants, described above, were retaliatory in nature. After acquisition of the Honda agreement the Defendants then became obstructive instead of supportive of the corporation. The court finds that these directors' actions were contrary to the best interest of the corporation and that the path the Defendants decided to take jeopardized the corporation.
>
> The court finds that the actions of these Defendants do constitute a gross abuse of their discretion and authority. Pursuant to A.C.A. 4-27-807 these Defendants are removed from the Board of Directors for a period of two (2) years.

Taylor and Hufstedler's blatant violations of the franchise agreement, coupled with their clear intentions to commit other actions designed to wrest control away from Hinkle, are clearly injurious to the corporation, and such actions do, indeed, constitute a gross abuse of discretion. Based on the evidence presented in this particular case, we cannot say that the trial court abused its discretion in removing the appellants from the board of directors.

Affirmed.

THORNTON, J., not participating.

Andrew R. ENGRAM *v.* STATE of Arkansas

CR 99-928 200 S.W.3d 367

Supreme Court of Arkansas
Opinion delivered December 16, 2004

[Rehearing denied January 20, 2005.]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Bruce D. Eddy; and *Montgomery, Adams & Wyatt, PLC*, by: *Dale E. Adams*, for petitioner.

Mike Beebe, Att'y Gen., by: *Jeffrey A. Weber*, Ass't Att'y Gen., for respondent.

TOM GLAZE, Justice. Petitioner Andrew Engram has filed a motion to recall the mandate and reopen his case. Engram was charged in the June 10, 1997, capital murder and rape of Laura White, a security guard working at Sears in North Little Rock. A jury convicted him on both counts on January 28, 1999, and sentenced him to death. His conviction and sentence were affirmed by this court on May 4, 2000. *See Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000). Engram then petitioned to the United States Supreme Court for a writ of certiorari, which the Court denied, *see Engram v. Arkansas*, 531 U.S. 1081 (2001); this court's mandate issued on January 12, 2001. On January 22, 2001, an attorney was appointed to represent Engram in postconviction proceedings, but, at a hearing before the circuit court, the attorney opined that there was nothing that merited Rule 37 relief. Engram then, on January 9, 2002, filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas.

On April 18, 2003, Engram requested leave from the federal court to file an amended habeas corpus petition in order to raise additional grounds for relief, including a claim that he is mentally retarded and that his execution is barred under the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002). The federal district court granted Engram's motion to amend, but also raised *sua sponte* the question of whether Engram had presented his mental retardation claim in state court. After briefing by both Engram and the State, the federal court determined that Engram "did not present the federal constitutional dimensions of his *Atkins* claim to the state courts." Further, the federal court disagreed with the State's contention that Engram was procedurally barred from raising the mental retardation claim, ruling that there was "no question that the legal basis for [Engram's] *Atkins* claim was

unavailable to him during the state proceedings." Citing *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003), the federal district court concluded that "a substantial possibility exists that the Arkansas Supreme Court will recall the mandate in this case to consider [Engram's] *Atkins* claim." Thus, the court directed Engram to move to dismiss his amended petition without prejudice, and granted him leave to file a second amended petition that would relate back to his original, timely-filed petition.

Engram filed a motion to dismiss his amended petition, and the federal court granted his motion on October 7, 2003. Following entry of the federal court's order, Engram filed in this court a "Motion to Recall the Mandate and Reopen the Case and Brief in Support," on November 5, 2003. Our court directed that Engram's motion be submitted as a case, and a briefing schedule was established.

The most recent case in which this court has been asked to recall its mandate and reopen the case under similar circumstances was *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003). In that death-penalty case, Robbins asked this court to recall its mandate in order to address an error alleged to have occurred in the jury's completion of the sentencing verdict forms. In agreeing that the mandate should be recalled and the case reopened, the *Robbins* court noted that it was doing so for three reasons: 1) a decision had been cited to the court that was legally on all fours with the issue presented by Robbins; 2) the federal district court had dismissed Robbins's federal *habeas corpus* petition because that issue had not been addressed in state court; and 3) it was "a death case where heightened scrutiny is required." *Robbins*, 353 Ark. at 564. However, the *Robbins* court expressed its belief that its holding was "*sui generis* . . . [and] one of a kind, *not to be repeated*." *Id.* at 564-65 (emphasis added).

Engram contends that this court should recall its mandate and reopen his case based on the fact that, in 2002, the Supreme Court decided the case of *Atkins v. Virginia*, *supra*, wherein the Court held that the execution of mentally retarded individuals violates the Eighth Amendment's prohibition on cruel and unusual punishment. The *Atkins* Court noted that the practice of executing the mentally retarded had "become truly unusual, and it is fair to say that a national consensus has developed against it." *Atkins*, 536 U.S. at 316. In addition, the Court held that, given the diminished reasoning capacity of those with mental retardation, neither the retributive nor the deterrent purposes of the death penalty would

be served by executing the mentally retarded: "Unless the imposition of the death penalty on a mentally retarded person measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Id.* at 319 (quotations and citation omitted).

Although the *Atkins* decision came down after Engram's conviction and after the mandate issued in his case, the rule announced in *Atkins* is retroactive, according to the Supreme Court's reasoning set out in *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry*, the Court held that, when a new rule places a certain class of individuals beyond the State's power to punish, "the Constitution itself deprives the State of the power to impose a certain penalty," and the new rule should be applied retroactively. *Penry*, 492 U.S. at 330. Thus, although the *Penry* Court concluded that executing the mentally retarded was not constitutionally prohibited, it noted that, if a case in the future were to reach that conclusion, the prohibition should be applied retroactively and would apply to defendants on collateral review. *Id.*

In the present case, Engram argues that this court should read *Atkins*, as applied retroactively under the reasoning of *Penry*, in such a way that would permit reopening his case in order for him to raise and address the issue of his alleged mental retardation. Engram concedes that sentencing, this court's mandate, and the time for postconviction remedies are all long past. Nevertheless, Engram argues that this court can reopen his case under *Robbins*, because the three factors set out in *Robbins* have been met, as follows: 1) *Atkins* is on all fours with his case; 2) the federal court dismissed his *habeas* petition because the mental retardation issue has not yet been addressed by the state courts; and 3) this is a death case requiring heightened scrutiny.

However, *Robbins* is significantly distinguishable from Engram's case. The purpose of recalling the mandate and reopening the case in *Robbins* was in order to correct an error in the appellate process. For clarity, we briefly address the facts and history of the *Robbins* case at this stage. First, after Robbins was convicted, he waived his right to direct appeal, and this court subsequently affirmed the trial court's determination that Robbins was competent to make such a waiver. *State v. Robbins*, 335 Ark. 380, 985 S.W.2d 293 (1998) (*per curiam*) (*Robbins I*). Next, we further held that Robbins properly waived his right to seek Rule 37 postconviction relief. *State v. Robbins*, 336 Ark. 377, 985 S.W.2d 296

(1999) (*per curiam*) (*Robbins II*). However, Robbins's mother filed a next-friend petition asking this court to recall the mandate and re-examine Robbins's case; we granted her motion, recalled the mandate, stayed the execution, and ordered briefing on the issues raised by Robbins's mother. *State v. Robbins*, 337 Ark. 227, 987 S.W.2d 709 (1999) (*per curiam*) (*Robbins III*).

After considering the arguments raised as a result of that briefing, this court held that it was the court's duty to conduct an independent examination of the record to determine whether prejudicial error occurred under Ark. Sup. Ct. R. 4-3(h), whether any *Wicks* violations occurred during trial, and whether "fundamental safeguards" were in place during the trial. *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (*Robbins IV*). In order to accomplish this task, this court appointed *amicus* counsel to review the record and assist this court in its review, which counsel did.

In *Robbins v. State*, 342 Ark. 262, 27 S.W.3d 419 (2000) (*Robbins V*), this court held that no Rule 4-3(h) errors, *Wicks* errors, or errors implicating "other fundamental safeguards" occurred during the trial. This court affirmed Robbins's capital murder conviction and death sentence and dissolved the stay of execution. Following *Robbins V*, Robbins began, for the first time, to contest his death sentence, and he engaged legal counsel to pursue *habeas corpus* relief in federal district court. Robbins argued in the subsequent federal proceeding on his *habeas corpus* petition that an inconsistency in the jury's verdict forms violated his constitutional rights under this court's decision in *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995). The State responded that Robbins had exhausted his state remedies by not pursuing a petition for rehearing and that the mandate in the case had issued, foreclosing additional review. The federal district court dismissed Robbins's habeas corpus petition without prejudice on the basis that Robbins had not exhausted his state remedies. Specifically, the federal district court noted that state courts had not examined Robbins's inconsistency-in-the-verdict-forms argument under *Willett v. State, supra*, and that he could "pursue his state remedies, if any."

Following dismissal of the federal *habeas corpus* matter, Robbins filed a petition to reopen his case in this court, arguing that this court's holding in *Robbins IV* required that the court reopen the case, and that a "fundamental error," a violation of Robbins's constitutional rights under *Willett v. State, supra*, occurred in his case. This court ultimately decided to recall the mandate because

of the "extraordinary circumstances" — i.e., a mistake was made in *Robbins V*, in that an issue was overlooked that would have been reversible error. Thus, the *Robbins* case hinged on the fact that an error was made *during this court's review*, and the recall of the mandate was intended to give *this court* an opportunity to address an issue that it should have addressed before. And as noted above, the *Robbins* court stressed that it considered the case "to be one of a kind, not to be repeated." 353 Ark. at 564-55.

Engram's case differs from *Robbins*. For example, unlike *Robbins*, Engram is not asking this court to review an error alleged to have been made by this court during the course of its appellate review; instead, he is asking us to reopen his case so the trial court can address a matter that was never raised during trial. In *State v. Earl*, 336 Ark. 271, 984 S.W.2d 442 (1999) (*Earl II*), this court denied a motion to recall the mandate in similar circumstances. In that case, Earl asked this court to recall the mandate that issued after this court's opinion in *State v. Earl*, 333 Ark. 489, 970 S.W.2d 789 (1998) (*Earl I*), wherein this court held that a search was proper under Ark. R. Crim. P. 5.5. Subsequent to *Earl I*, the United States Supreme Court held unconstitutional an Iowa search-and-seizure statute that was similar to our Rule 5.5. *See Knowles v. Iowa*, 525 U.S. 113 (1998). In *Earl II*, Earl asked this court to recall its mandate on the basis of the Supreme Court's decision in *Knowles*, but this court declined to do so, stating that Earl "never timely challenged Rule 5.5's constitutionality at his hearing below or on appeal, and he did so only after the [Supreme Court] case was decided and after our court's mandate was issued." *Earl II*, 336 Ark. at 272.

Engram's situation is more like *Earl* than *Robbins*. Despite Engram's arguments that he did not have the tools to raise a mental-retardation argument *vis-a-vis* the issue of execution at the trial level, Engram could have availed himself of Ark. Code Ann. § 5-4-618(b) (Repl. 1997), which explicitly provides that "[n]o defendant with mental retardation at the time of committing capital murder shall be sentenced to death."[1] As this court has

[1] At oral argument, counsel for Engram asserted that, despite the existence of § 5-4-618 at the time of his trial, he has never had the opportunity to present this argument as an Eighth Amendment claim. Counsel stated that "we [only now] realize under *Atkins* that an individual has that Eighth Amendment right. The whole thing is [that] the State is banned

previously held in *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997), "a defendant who wishes to invoke this provision must do so by written motion prior to trial. § 5-4-618(d)(1). If such motion is filed, the trial court must determine prior to trial whether the defendant is in fact mentally retarded." *Rankin*. 329 Ark. at 390 (citing § 5-4-618(d)(2)). Here, Engram simply did not file such a motion, nor did he request a court ruling on the issue of his mental retardation. In fact, a hearing was conducted on Engram's competency on March 19, 1998, and Engram offered no evidence at that hearing showing he was mentally retarded. As described below, forensic psychologist Dr. John Anderson testified on behalf of the State; Engram, however, put on no evidence regarding his mental status, although it was his burden to prove mental retardation. *See* § 5-4-618(c). Consequently, the trial court had no duty to rule on this issue.

At that hearing, Dr. Anderson testified that he conducted a forensic psychological examination of Engram, and administered the Kaufman Brief Intelligence Test in order to determine whether Engram was mentally retarded. Dr. Anderson stated that Engram scored an 81 on the composite results, 82 on the vocabulary, and 83 on the non-verbal scores. Applying a "confidence interval" of plus-or-minus five points, Dr. Anderson testified that Engram's "true score, or a score if he were administered this test a repeated number of times and you could control for learning and fatigue and that sort of thing, it would likely fall between the scores of 76 and 86." Dr. Anderson stated that *this score did not indicate mental retardation, and his opinion was that Engram was not mentally retarded.*

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from executing the mentally retarded." However, under § 5-4-618, the State is barred from executing the mentally retarded; as noted above, the statute explicitly provides that "[n]o defendant with mental retardation at the time of committing capital murder shall be sentenced to death." *See* § 5-4-618(b). Further, the statute prohibits even the "death qualification" of the jury when the trial court determines that the defendant is mentally retarded. *See* § 5-4-618(d)(2)(B). Simply put, Engram offers no explanation why his Eighth Amendment argument — i.e., that the Eighth Amendment prohibits the execution of the mentally retarded — is not resolved by the application of our statute, *which prohibits the execution of the mentally retarded.* As the State noted at oral argument, under *Atkins*, the Eighth Amendment is satisfied when a state has in place a procedure that allows defendants to raise and be heard on the issue of their alleged mental retardation. Arkansas has such a procedure in § 5-4-618.

On cross-examination, Dr. Anderson agreed that, given the margin of error, Engram's IQ score could be as low as 76, which would be in the borderline range of general abilities, or in the area between mental retardation and average functioning. Upon questioning by the court, Dr. Anderson said that a score of 76 to 86 would be in the "low average" range, and that any score above 78 or 80 "would be, I guess, what most people think of as a normal score." According to Dr. Anderson, the mean IQ score is 100, and anything between 80 and 120 would be considered "normal."

At the conclusion of the competency portion of the hearing, the State asked that Engram be found competent, and the court complied. However, neither the defense nor the State asked for a ruling on the question of whether Engram was mentally retarded, and the trial court did not make such a ruling. It is sufficient to point out that this court has held that, where a defendant has an intelligent quotient which is above that 65 quotient prescribed by law, he is not entitled to the rebuttable presumption of mental retardation under the statute. *See Reams v. State*, 322 Ark. 336, 909 S.W.2d 324 (1995). This may well be the reason Engram failed to raise the mental retardation defense. *See id.*

As in *Earl II*, the issue on which Engram asks this court to recall the mandate is an issue which could have been resolved by the trial court, if only Engram had presented evidence bearing on this retardation issue and had asked for the trial court's ruling. We agree with the State's contention that a mental retardation claim cannot be raised at just any time in a defendant's proceedings. At oral argument, there was a suggestion that Engram's mental retardation claim could be considered as falling within one of the so-called *Wicks* exceptions, wherein this court may consider an argument raised for the first time on appeal when the trial court failed to bring to the jury's attention a matter essential to its consideration of the death penalty itself. *See Wicks v. State*, 270 Ark. 781, 785, 606 S.W.2d 366, 369 (1980). However, as described above, testimony presented to the trial court indicated that the lowest Engram's IQ score could be was 76. As already noted, Arkansas' statute creates a rebuttable presumption of mental retardation at an IQ of 65. *See* § 5-4-618(a)(2). Therefore, because Engram could not have availed himself of this presumption, there

was no duty on the trial court's part to raise, *sua sponte*, the issue of whether Engram was not eligible for the death penalty.[2]

This is simply not a case like *Robbins*, where the alleged error was an error in this court's own review of the case on appeal, and this court was asked to reopen the case to address its own error. Because *Robbins* was so strictly limited to its facts, this court made it clear that it would not expand the nature of cases in which it will recall a mandate it has already issued. Here, since it was Engram's burden to do so, he should have obtained a ruling on his mental retardation issue from the trial court before his trial ever started.

Instead, Engram never pursued the mental retardation issue, likely for the reason that there was no evidence offered to support such a defense. After all, Dr. Anderson testified that Engram's IQ was between 76 and 86. The General Assembly has set the threshold for presuming mental retardation exists at 65. Although Engram argues briefly that this figure is too low (and therefore does not comport with *Atkins*), the establishment of that presumption is a legislative determination.[3] Further, even if we were to rewrite the statute and declare that the presumptive IQ score indicating mental retardation is 70-75, Engram would still not fall within that range. He had a tested IQ that, at its lowest, was 76. Therefore, even applying the more expansive 70-75 score utilized in *Atkins*, Engram still would not have qualified as being mentally retarded.

The fundamental problem with Engram's argument, however, is simply that this is an argument that should have been made to the trial court.[4] As in *Earl II*, he did not raise it, and the fact that the Supreme Court has subsequently spoken on the constitutionality of the issue does not change the fact that he could — and

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[2] In addition, even to the extent that *Wicks* allows certain arguments to be raised for the first time on appeal, we note that the present stage of these proceedings hardly constitute "the first time on appeal." We are now past the trial, the appeal, the postconviction proceedings, and part of the federal *habeas* process.

[3] We note that *Atkins* does not declare that the Constitution requires states to set a threshold for mental retardation of 70 or 75. Instead, *Atkins* merely pointed out in a footnote that current psychological diagnostic materials "typically consider[ ]" an IQ between 70 and 75 or lower to be "the cutoff IQ score for the intellectual function prong of the mental retardation definition[.]" *Atkins*, 536 U.S. at 309, fn.5.

[4] One of the dissenting opinions asserts that the burden was on the trial court to rule on the issue of Engram's mental retardation. However, § 5-4-618(d)(1) explicitly provides that "[a] defendant on trial for capital murder shall raise the special sentencing provision of mental retardation *by motion prior to trial*." (Emphasis added.) No such motion appears in the

should — have attempted to avail himself of § 5-4-618 at trial. Even though the federal district court, in dismissing Engram's *habeas* petition, noted that Engram "did not present the federal constitutional dimensions of his *Atkins* claim to the state courts," Engram *could have* raised the issue well before now, as was done in *Atkins*. There, Mr. Atkins raised the issue in his trial, even knowing that the Supreme Court had considered and rejected a similar constitutional argument in *Penry v. Lynaugh*. There is simply no merit to Engram's contention that he could not have made his federal constitutional argument before now.[5]

[redacted] Further, this court has already held that the Supreme Court's decision in *Atkins* "merely reaffirmed this state's pre-existing prohibition against executing the mentally retarded" found in § 5-4-618. *See Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004). Engram, of course, takes issue with this interpretation, arguing that § 5-4-618 and the holding in *Atkins* "are not the same," since *Atkins* removes the mentally retarded from the class of persons eligible for the death penalty, while the statute makes the issue something that can be waived by not raising it before trial. However, *Atkins* explicitly noted that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. . . . [Therefore], we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Atkins*, 536 U.S. at 317. Arkansas has made § 5-4-618 the "way[ ] to enforce the constitutional restriction," and Engram did not comply with it. *See Anderson, supra* (pointing out that § 5-4-618 "specifically places the burden on the defendant to prove mental retardation at the time of committing the offense by a preponderance of the evidence").

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trial record. It was Engram's responsibility to file a motion under § 5-4-618 to avoid application of the death penalty, *See Rankin, supra.*

[5] It is also apparent that Engram has not heretofore had a problem with raising constitutional arguments he was sure to lose on: in his direct appeal, he argued both that there was an unconstitutional overlap between capital murder and first-degree murder, and that the admission of victim-impact evidence is unconstitutional. *See Engram*, 341 Ark. at 206, 209. Indeed, with respect to both of those arguments, this court noted that Engram conceded in his brief that "this court ha[d] resolved this issue unfavorably to his position in numerous cases." *Id.* Clearly, had he wanted to raise the mental retardation issue before, he would have.

Engram alternatively argues that he should be permitted to file a Rule 37 petition for postconviction relief. As mentioned above, following this court's initial decision in *Engram*, Engram was appointed counsel to pursue any appropriate Rule 37 relief. At a hearing held on June 25, 2001, Engram's appointed attorney informed the trial court that she had reviewed the record, discussed the matter with Engram, and concluded that there were no "issues that were appropriate for Rule 37.5 relief." Counsel therefore concluded that the next step for Engram would be to pursue federal *habeas* relief. Upon questioning by the court, Engram stated that he agreed with his attorney's assessment. Thus, Engram had the opportunity to pursue any available or appropriate Rule 37.5 relief, and chose not to do so.[6]

In any event, the time for filing a Rule 37 petition is long since past; the rule provides that a petition for postconviction relief must be filed within sixty days of the mandate being issued following direct appeal. The cases on which Engram relies — *Jackson v. State*, 343 Ark. 613, 37 S.W.3d 595 (2001), and *Porter v. State*, 339 Ark. 15, 2 S.W.3d 73 (1999) — are factually distinguishable. Although this court in those two cases permitted the filing of a Rule 37.5 petition outside the time limits prescribed in the rule, in *Jackson*, it was because there was some confusion about *when* Jackson's attorney had been appointed; in *Porter*, there was a question about *whether* Porter had been appointed counsel. In *Porter*, this court noted the following:

> Rule 37.2(c) clearly states that if an appeal was taken of the judgment of conviction, a petition claiming relief under this rule must be filed in the circuit court within sixty days of the date the mandate was issued by the appellate court. We have held that the filing deadlines imposed by this section are jurisdictional in nature

[6] Even if Engram had opted to argue in a postconviction proceeding that his trial attorneys were ineffective for failing to raise or preserve the issue of his alleged mental retardation, it is unlikely that he would have been successful. This court has frequently held that it is not ineffective assistance of counsel to fail to make a meritless objection. *See Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001); *Trimble v. State*, 336 Ark. 437, 986 S.W.2d 293 (1999). According to Dr. Anderson, Engram's IQ was, at the lowest possible range, a 76. As noted above, Arkansas has established an IQ of 65 as the point at which it may be presumed that a defendant is mentally retarded. Therefore, Engram's trial attorneys could have reasonably considered it fruitless to raise the issue of whether Engram was mentally retarded, and they most likely would not have been found ineffective for their failure to do so.

> and that if they are not met, a circuit court lacks jurisdiction to consider a Rule 37 petition or a petition to correct an illegal sentence on its merits. *Petree v. State*, 323 Ark. 570, 920 S.W.2d 819 (1995).
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> However, while there is no constitutional right to a postconviction proceeding, when a State undertakes to provide collateral relief, due process requires that the proceeding be fundamentally fair. *See Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997) (quoting *Robinson v. State*, 295 Ark. 693, 751 S.W.2d 335 (1988)). Here, the question becomes whether it is "fundamentally fair" to require an inmate on death row to abide by the stringent filing deadlines when he was under the impression he was represented by counsel and that said counsel was timely filing the proper pleadings (such as a petition under Rule 37) on his behalf.

Porter, 339 Ark. at 18.

Here, unlike the situations in *Jackson* and *Porter*, there has been no confusion about when filing deadlines occurred or about whether counsel had been appointed. Engram and his Rule 37 attorney made a deliberate decision not to pursue postconviction relief. There is no provision in our law that provides for petitions for "post-postconviction relief," i.e., a mechanism for filing an ineffective-assistance-of-counsel petition with respect to the counsel appointed to handle the Rule 37 petition. Engram's state court remedies with respect to postconviction relief have been exhausted.

Finally, Engram suggests that he might be able to pursue some form of state *habeas* relief, since there is no time limit on filing a petition for writ of *habeas corpus* based on an illegal sentence. *See Renshaw v. Norris*, 337 Ark. 494, 989 S.W.2d 515 (1999) (to impose time limits on *habeas* relief "would contravene the proscription against suspending the right to *habeas corpus*."). However, a writ of *habeas corpus* will only be issued if the commitment was invalid on its face, or the sentencing court lacked jurisdiction. *See Flowers v. Norris*, 347 Ark. 760, 68 S.W.3d 289 (2002). Clearly, the sentencing court in Engram's case possessed jurisdiction, and because Engram failed to get a ruling from the court that he was mentally retarded, the sentence of death was not invalid. Therefore, state *habeas* relief is not a proper avenue for Engram.

In sum, this court declines to recall its mandate and reopen the case. Engram's situation is factually and legally distinguishable from the *Robbins* case; the time for seeking Rule 37 relief is long past; and state *habeas* relief is not appropriate. Because the record reflects that Engram has exhausted his right to assert an *Atkins* defense in state court, he is left to pursue any such relief in the federal courts.

CORBIN, BROWN, and THORNTON, JJ., dissent.

ROBERT L. BROWN, Justice, dissenting. This case concerns whether the state courts or the federal courts should decide the mental-retardation issue that was raised by Engram before his trial in 1998.[1] The issue was raised by Engram and developed before the circuit court, but it was not ruled on by that court. This was contrary to Act 420 of 1993, now codified at Ark. Code Ann. § 5-4-618(d)(2) (Repl. 1997), which mandates that "the court *shall* determine if the defendant is mentally retarded," after the issue is raised. (emphasis added). That legislative directive was not followed in the instant case.

For this reason, I would recall the mandate and remand to the circuit court for the limited purpose of deciding the issue of mental retardation based on the record that has already been developed. By failing to do this, this court is eschewing our state responsibility, and the federal court will now be forced to relitigate the mental-retardation issue, beginning at square one. That will needlessly delay resolution of this matter.

The federal district court concluded in its remand order that "a substantial possibility exists that the Arkansas Supreme Court will recall the mandate in this case to consider [Engram's] *Atkins* [*v. Virginia*, 536 U.S. 304 (2002) (execution of the mentally retarded is unconstitutional)] claim." Because the claim had not previously been presented to the state court, according to the federal district court, it was affording Engram an opportunity to exhaust his state

[1] The majority opinion suggests that mental retardation was not raised at the 1998 pre-trial hearing. At the beginning of the hearing, the circuit court asked what the hearing was about and defense counsel answered: "competency, responsibility and IQ to determine whether Mr. Engram is mentally retarded." To require a written motion as opposed to an oral motion, as the majority appears to do, needlessly exults form over substance in this highly sensitive area, especially when the circuit court knew what the hearing was about and testimony was taken on the subject of Engram's mental ability.

remedies in the interest of "comity and federalism" before proceeding further in federal court. By invoking the exhaustion-of-state-remedies doctrine, the federal district court adhered to its longstanding rule of giving deference to the states, but it also invoked the spirit of Congress's Antiterrorism and Effective Death Penalty Act of 1996 and the Arkansas Effective Death Penalty Act of 1997, now codified at Ark. Code Ann. § 16-91-201 through 16-91-206 (Supp. 2003). Both the congressional act and state act provide for a comprehensive state review of death cases as an antidote to multiple federal *habeas corpus* reviews. It is that comprehensive state review that now is lacking owing to this court's failure to resolve all state issues.

What the federal district court may not have known when it invoked the exhaustion doctrine is that mental retardation was in fact raised on Engram's behalf at a pretrial hearing in state court in 1998. Prior to trial, the circuit court conducted a hearing on Engram's competency *and* mental retardation. On the prosecutor's motion, the court found Engram competent to stand trial but did not rule on whether he was mentally retarded. Again, this error was made even though testimony had been taken relating to the question of Engram's mental retardation and even though our state statute enacted in 1993 provides that where a motion relating to mental retardation is made, "the court *shall* determine if the defendant is mentally retarded." Ark. Code Ann. § 5-4-618 (d)(2) (Repl. 1997) (emphasis added).

The majority appears to contend that a circuit court ruling on mental retardation was not really necessary, because there was testimony that Engram's intelligence quotient in 1998 was 76 and the presumptive level for mental retardation fixed by § 5-4-618(a)(2) is 65. But that conclusion casts a blind eye to the statutory mandate that the circuit court *shall* rule when the issue is raised. Moreover, a 65 I.Q. is only a presumptive benchmark and is not conclusive on the issue, as the definition of "mental retardation" in § 5-4-618(a)(1) makes crystal clear. As a final note, I disagree that speculation on what the circuit court *probably* would have done is appropriate in a death case by an appellate court. Rather, our role should be to assure that the matter was properly ruled upon by the circuit court.

Let me hasten to underscore that my position in this case is based on the fact that the mental-retardation claim was raised after § 5-4-618(d)(2) became law in 1993 and was never decided by the circuit court. My position is not based on the *Atkins v. Virginia,*

supra, decision or on Engram's argument that post-*Atkins*, all death cases are subject to being reopened for a mental retardation evaluation. My dissent is solely based on the failure to comply with our state statute.

As already noted, it is clearly incumbent on state courts to provide a full, complete, and comprehensive review in death cases. I conclude that this review was not perfected, as required by § 5-4-618(d)(2), because the mental-retardation issue was not resolved by the circuit court which involved the imposition of the death penalty and was a matter essential to the jury's consideration of the death penalty. *See Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). Though no objection was made by defense counsel to the circuit court's failure to rule on the matter, these facts fall within the first *Wicks* exception to our requirement that such an objection be made. This court has left no doubt that the death penalty "is a unique punishment that demands unique attention to procedural safeguards." *Robbins v. State*, 353 Ark. 556, 561, 114 S.W.3d 217, 220 (2003). Like *Robbins*, in this case there was error committed on an issue of profound significance that was mandated by state statute.

For these reasons, I respectfully dissent.

CORBIN, J., joins in this dissent.

RAY THORNTON, Justice, dissenting. This case arises from a motion filed by petitioner, Andrew Engram, on November 5, 2003, to recall the mandate and to reopen his case. The majority declines to recall the mandate and reopen the case on the basis that the issue of mental retardation was not ruled upon at the competency hearing, that it was not raised in a direct appeal, and that petitioner waived any potential Rule 37 relief. I respectfully disagree. I believe that petitioner's case falls under the first *Wicks* exception, which provides that we may consider an argument raised for the first time on appeal when "the trial court[ ] fail[ed] to bring to the jury's attention a matter essential to its consideration of the death penalty itself." *See Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

I. Robbins

The issue in this case is whether extraordinary circumstances exist to warrant recalling the mandate and opening appellant's case. Appellant argues that, pursuant to our decision in *Robbins VI, supra,* we should recall the mandate issued on January 12, 2001, and allow

appellant to exhaust his claims, including the issue of mental retardation, in Pulaski County Circuit Court.

In *Robbins VI, supra,* we recognized that the death penalty demands unique attention to procedural safeguards, and citing both federal and state case law to support this proposition, we stated:

> The United States Supreme Court has made that abundantly clear. *See, e.g., Caldwell v. Mississippi,* 472 U.S. 320, 329, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.' ") (quoting *California v. Ramos,* 463 U.S. 992, 998-999, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983)); *Zant v. Stephens,* 462 U.S. 862, 884-885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) ("[B]ecause there is a qualitative difference between death and any other permissible form of punishment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.") (quotations omitted); *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."); *Eddings v. Oklahoma,* 455 U.S. 104, 118, 102 S. Ct. 869, 71 L. Ed. 2d 1 (O'Connor, J., concurring) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.").
>
> This court, early on, voiced its belief in the "humane principle applicable in general to criminal cases, and especially those where life is involved," and declined to exalt form over substance when dealing with the death penalty. *Bivens v. State,* 11 Ark. 455, 457 (1850).

Robbins VI, supra.

Robbins petitioned our court to recall the mandate and reopen his case because he alleged that we failed to recognize that the jury was inconsistent in completing Verdict Form 2, which deals with mitigating circumstances. *Id.* The State maintained that his claim was barred, particularly in light of our Rule 4-3(h) review of Robbins's case. *Id.*

We held that the mandate should be recalled and the case reopened for three reasons. *Id.* First, we recognized that our decision in *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995), might require resentencing, as there was an alleged comparable verdict form deficiency in *Willett*. Second, we acknowledged that the federal district court dismissed Robbins's *habeas corpus* petition because the verdict-form issue had not been addressed in our court, notwithstanding that there had been five appellate reviews by our court. *See State v. Robbins*, 342 Ark. 262, 27 S.W.3d 419 (2000) ("*Robbins V*") (holding that no Rule 4-3(h) errors, *Wicks* errors, or errors implicating other fundamental safeguards occurred during the trial); *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999) ("*Robbins IV*") (holding that, in death-penalty cases, we must conduct an independent review of the record to determine whether errors occurred under Rule 4-3(h), whether any *Wicks* violations occurred, or whether fundamental safeguards were in place during the trial); *State v. Robbins*, 337 Ark. 227, 987 S.W.2d 709 (1999) ("*Robbins III*") (recalling the mandate, staying the execution, and ordering briefing from Robbins and the State); *State v. Robbins*, 336 Ark. 377, 985 S.W.2d 296 (1999) ("*Robbins II*") (*per curiam*) (waiving his right to seek Rule 37 postconviction relief); *State v. Robbins*, 335 Ark. 380, 985 S.W.2d 293 (1998) ("*Robbins I*") (*per curiam*) (waiving his right to an appeal). Third, we emphasized that a heightened scrutiny is required in a death-penalty case. Finally, we noted that the original verdict forms were not included in the record. We issued a writ of *certiorari* and ordered that the record be supplemented with the original verdict forms. *Id.*

Petitioner's case is similar to *Robbins VI*, *supra*, in that his case has been dismissed in federal court to allow him to pursue additional claims, including the claim involving mental retardation, in state court. Petitioner's case is also similar to *Robbins VI*, *supra*, in that the death penalty has been imposed.

However, in this proceeding, petitioner asks us to reinvest jurisdiction in the trial court for consideration of his claim of mental retardation pursuant to *Atkins*, *supra*. In *Atkins*, the Supreme Court held that the executions of mentally retarded criminals constitute cruel and unusual punishment prohibited by the Eighth Amendment. The Court found that its death penalty jurisprudence provided "two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution." *Id.* First, the Court noted, "there is a

serious question as to whether either justification that we have recognized as a basis for the death penalty applies to mentally retarded offenders." *Id.* The Court further stated that "[t]he reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty." *Id.*

It is well-established that the issue of competency is determined by an application of statutory criteria that are not the same as those used to determine mental retardation. The standard under our law for determining competency for purposes of execution is whether a condemned person understands "the nature of and reason for the punishment." *Singleton v. Norris*, 332 Ark. 196, 199, 964 S.W.2d 366 (1998) (citing Ark. Code Ann. § 16-90-506(d)(1)(A) (Supp. 1997)).

In the present case, petitioner was found to be competent at his competency hearing held on March 19, 1998, but the trial court made no finding as to mental retardation. At the beginning of the hearing, the issue of mental retardation was raised in the following colloquy:

> THE COURT: All right. This is case 97-2685, State of Arkansas versus Andrew Engram. Mr. Fraiser is here with the prosecutor's office and Ms. Harris and Mr. Qualls are here for the defendant. And this is a hearing on competency, is that correct, Mr. Qualls?
>
> MR. QUALLS: That's correct, Your Honor. Competency, responsibility and IQ to determine whether Mr. Engram is mentally retarded.
>
> THE COURT: All right, then. You may proceed.

Evidence was presented by Dr. John Anderson of the Arkansas State Hospital that petitioner's IQ was in the range of seventy-six to eighty-six. Dr. Anderson based his testimony upon information in the prosecutor's file, social history, psychiatric interviews, the Kaufman Brief IQ Test, and the results from the MMPI. Dr. Anderson testified that he believed petitioner did not have mental retardation and that petitioner was competent to stand trial, but testified on cross-examination that petitioner could fall within a borderline range between mental retardation and average functioning.

The issue of mental retardation was raised by defense counsel at the competency hearing, but the trial court never ruled on it.

Nor did defense counsel request such a finding. When the State asked the trial court to find petitioner competent, the trial court replied, "So be it," and requested that the State prepare an order "reflecting that[.]" No such order is contained in the record.

The issue of mental retardation was not raised on direct appeal, and petitioner's postconviction counsel failed to file a Rule 37 petition within the sixty-day limit after our mandate issued on January 12, 2001, as required by Ark. R. Crim. P. 37.2, but rather waived any potential claims at the Rule 37 hearing on June 25, 2001, which was conducted approximately five months after our mandate issued. At that hearing, petitioner's postconviction counsel expressed a desire to proceed under *habeas* proceedings in federal district court without first exhausting state claims.

II. Wicks exception

Because the trial court failed to rule on the issue of mental retardation in petitioner's competency hearing, the question is whether a *Wicks* exception is applicable to the present case.

We recognize claims of fundamental error through *Wicks v. State,* 270 Ark. 781, 785, 606 S.W.2d 366, 369 (1980). The four recognized *Wicks* exceptions are: (1) when the trial court fails to bring to the jury's attention a matter essential to its consideration of the death penalty itself; (2) when defense counsel has no knowledge of the error and hence no opportunity to object; (3) when the error is so flagrant and so highly prejudicial in character as to make it the duty of the court on its own motion to have instructed the jury correctly; and (4) under Ark. R. Evid. 103(d) the appellate court is not precluded from taking notice of errors affecting substantial rights, although they were not brought to the attention of the trial court. *Anderson v. State,* 353 Ark. 384, 108 S.W.3d 592 (2003).

Petitioner has framed his argument in such a way that it falls under the first *Wicks* exception, which informs us that in cases in which the death penalty is imposed, we do review "the trial court's failure to bring to the jury's attention a matter essential to its consideration of the death penalty itself" without the requirement of an objection by counsel. *Wicks, supra.* In *Wicks*, we cited two examples of the first exception to our objection rule. In *Wells v. State*, 193 Ark. 1092, 104 S.W.2d 451 (1937), the trial court failed to require the jury to find the degree of the crime, as required by statute, so the jury might have imposed the death penalty for a

homicide below first-degree murder. In *Smith v. State*, 205 Ark. 1075, 172 S.W.2d 248 (1943), the trial court failed to tell the jury that it had the option of imposing a life sentence.

In this case, at the time of the competency hearing, the trial court was well aware that Ark. Code Ann. § 5-4-618 (Repl. 1997), which prohibits the execution of persons with mental retardation, was already in effect. Arkansas Code Annotated § 5-4-618 provides in pertinent part:

> (a)(1) As used in this section, "mental retardation" means:
>
> (A) Significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning manifest in the developmental period, but no later than age eighteen (18); and
>
> (B) Deficits in adaptive behavior.
>
> (2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.
>
> (b) *No defendant with mental retardation at the time of committing capital murder shall be sentenced to death.*
>
> (c) The defendant has the burden of proving mental retardation at the time of committing the offense by a preponderance of the evidence.
>
> (d)(1) A defendant on trial for capital murder shall raise the special sentencing provision of mental retardation by motion prior to trial.
>
> (2) *Prior to trial, the court shall determine if the defendant is mentally retarded.*

Id. (emphasis added).

With regard to Ark. Code Ann. § 5-4-618, we stated in *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004):

> We believe that the Court in *Atkins* merely reaffirmed this state's pre-existing prohibition against executing the mentally re-

> tarded. Section 5-4-618(b), which is part of Act 420 of 1993, provides that no defendant with mental retardation at the time of committing capital murder shall be sentenced to death . . .
>
> Section 5-4-618(a)(2) establishes a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five or below. *See* Ark. Code Ann. § 5-4-618(a)(2) (Repl. 1997). It specifically places the burden on the defendant to prove mental retardation at the time of committing the offense by a preponderance of the evidence. *See* Ark. Code Ann. § 5-4-618(c). The statute then sets forth the procedure by which a defendant charged with capital murder shall raise the special sentencing provision of mental retardation.

Anderson, supra. I believe Ark. Code Ann. § 5-4-618, which was already in effect at the time of *Atkins, supra,* is the Arkansas Legislature's method of assuming the "task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Atkins, supra* (quoting *Ford v. Wainwright,* 477 U.S. 399 (1986)).

I maintain that petitioner's case falls within the first *Wicks* exception because the trial court did not make a ruling on the question whether petitioner is mentally retarded, as required by Ark. Code Ann. § 5-4-618(a)(2). Here, the trial court abused its discretion in failing to take appropriate action to ensure that the death penalty would be imposed only after a determination is made that the accused is not mentally retarded. This ruling was essential because the death penalty would not have been presented to the jury for their consideration if the trial court had ruled that the petitioner was mentally retarded under Ark. Code Ann. § 5-4-618. Therefore, I conclude that the trial court's failure to make a determination as to mental retardation, pursuant to Ark. Code Ann. § 5-4-618, constituted a failure by the trial court "to bring to the jury's attention a matter essential" to the imposition of the death penalty under *Wicks, supra.*

For the foregoing reasons, I would grant petitioner's motion to recall the mandate, and I would remand the matter to the trial court for the limited purpose of making a determination of whether petitioner is mentally retarded in accordance with the requirements of Ark. Code Ann. § 5-4-618 and *Atkins, supra.*

MEADOW LAKE FARMS, INC. *v.* Carl COOPER, and Ben Cooper, d/b/a Cooper Farms

04-367 200 S.W.3d 399

Supreme Court of Arkansas
Opinion delivered December 16, 2004

Timothy F. Watson, Sr., for appellant.

Tom Thompson, for appellee.

ROBERT L. BROWN, Justice. Appellant Meadow Lake Farms, Inc., appeals from the circuit court's judgment granting summary judgment to appellees Carl Cooper and Ben Cooper, d/b/a Cooper Farms, where the court found that Meadow Lake Farms was not a licensed contractor. Meadow Lake Farms argues on appeal that the circuit court erred in granting summary judgment to the Coopers, because Meadow Lake Farms is not a "contractor" as defined by Ark. Code Ann. § 17-25-101(a)(1) (Repl. 2001), and the Arkansas Contractor Licensing statutes should not be construed to apply to agricultural precision land leveling. We agree with Meadow Lake Farms that summary judgment was granted in error, and we reverse and remand for further proceedings.

The facts are these. Meadow Lake Farms is a farming corporation with its principal place of business in Jackson County. The corporation owns farm land totaling 5,000 acres in Jackson and Independence Counties and is privately owned by Lewis Jones and his son, Mike Jones. The Coopers reside in Izard County and own a farm in Jackson County. The Coopers' Jackson County farm is close to one of the farms run by Meadow Lake Farms.

Meadow Lake Farms is primarily engaged in planting, cultivating, and hand harvesting rice, soybeans, and other crops, according to the affidavit of Lewis Jones. It also provides agricultural precision land leveling, primarily for its own farm land but also for the benefit of land they rent from others. On occasion, Meadow Lake Farms will level farm land for neighboring farms when it is asked to perform that service.

In 1999, Rick Fuller, a tenant of Cooper Farms, asked Lewis Jones to level one of the Coopers' agricultural fields. Jones and his son did so as part of the Meadow Lake Farms operation. Ben Cooper paid Meadow Lake Farms $25,590.51 for this work on February 25, 2000. Later in 2000, Fuller again approached Lewis Jones about leveling another one of the Coopers' agricultural fields. After Meadow Lake Farms did so, Ben Cooper paid Meadow Lake Farms $27,865.50 for this work on August 3, 2000. In October 2000, Fuller came to Jones again about leveling a third agricultural field belonging to the Coopers. After performing this job, on November 16, 2000, Meadow Lake Farms sent the Coopers an invoice for these services and for an ARKLA bill, all of which totaled $23,649.89. The Coopers did not pay this invoice.

Meadow Lake Farms sued the Coopers for payment of its invoice. The Coopers filed their answer and asserted that Meadow Lake Farms could not collect, because it was not a licensed contractor. The Coopers then moved for summary judgment and claimed that Meadow Lake Farms was a contractor under Ark. Code Ann. § 17-25-101(a)(1) and was operating without a contractor's license, as required by Ark. Code Ann. § 17-25-103 (Repl. 2001). Hence, they asserted that Meadow Lake Farms was precluded from bringing this action. A hearing was held on the motion, after which the court entered summary judgment in favor of the Coopers.

Meadow Lake Farms contends on appeal that the circuit court's judgment should be reversed, because the circuit court erred in finding that Meadow Lake Farms was a "contractor" that needed a contractor's license to provide agricultural precision land leveling services. It claims that it is not a "contractor" under a strict reading of Ark. Code Ann. § 17-25-101(a)(1), because the Coopers' land is not "for lease, rent, resale, public access or similar purpose," as required by the statute. It further maintains that like the landscaper in *Wilcox v. Safley*, 298 Ark. 159, 766 S.W.2d 12 (1989), it merely made the Coopers' farm land usable for farming. Moreover, according to Meadow Lake Farms, the General Assembly intends to distinguish services to agricultural lands from general commercial construction, because it once did so in Ark. Code Ann. § 17-25-106 (Repl. 2001) (construction for grain bins exempt from contractor's license requirement), even though this statute was repealed by Act 1346, § 1 of 2003. Finally, it urges that the circuit court erred in not giving due deference to the affidavit of Gregory L. Crow, attorney for the Arkansas Contractor Licens-

ing Board, who averred that § 17-25-101 had never been applied to agricultural land leveling by the Board. Meadow Lake Farms also notes that other states have exempted farms from contractor licensing provisions.

We turn first to a discussion of our standard of review. Summary judgment is to be granted by a circuit 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. *See* Ark. R. Civ. P. 56(c). *See also Swaim v. Stephens Production Co.*, 359 Ark. 190, 196 S.W.3d 5 (2004). 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. *See Swaim v. Stephens Production Co., supra.* 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 the 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.*

We review issues of statutory interpretation *de novo*, because it is for this court to decide what a statute means. *See, e.g., Swaim v. Stephens Production Co., supra; Cooper Realty Investments, Inc. v. Arkansas Contractors Licensing Bd.*, 355 Ark. 156, 134 S.W.3d 1 (2003). While we are not bound by the circuit court's ruling, we will accept that court's interpretation of a statute unless it is shown that the court erred. *See id.* When dealing with a penal statute, this court strictly construes the statute in favor of the party sought to be penalized. *See Cooper Realty Investments, Inc. v. Arkansas Contractors Licensing Board, supra*; *Ports Petroleum Co., Inc. of Ohio v. Tucker*, 323 Ark. 680, 916 S.W.2d 749 (1996).

The statute at issue defines a "contractor" as:

> ... any ... corporation, ... who, for a fixed price, ... contracts or undertakes to construct, ... or manages the ... alteration, ... or has ... altered, ... under ... its direction, any ... grading, or any other improvement or structure on public or private property for lease, rent, resale, public access, or similar purpose, ... when the cost of the work to be done, or done, in the State of Arkansas by the contractor, ... is twenty thousand dollars ($20,000) or more.

Ark. Code Ann. § 17-25-101(a)(1) (Repl. 2001). Under Arkansas law, any "contractor" violating the licensure law shall be guilty of a misdemeanor and shall be liable for a fine of not less than $100 nor more than $200 for each offense, with each day to constitute a separate offense. *See* Ark. Code Ann. § 17-25-103(a)(1) (Repl. 2001). Arkansas law further provides that no action may be brought, either at law or equity, to enforce any provision of a contract entered into in violation of this chapter. *See* Ark. Code Ann. § 17-25-103(d) (Repl. 2001). No action, moreover, may be brought either at law or equity for *quantum meruit* by any contractor in violation of this chapter. *See id.*

The Rules and Regulations of the Contractors Licensing and Bond Law provide that a contractor may be licensed in the following categories: heavy construction; highway, railroad, and airport construction; municipal and utility construction; building; light building; mechanical; electrical; and a specialty category. *See* Rules and Regulations 224-25-5(a). There are specialty classifications within each category. For example, within the heavy construction category, there exist a "dams, dikes, levees, and canals" specialty classification; within the building category, there exist "erosion control," "grading and drainage," and "landscaping, irrigation, streams" specialty classifications; and within the specialty category, there exists "dams, dikes, levees, canals," "erosion control," "grading and drainage," and "landscaping, irrigation, streams" specialty classifications. *See* Rules and Regulations, Outline of Classifications (1), (4), & (8).

The Coopers initially advance the argument that the issue of whether the improvement must be done "on public or private property for lease, rent, resale, public access, or similar purpose," as the definition for "contractor" under § 17-25-101(a)(1) requires, is not preserved because that specific assertion was not made to the circuit court. We disagree.

The question of whether Meadow Lake Farms was a "contractor" under § 17-25-101(a)(1) based on its field leveling work was the sole issue before the circuit court. Meadow Lake Farms contended it was not a contractor. The circuit court quoted the full statute in its order and obviously considered the statute *in toto*. The court said in its order:

A.C.A. Section 17-25-101(a)(1) provides, in part:

> "As used in this chapter, unless the context otherwise requires, "contractor" means any . . . corporation . . . who, for a fixed price

> . . . attempts to or submits a bid to construct, or contracts or undertakes to construct, or assumes charge, in a supervisory capacity or otherwise, or manages the construction, erection, alteration, or repair, or has or have constructed, erected, altered or repaired, under his or her, their, or its direction, any building, apartment, condominium, highway, sewer, utility, *grading, or any other improvement or structure on public or private property for a lease, rent, resale, public access, or similar purpose,* except single family residences, when the cost to be done, or done in the state of Arkansas by the contractor, including, but not limited to, labor and materials is Twenty Thousand Dollars ($20,000.000) or more." (Emphasis added).

It is now this court's task to interpret the meaning of the statute on *de novo* review. For us not to consider the entire statute would unduly hamper our interpretation and skew the results. This we will not do. As an additional point, this court has in the past adduced statutory authority that is apposite to the point raised on appeal, even when the precise subsection of the statute was not cited by the appellant. *See Littles v. Flemings*, 333 Ark. 476, 970 S.W.2d 259 (1998).

The circuit court, in its summary judgment, focused on the "grading" language in § 17-25-101(a)(1) and the Rules and Regulations of the Contractors Licensing and Bond Law but failed to consider *where* the grading was to take place. That of course, is the essence of this litigation. Meadow Lake Farms maintains that a "contractor" under § 17-25-101(a)(1) must be involved in some construction enterprise regarding structures and not simply engaged in field leveling for crops, where no structure is contemplated. That argument necessarily brings into play what work is being performed but also where the service is being provided, that is, on what property. To be a contractor, the work must pertain to property "for lease, rent, resale, public access, or similar purpose."

Meadow Lake Farms likens its situation to the fact situation in *Wilcox v. Safley, supra*. In *Wilcox*, a construction company was awarded a contract as the prime contractor to construct a sewer system in Faulkner County. The prime contractor orally agreed with a landscaper to pay him $2.32 per square yard of sod, if he provided bermuda sod and placed it on areas disturbed in the construction of the sewer system. When the prime contractor refused to pay the landscaper the balance due, the landscaper filed suit. The circuit court found that the landscaper providing the sod was a contractor who was not licensed and that that precluded him from maintaining an action to recover the balance due.

On appeal, this court reversed. We held that the language of Ark. Code Ann. § 17-22-101(a) (Supp. 1987), which is now codified at § 17-25-101(a)(1) (Repl. 2001), is not clear and unambiguous and is reasonably open to different interpretations, particularly when examining the actions of the landscaper. *Id.* This court then strictly construed § 17-22-101 (Supp. 1987) and § 17-22-103 (Supp. 1987), which is now codified at § 17-25-103 (Repl. 2001), in favor of the landscaper and found that he was not a contractor for purposes of § 17-22-101(a). Thus, he was entitled to maintain an action to recover his losses. *Id.* We said:

> Code provisions imposing penalties for noncompliance with licensing requirements, such as §§ 17-22-101 and 17-22-103, must be strictly construed. Accordingly, if the language of such provisions is not clear and positive, or if it is reasonably open to different interpretations, every doubt as to construction must be resolved in favor of the one against whom the enactment is sought to be applied. Where a provision is clear and unambiguous, the intention of the legislature must be determined from the plain meaning of the language of the provision.
>
> The language of § 17-22-101(a) is not clear and unambiguous. Under § 17-22-101(a), a contractor is a person who attempts to or submits a bid to construct, contracts or undertakes to construct, or manages the construction, erection, alteration, or repair of a building, apartment, condominium, highway, sewer, utility, grading, or any other improvement. In narrowly construing this language, we conclude that it is reasonably open to different interpretations, particularly when we examine the actions of [the landscaper] in sodding, sprigging, and seeding the land in question. These activities do not fall within the definition of construction, erection, alteration, or repair.

Wilcox v. Safley, 298 Ark. at 161-62, 766 S.W.2d at 13 (internal citations omitted).

[redacted] We agree with Meadow Lake Farms that the facts of the case at hand are analogous to those found in *Wilcox v. Safley, supra.* Clearly, this court held in that case that the predecessor statute to § 17-25-101(a)(1) (Repl. 2001), was open to reasonably different interpretations. Similarly, reasonably different interpretations were advanced at the trial level in this case. The circuit court found that Meadow Lake Farms's activities were "grading," and, thus, fell within the purview of the statute, whereas Meadow

Lake Farms claimed that its activities were not "grading" in the sense of grading for "construction" but rather were for the purpose of leveling farm lands for crop production. As we said in *Wilcox v. Safley, supra*, if the language is not clear and positive or is reasonably open to different interpretations, every doubt as to statutory construction must be resolved in favor of the one against whom the enactment is sought to be applied. In this case, that party is Meadow Lake Farms.

We are mindful of the standard of review for summary judgment, but also for when a penal statute is involved. In this case, we must strictly construe the penal statute in favor of Meadow Lake Farms. *See Cooper Realty Investments, Inc. v. Arkansas Contractors Licensing Bd., supra.* This court determined in *Wilcox v. Safley, supra*, that the language of § 17-25-101(a)(1) was not clear and unambiguous. We conclude that there exists a genuine factual issue surrounding whether Meadow Lake Farms provided grading services on property "for lease, rent, resale, public access, or similar purpose." We reverse the summary judgment and remand for a decision on that issue.

Reversed and remanded.

THORNTON, J., not participating.

James C. BRANSCUMB *v.* Clinton FREEMAN

04-147 200 S.W.3d 411

Supreme Court of Arkansas
Opinion delivered December 16, 2004

Becky A. McHughes and *Josh E. McHughes*, for appellant.

Bennie O'Neil, for appellee.

ANNABELLE CLINTON IMBER, Justice. The issue on appeal is whether a cause of action for negligence arises against the owner of an uninsured motor vehicle based solely upon a violation of the Arkansas Motor Vehicle Safety Responsibility Act, Ark. Code Ann. § 27-19-101, *et seq.* (2004), and the Arkansas Motor Vehicle Liability Insurance Act, Ark. Code Ann. § 27-22-101, *et seq.* (2004). Because this is a matter of first impression, we have jurisdiction pursuant to Rule 1-2(b)(1) of the Arkansas Rules of the Supreme Court.

Appellee Clinton Freeman allowed Jonathan D. Bell to test drive his uninsured 1992 Honda motorcycle on October 30, 1999. While operating the motorcycle, Bell entered an intersection but failed to stop at a stop sign, whereupon the motorcycle collided

with a vehicle driven by Appellant James C. Branscumb. Branscumb filed a complaint in circuit court against both Bell and Freeman in which he alleged that Freeman was negligent in allowing Bell to operate his vehicle without insurance as required by Ark. Code Ann. §§ 27-22-104 & 27-19-711 (2004). He also alleged in the complaint that the accident was proximately caused by Bell's negligence in failing to stop at the stop sign. The circuit court determined that Freeman was sued by Branscumb solely on the basis that Freeman owned an uninsured motorcycle that a third party was driving when, as a result of the driver's alleged negligence, the motorcycle collided with the vehicle operated by Branscumb. Based on the pleadings, the court ruled that Branscumb failed to state a claim under Arkansas law against Freeman and, therefore, dismissed the complaint against Freeman.

Branscumb initially appealed the dismissal of his claim against Freeman to the Arkansas Court of Appeals. On September 17, 2003, the Court of Appeals dismissed the appeal for lack of a final order in that the judgment did not dispose of Branscumb's additional claim against the separate defendant Bell. *Branscumb v. Freeman*, CA02-1030, slip op. at 1-2 (Ark. App. Sept. 17, 2003). The circuit court subsequently disposed of the case by entering summary judgment in favor of Branscumb on his claim against Bell, finding that Bell's negligence in failing to stop proximately caused the accident. Following entry of a final order on December 3, 2003, Branscumb timely filed a second notice of appeal, contending that the trial court erred in dismissing his claim against Freeman.[1]

We have repeatedly set forth our standard of review for orders of dismissal pursuant to Ark. R. Civ. P. 12(b)(6). *Clayborn v. Bankers Standard Ins. Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002). This court reviews a trial court's decision on a motion to dismiss by treating the facts alleged in the complaint as true and by viewing them in the light most favorable to the plaintiff. *King v. Whitfield*, 339 Ark. 176, 5 S.W.3d (1999); *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994). In viewing the facts in the light most favorable to the plaintiff, the facts should be liberally construed in plaintiff's favor. *Rothbaum v. Arkansas Local Police & Fire Retirement Sys.*, 346 Ark. 171, 55 S.W.3d 760 (2001); *Martin v. Equitable Life Assurance Soc. of the U.S.*, 344 Ark. 177, 40 S.W.3d 733 (2001). Our rules

[1] We issued a *Per Curiam* opinion ordering Branscumb to rebrief, as the addendum was deficient. *Branscumb v. Freeman*, 357 Ark. 644, 187 S.W.3d 846 (2004).

require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. Ark. R. Civ. P. 8(a)(1); *Grine v. Board of Trustees,* 338 Ark. 791, 2 S.W.3d 54 (1999); *Brown v. Tucker,* 330 Ark. 435, 954 S.W.2d 262 (1997).

This appeal also requires us to determine the intent and application of the Arkansas Motor Vehicle Safety Responsibility Act and the Arkansas Motor Vehicle Liability Insurance Act. We review statutory interpretation appeals *de novo*, as it is for us to decide the meaning of the statute. *Premium Aircraft Parts, LLC v. Circuit Court of Carroll County*, 347 Ark. 977, 69 S.W.3d 849 (2002).

The underlying lawsuit is a subrogation claim. In *St. Paul Fire & Marine Insurance Co. v. Murray Guard, Inc.*, 343 Ark. 351, 37 S.W.3d 180 (2001), we said subrogation is an equitable remedy that rests upon principles of unjust enrichment and attempts to accomplish complete and perfect justice among the parties. *Id. (citing Blackford v. Dickey,* 302 Ark. 261, 789 S.W.2d 445 (1990); and *Baker v. Leigh*, 238 Ark. 918, 385 S.W.2d 790 (1965)). We have further said that the elements of subrogation are as follows: 1) a party pays in full a debt or an obligation of another or removes an encumbrance of another, 2) for which the other is primarily liable, 3) although the party is not technically bound to do so, 4) in order to protect his own secondary rights, to fulfill a contractual obligation, or to comply with the request of the original debtor, 5) without acting as a volunteer or an intermeddler. *Id.* (*citing Blackford v. Dickey, supra*). Finally, we have said that subrogation is a doctrine of equity governed by equitable principles. *Id. (citing Cooper Tire & Rubber Co. v. Northwestern National Cas. Co.*, 268 Ark. 334, 595 S.W.2d 938 (1980); and *Federal Land Bank of St. Louis v. Richland Farming Co.*, 180 Ark. 442, 21 S.W.2d 954 (1929)).

In the instant case, Branscumb's insurance carrier, Guideone Insurance Company, paid his damages under the uninsured motorist clause of his policy. Under a theory of subrogation, Branscumb sought to recover damages in the amount of $9,163.83 by suing the person(s) who allegedly were responsible for his injuries — Bell, for negligently operating the motorcycle and Freeman for failing to insure the motorcycle. Branscumb submits that the owner's failure to keep insurance on his motorcycle should be evidence of negligence under the Arkansas Motor Vehicle Safety Responsibility Act, Ark. Code Ann. § 27-19-101, *et seq.* (2004), and the Arkansas Motor Vehicle Liability Insurance Act, Ark. Code Ann. § 27-22-101, *et seq.* (2004), and therefore his claim was improperly dismissed by the circuit court. We disagree.

Under the Motor Vehicle Safety Responsibility Act, the driver of a vehicle bears the responsibility of reporting an accident, and the penalty for failing to report an accident is license suspension.[2] Ark. Code Ann. §§ 27-19-501, 508 (Repl. 2004). Similarly, it is the driver's failure to file proof of insurance within 90 days of the accident that results in a presumption that the driver and the vehicle the driver is operating are uninsured. Ark. Code Ann. § 27-19-503 (Repl. 2004). In any event, the legislature has expressly provided that following an accident, the report and the security (if the vehicle is uninsured) required under the Act and any action taken by the enforcement agency, shall not be evidence of negligence in civil actions. Ark. Code Ann. § 27-19-621 (Repl. 2004).

Furthermore, subchapter seven of the Motor Vehicle Safety Responsibility Act does not provide for universal application; instead, it requires proof of financial responsibility for the future (i.e., mandatory liability insurance) and applies only to those persons "who have been convicted of or forfeited bail for certain offenses under motor vehicle laws or who have failed to pay judgments upon causes of action arising out of ownership, maintenance, or use of vehicles of a type subject to registration under the laws of this State." Ark. Code Ann. § 27-19-702 (Repl. 2004). *See Smith v. Shelter Mutual Ins. Co.*, 327 Ark. 208, 937 S.W.2d 180 (1997)(citing *State Farm Mutual Ins. Co. v. Cartmel*, 250 Ark. 77, 78, 463 S.W.2d 648, 649 (1971)); *Aetna Casualty & Surety Co. v. Simpson*, 228 Ark. 157, 306 S.W.2d 117 (1957).

The Motor Vehicle Liability Insurance Act, Ark. Code Ann. § 27-22-101, *et seq.* (Repl. 2004), is supplemental to and cumulative to the Motor Vehicle Safety Responsibility Act. Ark. Code Ann. § 27-22-102. Section 27-22-104 provides:

> (a)(1) It shall be unlawful for any person *to operate* a motor vehicle within this state unless the vehicle is covered by a certificate of self-insurance under the provisions of § 27-19-107, or by an insurance policy issued by an insurance company authorized to do business in this state.
>
> (2) Failure to present proof of insurance coverage at the time of arrest and a failure of the vehicle insurance database to show current

[2] The owner has the responsibility of making the report only if the driver is physically incapable of making the report. Ark. Code Ann. § 27-19-509 (Repl. 2004).

> insurance coverage at the time of the traffic stop creates a rebuttable presumption that the motor vehicle is uninsured.

Ark. Code Ann. § 27-22-104 (Emphasis added). In addition, Ark. Code Ann. § 27-22-105 states:

> (a) When *the operator of any motor vehicle* is involved in a motor vehicle accident in this state and the vehicle is found not to be adequately insured, as required by § 27-22-104(a)(1), the operator shall be deemed guilty of a Class A misdemeanor.
>
> (b) In addition, if a person is convicted of driving an inadequately insured vehicle which has been involved in an accident under subsection (a) of this section, the court may order that the vehicle be impounded until proof of vehicle insurance coverage is made to the court. The *owner of the vehicle* impounded shall be responsible for all costs of impoundment.

Ark. Code Ann. § 27-22-105 (Emphasis added). The legislative history behind these pertinent statutes is reflected in the Publisher's Notes to Act 988 of 1991, Section 1:

> MOTOR VEHICLES — LICENSING, REGISTRATION, AND INSURANCE — PENALTIES
>
> "AN ACT TO PROMOTE PUBLIC HIGHWAY SAFETY BY GENERATING ADDITIONAL REVENUE FOR EMERGENCY VEHICLES BY INCREASING THE FINE FOR FAILURE TO LICENSE MOTOR VEHICLES; TO PROVIDE FOR THE DISBURSEMENT OF THE FINE FOR FAILING TO LICENSE MOTOR VEHICLES; TO AMEND ARKANSAS CODE SECTIONS 27-22-103 AND 27-22-104(a) TO PROVIDE PENALTIES FOR SECOND AND THIRD OFFENSES OF THE MOTOR VEHICLE INSURANCE REQUIREMENT; TO AMEND ARKANSAS CODE TITLE 27, CHAPTER 14, SUBCHAPTER 3 TO PROVIDE ADDITIONAL PENALTIES FOR FAILURE TO REGISTER A MOTOR VEHICLE; AND FOR OTHER PURPOSES."
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> BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
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> SECTION 1. (a) It is hereby found and determined by the General Assembly that there is a large number of motor vehicles within

> this state which are not licensed; that this situation results in lost revenues to the state in the form of license fees not paid; that the owners of unlicensed motor vehicles most likely do not pay property taxes on such vehicles, thereby depriving local governments and school districts of vitally needed revenues; that it is probable that the owners of unlicensed new motor vehicles have not paid the sales tax on such new vehicles thereby depriving the state of a significant amount of tax revenues; that it is also probable that these owners have not complied with mandatory insurance requirements, thereby increasing the potential financial catastrophe to others involved in accidents with them; and that this act is designed to promote the enforcement of Arkansas' motor vehicle licensing laws.
>
> (b) It is further found and determined by the General Assembly that penalties for failure to obtain motor vehicle insurance are prescribed by Arkansas law; that enhancing penalties for second and third offenses of the liability insurance requirement will increase compliance with the requirement; therefore it is also the purpose of this act to enhance the penalties for repeat offenses of the liability insurance requirement.

[redacted] Based on the plain language and the legislative history of these provisions, we decline to impose civil liability on a motor vehicle owner solely for failing to insure his or her motor vehicle. Under the above-quoted provisions, it is the operator of the motor vehicle, and not the owner, who is the focus of the statutory prohibition. Section 27-22-104(a)(1) makes it unlawful for any person to operate an uninsured motor vehicle. Similarly, a rebuttable presumption that a motor vehicle is uninsured only arises if there is no proof of insurance at the time of a traffic stop. Ark. Code Ann. § 27-22-104(a)(2). Section 27-22-103 authorizes fines against operators of uninsured motor vehicles. The legislature clearly intended to distinguish operators from owners of motor vehicles by imposing criminal liability solely on the operator of an uninsured motor vehicle that is involved in an accident, while the owner's responsibility is limited to paying the costs of impoundment. Ark. Code Ann. § 27-22-105. In distinguishing the operator from the owner, the legislature has recognized that an owner is not always the operator of the motor vehicle. Additionally, the legislative history indicates that the legislature's primary purpose in amending the automobile licensing and insurance laws was not to impose civil liability on motor vehicle owners, but to protect

against the loss of a significant amount of tax revenues. 1991 Ark. Law Acts 988, § 1 (1991) (codified at Ark. Code Ann. § 27-22-104 (2004)).

Moreover, Branscumb's proposed theory would implicitly create a negligence *per se* cause of action. Under Arkansas law, in order to prevail on a claim of negligence, the plaintiff must prove that the defendant owed a duty to the plaintiff, that the defendant breached the duty, and that *the breach was the proximate cause of the plaintiff's injuries. See Wilson v. Rebsamen Ins., Inc.,* 330 Ark. 687, 957 S.W.2d 678 (1997). In this case, a third party was operating Freeman's motorcycle when the accident occurred. Because Freeman's failure to insure the vehicle could never be the proximate cause of the accident and resulting injuries, Branscumb would only be able to prevail under a negligence *per se* theory of liability. As explained earlier, the relevant statutory provisions reflect no such intent by the legislature.

Branscumb further contends that this court has previously imposed civil liability where a statute is silent on the issue of civil liability. *Jackson v. Cadillac Cowboy, Inc.*, 337 Ark. 24, 986 S.W.2d 410 (1999); *Shannon v. Wilson,* 329 Ark. 143, 947 S.W.2d 349 (1997). His reliance on those cases, however, is misplaced. In *Shannon,* we said that the violation of Ark. Code Ann. § 3-3-202 (Repl. 1996), which prohibits the sale of alcohol to minors, by licensed alcohol vendors is evidence of negligence to be submitted to the jury. In so holding, we modified our judicially-created common law rule, as set forth in *Carr v. Turner,* 238 Ark. 889, 385 S.W.2d 656 (1965), under which providers of alcohol may not be held liable for damages arising out of the negligent operation of motor vehicles. The decision to modify our common law rule, however, was based in large measure upon the legislature's enactment of section 3-3-202. In that statute, the legislature explicitly expressed an intent to protect minors as a special class of citizens and it placed an affirmative duty on licensed vendors to safeguard against selling alcohol to minors. Similarly, in *Jackson v. Cadillac Cowboy, Inc.,* the court extended the holding in *Shannon* by recognizing a cause of action for negligence against licensed vendors who sell liquor to intoxicated persons. We concluded that the high duty of care imposed by the legislature on licensed alcohol vendors, as expressed in Ark. Code Ann. § 3-3-218(a) & (b) (Repl. 1996), was sufficient for us to extend the *Shannon* holding. *Jackson v. Cadillac Cowboy, Inc., supra.*

With regard to the instant case, *Shannon* and *Cadillac Cowboy* are clearly inapposite. In those cases, we relied upon the high duty of care that has been statutorily imposed on licensed alcohol vendors. In contrast, the legislature has taken no action to indicate its intent to specifically hold the *owner* of an uninsured motor vehicle responsible for a third party's operation of that vehicle based solely upon the uninsured status of the vehicle. The relevant statutes place the duty on the operator; that is, it is "unlawful for any person to operate" an uninsured motor vehicle, and it is the operator who may be criminally liable for "driving an inadequately insured vehicle which has been involved in an accident." Ark. Code Ann. §§ 27-22-104(a)(1) & 27-22-105. Accordingly, we decline to recognize a private cause of action for negligence against the owner of an uninsured motor vehicle based solely upon a violation of the Arkansas Motor Vehicle Safety Responsibility Act and the Arkansas Motor Vehicle Liability Insurance Act.[3]

Affirmed.

Mary RODRIGUEZ *v.* ARKANSAS DEPARTMENT of HUMAN SERVICES and Minor Children

03-1466 200 S.W.3d 431

Supreme Court of Arkansas
Opinion delivered December 16, 2004

[Rehearing denied January 20, 2005.]

[3] The Missouri Court of Appeals made a similar holding in *Wise v. Crump*, 978 S.W.2d 1 (Mo. Ct. App. 1998).

DeeNita D. Moak, for appellant.

Gray Allen Turner, for appellee.

ANNABELLE CLINTON IMBER, Justice. Mary Rodriguez appeals from the Faulkner County Circuit Court's order terminating her parental rights as to two of her children, Rosalinda and Imelda Rodriguez. We affirm the circuit court.

Rosalinda and Imelda are the children of Mary and Arturo Rodriguez. Arturo resides in Mexico, but Mary, a citizen of the United States who was born in Ohio, currently resides in Damascus, Arkansas. On August 24, 2001, the Arkansas Department of Human Services (DHS) placed a 72-hour hold on Rosalinda and Imelda for their safety and protection due to the possible threat of Mary returning to Mexico with the children. Rosalinda and Imelda were removed from Mary's custody after DHS filed a petition for emergency custody. An affidavit by a DHS employee averred that Mary was not providing the children with a proper education, as Mary home schooled the children with a questionable curriculum that she called "Phonics." Additionally, the affidavit stated that the house was "full of fleas, mice, rodents, [and other] animals, and was piled with trash," and one child suffered an ear infection that remained untreated because Mary was afraid of taking the child to the doctor for fear of the records being used by DHS to trace and locate the children.

On August 27, 2001, the Juvenile Division of the Faulkner County Circuit Court entered an emergency order, placing custody of the children with DHS. Following Mary's waiver of a probable cause hearing, the circuit court entered a probable cause order on September 25, 2001. In the order, the court awarded temporary custody to Paula Sullivan, the children's older half-sister; directed DHS to develop an appropriate case plan for the children and family; and authorized DHS to arrange supervised visitation with Mary and to provide a Spanish interpreter[1] during the visits so as to assure that no inappropriate communications occurred between Mary and the children. In a review order entered on December 5, 2001, the circuit court ordered Mary to

[1] Mary and both the children are bilingual in Spanish and English.

undergo a psychological evaluation by Dr. Paul DeYoub, a clinical psychologist. Another review order dated February 27, 2002, found that the case plan, services, and placement of the children met their needs and interests. In addition, the court concluded that DHS no longer had to provide a Spanish interpreter for visitation, that DHS was relieved of providing services to Mary other than visitation, and that Mary was prohibited from making phone calls to Paula Sullivan's home where the children resided. A permanency planning hearing was scheduled for April 9, 2002. On August 30, 2002, following its determination that DHS had complied with the terms of the case plan by making reasonable efforts to deliver reunification and permanency services to Mary, the circuit court accepted DHS's amended permanency plan to terminate her parental rights. Shortly thereafter, on September 17, 2002, DHS petitioned the circuit court to terminate Mary's parental rights; but, meanwhile, the circuit court placed the children in the temporary custody of relatives who reside in other states.[2] On November 22, 2002, the circuit court terminated the parental rights of Mary and Arturo.

Mary initially appealed to the Arkansas Court of Appeals. The court of appeals reversed the circuit court's order terminating Mary's parental rights, holding that the circuit court "erred in determining that Mary's due process rights afforded by the statutorily-required case plan had not been violated, even though the case plan was not introduced into evidence." The court of appeals reasoned that it was unable to review whether Mary's due process rights were violated because DHS failed to introduce the case plan as part of the record below. The court of appeals further held that admission of the psychological report, prepared by Dr. DeYoub, was reversible error. Finally, the court of appeals found that the circuit court relied on the report to make judgmental statements and to reach conclusions before the report was admitted into evidence. This case comes to us by a grant of petition for review pursuant to Rule 2-4 of the Arkansas Rules of the Supreme Court.

Upon a petition for review, we consider a case as though it had been originally filed in this court. *McCoy v. State*, 347

[2] The children's sister, Wendy Doran, resides in Louisiana; Mary's sister, Judy Keller, resides in Michigan.

Ark. 913, 69 S.W.3d 430 (2002). We recently set forth our standard of review in parental rights-termination cases:

> Arkansas Code Annotated section 9-27-341(b)(3) (Supp.1999) requires an order terminating parental rights be based upon clear and convincing evidence. *Larscheid v. Arkansas Department of Human Services*, 343 Ark. 580, 36 S.W.3d 308 (2001) (citing *Baker v. Arkansas Dept. of Human Servs.*, 340 Ark. 408, 12 S.W.3d 200 (2000)). Our law is well settled that when the burden of proving a disputed fact in chancery court is by clear and convincing evidence, the question that must be answered on appeal is whether the chancery court's finding that the disputed fact was proven by clear and convincing evidence was clearly erroneous. *Id.* (citing *J.T. v. Arkansas Dept. of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997); *Anderson v. Douglas,* 310 Ark. 633, 839 S.W.2d 196 (1992)). Clear and convincing evidence is that degree of proof that will produce in the fact finder a firm conviction as to the allegation sought to be established. *Id.* In resolving the clearly erroneous question, we must give due regard to the opportunity of the chancery court to judge the credibility of witnesses. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Gregg v. Arkansas Dep't of Human Servs.*, 58 Ark.App. 337, 952 S.W.2d 183 (1997). Cases such as this are reviewed *de novo* on appeal. *Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999).

Dinkins v. Arkansas Dept. of Human Serv., 344 Ark. 207, 40 S.W.3d 286 (2001). *See also Wade v. Arkansas Dept. of Human Serv.*, 337 Ark. 353, 990 S.W.2d 509 (1999).

In the brief that Mary submitted to the Arkansas Court of Appeals, she raised only two points of error: first, that she was denied due process because DHS failed to comply with Ark. Code Ann. § 9-27-402(c)(5)(A)(2004); second, that the circuit court erred in admitting Dr. DeYoub's report into evidence. The briefs submitted to this court, however, are significantly different in that Mary has included four additional points on appeal.[3]

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[3] These four additional points are as follows:

1. The trial court erred in admitting hearsay testimony of witnesses, irrelevant testimony of witnesses, and irrelevant exhibits.

We accept petitions for review pursuant to Rule 2-4 of the Arkansas Rules of the Supreme Court. This rule clearly states that, "[w]hen the Supreme Court grants a petition for review, the Clerk shall promptly notify all counsel and parties appearing pro se. Within two weeks of the notification, *fourteen additional copies of the briefs previously submitted to the Court of Appeals* shall be filed with the Clerk." Ark. Sup. Ct. R. 2-4(e) (2004) (emphasis added). In addition, our rule allows parties, after permission is granted, to file supplemental and reply briefs, but those may not exceed 10 pages in length. Ark. Sup. Ct. R. 2-4(f). While we did grant the parties permission to file supplemental and reply briefs and we granted Mary permission to file a substituted brief in order to cure deficiencies in her abstract and addendum, Ark. Sup. Ct. R. 4-2(b) (2004), this does not give Mary permission to raise points on appeal that were not originally submitted to the court of appeals for review. Accordingly, we decline to consider any point on appeal that was not originally submitted to the court of appeals.

In her first point on appeal, Mary contends that she was denied due process because DHS failed to comply with Ark. Code Ann. § 9-27-402 (c)(5)(A). This section states in pertinent part:

> (c) When the juvenile is receiving services in an out-of-home placement, the case plan must include at a minimum, in addition to the requirements in subsections (a) and (b) of this section:
>
> (5)(A) The specific actions to be taken by the parent, guardian, or custodian of the juvenile to eliminate or correct the identified problems or conditions and the period during which the actions are to be taken.

Ark. Code Ann. § 9-27-402(c)(5)(A). More specifically, Mary asserts that DHS failed to specify in the case plan the actions she needed to

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2. The trial court erred in terminating the parental rights of appellant when no evidence was presented in the State's case in chief at the termination of parental rights hearing.

3. The trial court erred in denying appellant a hearing on the issue of placement prior to removing her children from the jurisdiction of the State of Arkansas to allow guardianships to be established in another jurisdiction.

4. The trial court erred in finding that there was sufficient evidence to terminate the parental rights of the appellant.

take to achieve reunification with her children, thereby denying her due process of law. In rebuttal, DHS suggests that Mary abandoned her due process argument on appeal because her *mere* assertion of a due process violation is not sufficient to preserve the point for appellate review.

First, this court cannot determine whether Mary's due process rights were violated based on the case plan's lack of specificity because we have no case plan in the record to review. While there is evidence in the record that a case plan existed, it is not included in the record before us. In the notice of appeal, Mary designated the "entire record" for the purpose of this appeal. Rule 3-1(n) of the Rules of the Arkansas Supreme Court specifically states what is meant by the term "record" for purposes of appeal: "The term 'record' in civil cases, and as used in these Rules, refers only to the pleadings, judgment, decree, order appealed, transcript, exhibits, and certificates." Ark. Sup. Ct. R. 3-1(n) (2004). Furthermore, according to the Rule 3-2, the record to be transmitted to this court by the circuit clerk shall "include all matters in the record as required by Rule 3-1(n)." Ark. Sup. Ct. R. 3-2 (2004). Thus, the "entire record" could be properly prepared and transmitted by the circuit clerk under our rules without including the case plan even though the plan had in fact been filed in accordance with Ark. Code Ann. § 9-27-402 (c)(5)(A).

We have consistently said that it is the duty of the appellant to bring up an adequate record for our review. *Clowney v. Gill*, 326 Ark. 253, 929 S.W.2d 720 (1996); *City of Benton v. Arkansas Soil & Water Conservation Comm'n.*, 345 Ark. 249, 45 S.W.3d 805 (2001)(citing *Hankins v. Dept. of Fin. & Admin.*, 330 Ark. 492, 954 S.W.2d 259 (1997)). Failure to do so precludes our review. *Id.* As noted earlier, it is entirely possible that the case plan at issue here was filed but not included in the record because it was not introduced and admitted into evidence. If Mary believed that the case plan lacked specificity, it was her responsibility to support her claim by introducing the plan into evidence. The basis of such a claim would necessarily be the contents of the challenged document. In any event, even if the case plan was not properly filed below, the record before us does not reflect an objection to the lack of a filed case plan. Furthermore, Mary has cited no case law in support of her due process claim. Assignments of error unsupported by convincing argument or authority will not be

considered on appeal, unless it is apparent without further research that the point is well taken. *Hodges v. Lamora*, 337 Ark. 470, 989 S.W.2d 530 (1999).

Mary's second point on appeal is her claim that the court erred in admitting the report of Dr. DeYoub into evidence. While Mary initially objected to the report's admissibility as hearsay, the report was subsequently admitted into evidence without objection as part of a court report at the permanency planning hearing.

To preserve an objection for appeal, a timely and appropriate objection must be made. *Leavy v. State*, 314 Ark. 231, 862 S.W.2d 832 (1993). When no objection is made, the argument that the evidence is inadmissible is not preserved for appeal. *Id.* However, even when a proper objection is initially made, to properly preserve the argument for appeal, the appellant must renew that objection when the appellee subsequently attempts to introduce the same evidence. *See Baker v. State*, 334 Ark. 330, 974 S.W.2d 474 (1998); *Mills v. State*, 321 Ark. 621, 623, 906 S.W.2d 674 (1995). Given the subsequent admission of the report by DHS, without objection by Mary, we hold that this issue was not preserved for our review on appeal, and we affirm the circuit court.

Affirmed.

DAIMLERCHRYSLER SERVICES NORTH AMERICA, LLC *v.* Richard WEISS, Director of Department of Finance and Administration and Timothy Leathers, Commissioner of Revenue

04-284 200 S.W.3d 405

Supreme Court of Arkansas
Opinion delivered December 16, 2004

[Rehearing denied January 20, 2005.]

Akerman Senterfitt, by: *Peter O. Larsen* and *David E. Otero*; and *Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.*, by: *John K. Baker*, for appellant.

Ronna L. Abshure and *Martha G. Hunt*, Revenue Legal Counsel, for appellee.

JIM HANNAH, Justice. Appellant DaimlerChrysler Services North America, LLC ("Chrysler") appeals the order of dismissal of the Pulaski County Circuit Court, Seventeenth Division, wherein the circuit court found that it lacked jurisdiction to award a "bad debt" refund to Chrysler because Chrysler is not a "taxpayer" for the purposes of Ark. Code Ann. § 26-52-309 (Repl. 1997), which is commonly known as the "Bad Debt Statute." We find no error and,

accordingly, we affirm. This is an appeal required by law to be heard by this court; our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(8). *See also* Ark. Code Ann. § 26-18-406 (Repl. 1997).

Facts

Chrysler sold and leased motor vehicles and financed the sale of motor vehicles from motor-vehicle dealerships (collectively referred to as "sellers") to consumer purchasers. In a typical transaction, the consumer purchaser entered into an installment contract for the purchase of a motor vehicle from the seller. The amount financed included the purchase price of the motor vehicle, as well as the gross receipts tax due on the vehicle, which the seller paid to the State. The seller then assigned the installment contract to Chrysler, and Chrysler collected the payments. In return, Chrysler paid the seller the full financed amount. At some point during the period of repayment, the purchaser defaulted on the installment contract. After resorting to available remedies against the purchaser, Chrysler wrote off the uncollectible portion of the debt for federal income tax purposes.

On February 16, 2000, Chrysler filed a claim with appellee Department of Finance and Administration (DF&A) for a refund or deduction of the pro rata portion of gross receipts tax related to bad debts arising out of the sale and financing of motor vehicles in Arkansas. The claim was filed pursuant to the Bad Debt Statute, which allows taxpayers that finance sales transactions a deduction or refund for gross receipt tax that was previously reported and remitted, but is now uncollectible. DF&A determined that Chrysler was not a taxpayer under the Bad Debt Statute and denied Chrysler's claim for a refund.

Pursuant to Ark. Code Ann. § 26-18-406, Chrysler appealed DF&A's decision to the circuit court, and in an order entered on November 13, 2003, the circuit court dismissed the case, holding that Chrysler was not a "taxpayer" for the purposes of the Bad Debt Statute and, as such, Chrysler was not entitled to a deduction. Chrysler's sole point on appeal is that the circuit court erred in finding that it lacked jurisdiction to award a deduction on the ground that Chrysler is not a "taxpayer" for the purposes of the Bad Debt Statute.

Standard of Review

As a general rule, in reviewing the grant of a motion for summary judgment, the appellate 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. *Mack v. Brazil, Adlong, & Winningham, PLC*, 357 Ark. 1, 159 S.W.3d 291 (2004). The appellate 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, the granting of this summary judgment motion was based upon the circuit court's interpretation of the Bad Debt Statute. The question of the correct application and interpretation of an Arkansas statute is a question of law, which this court decides *de novo*. *Cooper Realty Invs., Inc. v. Arkansas Contractors Licensing Bd.*, 355 Ark. 156, 134 S.W.3d 1 (2003).

A tax deduction is allowed only as a matter of legislative grace and one claiming the deduction bears the burden of proving that he is entitled to it and of bringing himself clearly within the terms and conditions as may be imposed by the statute. *St. Louis Southwestern Ry. Co. v. Ragland*, 304 Ark. 1, 4, 800 S.W.2d 410, 412 (1990); *Skelton v. B.C. Land Co.*, 256 Ark. 961, 513 S.W.2d 919 (1974). Similarly, we have held in numerous tax-exemption cases that any tax exemption must be strictly construed against the exemption and any doubt suggests the exemption should be denied. *See, e.g., Rineco Chem. Indus., Inc. v. Weiss*, 344 Ark. 118, 40 S.W.3d 257 (2001); *Technical Servs. of Ark., Inc. v. Pledger*, 320 Ark. 333, 896 S.W.2d 433 (1995); *Pledger v. C.B. Form Co.*, 316 Ark. 22, 871 S.W.2d 333 (1994); *Southwestern Ry., supra.*

In this case, the circuit court's decision denying Chrysler's claim to a deduction is based upon the circuit court's construction of "taxpayer" under the Bad Debt Statute. This court outlined our rules of statutory construction in *Faulkner v. Arkansas Children's Hospital*, 347 Ark. 941, 952, 69 S.W.3d 393, 400 (2002), where we stated:

> The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Raley v. Wagner*, 346 Ark. 234, 57 S.W.3d 683 (2001); *Dunklin v. Ramsay*, 328 Ark. 263, 944 S.W.2d 76 (1997). When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Stephens v. Arkansas Sch. for the Blind*, 341 Ark. 939,

> 20 S.W.3d 397 (2000); *Burcham v. City of Van Buren,* 330 Ark. 451, 954 S.W.2d 266 (1997). Where the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Stephens v. Arkansas Sch. for the Blind, supra* (citing *State v. McLeod,* 318 Ark. 781, 888 S.W.2d 639 (1994)). Finally, the ultimate rule of statutory construction is to give effect to the intent of the General Assembly. *Ford v. Keith,* 338 Ark. 487, 996 S.W.2d 20 (1999); *Kildow v. Baldwin Piano & Organ,* 333 Ark. 335, 969 S.W.2d 190 (1998).

With this standard of review in mind, we turn to Chrysler's argument on appeal.

Meaning of "Taxpayer" for the Purposes of the Bad Debt Statute

Chrysler contends that the circuit court's construction of "taxpayer" under the Bad Debt Statute is erroneous because it conflicts with the plain language and legislative intent of the statute.

Section 26-52-309 provides:

> (a) In computing the amount of tax due under the Arkansas Gross Receipts Act, § 26-52-101 et seq., and any act supplemental thereto, taxpayers may deduct bad debts from the total amount upon which the tax is calculated for any report. Any deduction taken or refund paid which is attributed to bad debts shall not include interest.
>
> (b)(1) For purposes of this section, "bad debt" means any portion of a debt for an amount which a taxpayer has reported as taxable which the taxpayer legally claims as a bad debt deduction for federal income tax purposes.
>
> (2) Bad debts include, but are not limited to, worthless checks, worthless credit card payments, and uncollectible credit accounts.
>
> (3) Bad debts do not include financing charges or interest, uncollectible amounts on property that remain in the possession of the taxpayer or vendor until the full purchase price is paid, expenses incurred in attempting to collect any debt, debts sold or assigned to third parties for collection, and repossessed property.

(c) Bad debts incurred for sales made prior to November 9, 1983, shall not be deducted.

(d) Bad debts must be deducted within three (3) years of the date of the sale for which the debt was incurred.

(e) If a deduction is taken for a bad debt and the taxpayer subsequently collects the debt in whole or in part, the tax on the amount so collected shall be paid and reported on the next return due after the collection.

In this case, the parties agree that Chrysler was the source of payment of the gross receipts tax due on the motor vehicles. However, the party who actually paid the gross receipts tax is not automatically a "taxpayer" for the purposes of the Bad Debt Statute. To be a "taxpayer" for the purposes of the Bad Debt Statute, Chrysler must be a "person liable to remit a tax hereunder or to make a report for the purpose of claiming any exemption from payment of taxes levied by [the Gross Receipts Act.]" Ark. Code Ann. § 26-52-103(a)(5) (Repl. 1997). We first note that Chrysler is a "person" under the Bad Debt Statute, as limited liability companies are included within the definition of "person." *See* Ark. Code Ann. § 26-52-103(a)(1) (Repl. 1997). While it is clear that Chrysler was the source of payment of the gross receipts tax to the State, the parties disagree on the issue of whether Chrysler was *liable* to remit the tax. "Liable" is not defined for the purposes of the Bad Debt Statute. *Black's Law Dictionary* defines "liability," in part as:

1. The quality or state of being legally obligated or accountable; . . .

2. A financial or pecuniary obligation; DEBT < tax liability > . . .

932 (8th ed. 2004).

DF&A contends that for the purposes of the motor vehicle gross receipts tax, the taxpayer, or person liable to remit the tax, is the consumer. Section 26-52-510(a)(1)(A) (Repl. 1997) provides:

The tax levied by this chapter and all other gross receipts taxes levied by the state *in respect to the sale of new or used motor vehicles*, trailers, or

> semitrailers *required to be licensed in this state shall be paid by the consumer* to the Director of the Department of Finance and Administration instead of being collected by the dealer or seller, and it is the mandatory duty of the director to require the payment of such tax at the time of registration before issuing licenses for new or used motor vehicles or trailers.

(Emphasis added.) DF&A's argument is well-taken. Clearly, Chrysler is not liable to remit the tax.

Chrysler next argues that it is a taxpayer because it possesses an Arkansas Sales and Use Tax Permit and pays substantial tax in Arkansas. DF&A points out that Chrysler's sales and use tax permit provides that Chrysler is engaged in the business of "automobile leasing." The permit does not describe Chrysler as being engaged in the business of the sale of motor vehicles. DF&A argues that since Chrysler is not *required* to remit taxes and make reports of those taxes for motor vehicle gross receipts tax and make reports of that tax, then Chrysler cannot claim that it is a "taxpayer" in the sale of motor vehicles. We agree with DF&A's contention that it is possible to be a taxpayer for one kind of tax, while not a taxpayer for another kind of tax.

Chrysler goes on to argue that even if it is not a "taxpayer" as defined under § 26-52-103(a)(5), it is a taxpayer under DF&A's Regulation 1994-3.

That regulation provides in part:

> Pursuant to authority given the Commission of Revenues by subsection (b) of Section 1 of Act 293 of 1991 (Ark. Code Ann. §§ 27-14-906(b)), after the effective date of this regulation, *lienholders* and motor vehicle dealers *may apply for registration and certificates of title on behalf of the purchasers* of new or used vehicles. . . . The dealer or *lienholder* shall file the application with the Commissioner, shall attach thereto a copy of the instrument creating and evidencing the lien or encumbrance and *shall pay all taxes* and fees due *for such registration and issuance of a title.*

We agree with DF&A's contention that the only party who is *liable* to pay the motor vehicle gross receipts tax is the consumer. Regulation 1994-3 *allows* lienholders to pay gross receipts tax *on behalf of* consumers; however, this allowance does not transfer ultimate liability of payment of the gross receipts tax from the consumer to the lienholder.

Chrysler further argues that it is a "taxpayer" because it meets the requirements of a "taxpayer" as defined by the Arkansas Tax Procedure Act, which is codified at Ark. Code Ann. § 26-18-101 (Repl. 1997). A "taxpayer" under this Act is defined as follows:

> (A) Any person subject to or liable for any state tax;
>
> (B) Any person required to file a return, or to pay, or withhold and remit any tax required by the provisions of any state tax law; or
>
> (C) Any person required to obtain a license or a permit or to keep any records under the provisions of any state tax law; . . .

Ark. Code Ann. § 26-18-104(14) (Repl. 1997).

We need not address the merits of Chrysler's argument that it is a "taxpayer" under the Arkansas Tax Procedure Act. The Bad Debt Statute is a part of the Arkansas Gross Receipts Act, and "taxpayer" is specifically defined under that Act, for the purposes of that Act. We have long held that a general statute must yield when there is a specific statute involving particular subject matter. *See, e.g., Ozark Gas Pipeline Corp. v. Arkansas Pub. Serv. Comm'n*, 342 Ark. 591, 29 S.W.3d 730 (2000); *Shelton v. Fiser*, 340 Ark. 89, 8 S.W.3d 557 (2000).

Next, Chrysler argues that as an assignee of the sellers, Chrysler is a "taxpayer" entitled to relief under the Bad Debt Statute. Chrysler states:

> . . . in the event that this Court determines that the Sellers are "taxpayers" under the Bad Debt Statute, Chrysler also is a "taxpayer" by assignment under Arkansas' common law of assignment, and is therefore entitled to a refund or deduction because the Sellers assigned all of their rights under the Bad Debt Statute to Chrysler. The circuit court agreed this is a solid argument and this is not an issue on appeal.

While the circuit court does state that "Chrysler sets forth a solid argument," the circuit court concludes that "the Sellers are not taxpayers as defined by the Arkansas Code." Since Chrysler states that this is "not an issue on appeal," we do not address it.

Affirmed.

BROWN, J., concurring.

THORNTON, J., not participating.

ROBERT L. BROWN, Justice, concurring. I concur with the result reached by the majority opinion, but do so with serious misgivings. The result of today's decision is to render the Bad Debt Statute, Ark. Code Ann. § 26-52-309 (Repl. 1997), useless for transactions involving motor vehicle financing. This means those lenders who finance car sales are unable to collect a refund of sales taxes paid on uncollectible debts. Thus, a major sector of our business community is treated differently from all other sales transactions in our state. As a result, lenders on car sales pay a tax they do not owe, and the State realizes a considerable windfall. I would hope that the General Assembly will look closely at this situation at its next regular session, commencing in January.

The majority rationalizes its decision on the basis that sales tax refunds for uncollectible bad debt are only available to "taxpayers." Lenders of the money to pay the sales tax are not defined as taxpayers under Ark. Code Ann. § 26-52-103(a)(5) (Repl. 1997), says the majority, because lenders are not *liable* to pay the sales tax. The majority refers to Ark. Code Ann. § 26-52-510(a)(1)(A) (Repl. 1997), where it is the consumer who is directed to pay the sales tax on motor vehicle purchases.

The problem with the majority's analysis is that it renders the Bad Debt Statute meaningless for sales of motor vehicles when financing is involved. In today's world, it is a rare new-car sale where the price is paid in cash. Without question, financing a car purchase is the preferred method for the vast majority of consumers. Yet, the majority's analysis forecloses the lender, who actually provides the money to pay the sales tax, from collecting a refund for the portion of the tax paid on the bad debt. Who then would be available to collect the refund under the Bad Debt Statute? Not the seller/dealer, because no debt is owing to it. The dealer has been paid the purchase price in full. Not the consumer/purchaser. He or she did not pay the sales tax but owes that amount to the lender. As a result, under the majority's interpretation, no entity or person can claim a bad debt refund when a motor vehicle loan is involved.

Though the majority does not expressly state this, it has concluded, in effect, that motor vehicle transactions are excluded from refunds under the Bad Debt Statute, even though the General

Assembly never makes that declaration in the statute. The majority is simply reading in an exception that is not there. Lenders like Daimler Chrysler no doubt are puzzled as to why the statute does not apply to them. They have paid a tax they do not owe; yet, the State keeps the money and realizes a windfall and refuses to extend them the refund privilege. That is not right.

Having said that, the Bad Debt Statute is not a model of clarity. And though the statute does not expressly exempt motor vehicle sales, some meager doubt is raised because other statutes do treat payment of the sales tax on motor vehicle sales differently from sales of ordinary tangible property. *Compare* Ark. Code Ann. § 26-52-510 (Repl. 1997) (consumers pay the sales tax directly to the State for car purchases) *to* Ark. Code Ann. § 26-52-508 (Repl. 1997) (sellers collect sales tax on sales of tangible personal property and remit to State). Our standard of review for an exemption or deduction from paying a tax is that we strictly construe the statute against an exemption and if there is any doubt, the exemption or deduction should be denied. *See, e.g., St. Louis Southwestern Ry. Co. v. Ragland*, 304 Ark. 1, 800 S.W.2d 410 (1990). Though I think the majority's analysis on the liability to pay the tax is questionable, I must confess to some doubt as to what the General Assembly intended for refunds for bad debts associated with motor vehicle sales.

There is one final point about the majority opinion. It does not discuss Daimler Chrysler's assignment argument which the trial court addressed and which Daimler Chrysler argues on appeal. The seminal case on this point, *Puget Sound Nat'l Bank v. State Dep't of Revenue*, 123 Wash. 2d 284, 868 P.2d 127 (1994), holds that the Washington State bad debt statute did not prohibit the refund of assigned sales tax refunds to lenders; nor did public policy prohibit the assignment of a tax refund, since any other rule would be inequitable and entitle the state to a financial windfall. That issue needs to be resolved.

For these stated reasons, I concur only in the result.

SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY *v.* Barbara SPEARS and Jerl Saeler

04-815 200 S.W.3d 436

Supreme Court of Arkansas
Opinion delivered December 16, 2004

[redacted]

[redacted]

Wright, Berry, Hughes & Moore, by: *Rodney P. Moore*, for appellant.

Holleman & Associates, P.A., by: *John T. Holleman, IV*, and *Stacy D. Fletcher*, for appellees.

JIM HANNAH, Justice. Appellant Southern Farm Bureau Casualty Insurance (Farm Bureau) appeals from a jury verdict in Dallas County Circuit Court in favor of appellee Barbara Spears. Spears was driving a car owned by Jerl Saeler when a Coyote C-26 front-end loader, owned by the City of Fordyce and operated by Joseph Watson, collided with the vehicle. The jury found that Spears was entitled to uninsured-motorist coverage under an automobile policy with Farm Bureau, awarding damages in the amount of $15,188. Farm Bureau moved for judgment notwithstanding the verdict, which was denied.

On appeal, Farm Bureau argues that the circuit court erred in denying its motion for judgment notwithstanding the verdict because the jury delivered inconsistent verdicts and because Spears failed to meet her burden of proving that the front-end loader was an uninsured auto as defined in the insurance policy under which Spears was insured. In addition, Farm Bureau argues that the circuit court erred in instructing the jury that ambiguous terms in the insurance policy were to be construed against the insurer because Spears failed to present proof that the insurance policy contained ambiguous terms.

We hold that the circuit court erred in denying Farm Bureau's motion for judgment notwithstanding the verdict and, accordingly, we reverse and dismiss. As this is the second appeal of this matter to this court, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(7).

Facts

A full recitation of the facts was set forth in the prior appeal of this case. *Spears v. City of Fordyce*, 351 Ark. 305, 92 S.W.3d 38 (2002) (*Spears I*). Here, we recite the facts that are pertinent to this appeal. In *Spears I*, Spears[1] filed a complaint against the City of Fordyce, Joseph Watson, the operator of the front-end loader, and the Arkansas Public Entities Association (collectively referred to as "the City"), alleging that she suffered physical injuries and prop-

[1] Both Spears and Saeler, the owner of the vehicle Spears was driving, filed suit. For convenience, we refer only to Spears.

erty damages as a result of the negligence of the City of Fordyce and Joseph Watson. In addition, Spears claimed that she was entitled to receive benefits from Farm Bureau, based on an underinsured-motorist policy. The City filed a motion for summary judgment, arguing in part that the City was not required to carry liability insurance on the front-end loader because it was not a motor vehicle. Subsequently, Spears amended her complaint and alleged that in the event the circuit court determined that the City was immune from suit, she was entitled to recover the entire policy limits from an uninsured-motorist policy.

The circuit court granted the City's motion for summary judgment, finding that the City was immune from liability except to the extent of coverage by liability insurance. Further, the circuit court found that insurance coverage was not required for the front-end loader because it was "special mobile equipment" pursuant to Ark. Code Ann. § 27-14-211 (Repl. 1994), and, as such, was not subject to registration with the State pursuant to Ark. Code Ann. § 27-14-703 (Repl. 1994).

Farm Bureau filed a motion for summary judgment, arguing that Spears's claim for benefits from the uninsured-motorist policy was improper because the front-end loader was not an "auto" as defined in the policy. The circuit court granted Farm Bureau's motion for summary judgment, finding that a front-end loader was special mobile equipment and was not a vehicle that was designed primarily to be used on public roads. Based on this finding, the circuit court concluded that Spears could not recover from the uninsured-motorist policy. In that case, we reversed and remanded the order of the Dallas County Circuit Court granting summary judgment in favor of the City of Fordyce, Joseph Watson, and the Arkansas Public Entities Risk Management Association.

Spears raised two points on appeal in *Spears I*. In her first point on appeal, she argued that the circuit court erred in determining that the front-end loader was "special mobile equipment" and, thus, not subject to registration with the State. We agreed and concluded that the appellants raised a genuine issue of fact as to whether the operation of the front-end loader on public roads was frequent and regular or merely incidental. *See Spears I*, 351 Ark. at 315, 92 S.W.3d at 44. Accordingly, we found that until this disputed factual question was resolved, it was impossible for us to determine whether the front-end loader is excepted from the statutory definition of "motor vehicle." *See id.*

In her second point on appeal, Spears argued that the circuit court erred when it granted Farm Bureau's motion for summary judgment. We held that the motion for summary judgment was premature, stating:

> Specifically, we conclude that the issue of whether appellants may recover from Farm Bureau is not ripe for consideration until the issue of whether the City was required to carry insurance on the front-end loader is resolved. Because we have determined that this issue is not yet resolved, any consideration by the trial court of a motion for summary judgment in favor of Farm Bureau was premature, and any review by this court of the disposition of such a motion would also be premature. Accordingly, we decline to consider the merits of appellants' second point on appeal.

Spears I, 351 Ark. at 315, 92 S.W.3d at 44.

After our reversal in *Spears I*, in a bifurcated trial, the jury found by a preponderance of the evidence that the front-end loader owned and operated by the City constituted "special mobile equipment" as defined in § 27-14-211.[2] Farm Bureau moved for a directed verdict. The circuit court denied the motion and submitted to the jury the issue of whether Spears was entitled to recover damages from Farm Bureau through uninsured-motorist coverage.

The jury returned a verdict in favor of Spears and fixed her damages at $15,188.00. Subsequently, Farm Bureau filed a motion for judgment notwithstanding the verdict, raising the same arguments that it does here on appeal. The circuit court denied the motion, and this appeal followed.

Inconsistent Jury Verdicts

We begin by addressing Farm Bureau's argument that the jury verdicts in this case are inconsistent because as a matter of law, once the jury determined that the front-end loader was "special mobile equipment" in Spears's case against the City, it could not then determine that the front-end loader was an "auto" in Spears's case against Farm Bureau. Specifically, Farm Bureau contends that upon the jury's determination that the front-end loader was special mobile equipment, the question of whether or not the uninsured-

[2] Spears does not appeal this finding.

motorist protection of the insurance policy applied was resolved because the front-end loader could not be both "special mobile equipment" and an "auto" at the same time. We disagree with Farm Bureau's argument that the issue was *resolved* once the jury determined that the front-end loader was special mobile equipment in Spears's case against the City. Rather, the issue of whether the front-end loader was special mobile equipment was the *threshold* issue in this case. Section 27-14-211 provides in part:

> "Special mobile equipment" means every vehicle *not designed or used primarily for the transportation of persons or property* and incidentally operated or moved over the highways, including farm tractors, road construction or maintenance machinery, ditch-digging apparatus, well-boring apparatus, and concrete mixers.

(Emphasis added.)

Since municipalities are immune from liability and from suit for damages except to the extent that they may be covered by liability insurance, *see* Ark. Code Ann. § 21-9-301, and municipalities are not required to maintain liability insurance on special mobile equipment, *see* Ark. Code Ann. § 27-14-703, then a finding by the jury that the front-end loader was special mobile equipment means that the City was not required to maintain liability insurance on the front-end loader. At that point, Spears could recover from: (1) the City if, despite not being required to maintain liability insurance, it had insured the front-end loader, or (2) Farm Bureau, if the front-end loader was an uninsured auto under the insurance policy.

Still, Farm Bureau maintains that a vehicle which is deemed "special mobile equipment" and not a "motor vehicle" pursuant to § 27-14-211 cannot be deemed an "auto" under the insurance policy. Perhaps this would be so if the definition of "special mobile equipment" under § 27-14-211 were the same as the definition of "auto" as set out in the insurance policy. However, that is not the case here.

"Special mobile equipment," in relevant part, is "every vehicle *not designed or used primarily for the transportation of persons or property* and incidentally operated or moved over the highways. . . ." Ark. Code Ann. § 27-14-211(emphasis added). The definition of "auto," as set out in the insurance policy, is "a motor vehicle, semi-trailer or trailer *designed primarily to be used on public*

roads." (Emphasis added.) Clearly, a vehicle could be designed primarily to be *used* on public roads, even though it is not designed or used primarily for the *transportation* of persons or property over the highways. Therefore, we reject Farm Bureau's argument that, as a matter of law, the front-end loader at issue cannot be both "special mobile equipment" under the Arkansas Code and an "auto" under the terms of the insurance policy.

Judgment Notwithstanding the Verdict

A circuit court is to evaluate a motion for judgment notwithstanding the verdict by deciding whether the evidence is sufficient for the case to be submitted to the jury; that is, whether the case constitutes a *prima facie* case for relief. *Wal-Mart Stores, Inc. v. Tucker*, 353 Ark. 730, 120 S.W.3d 61 (2003). In making that determination, the circuit court does not weigh the evidence; rather, the circuit court is to view the evidence in a light most favorable to the party opposing the motion. *Id.* The standard of review for a motion for judgment notwithstanding the verdict is whether there is substantial evidence to support the jury verdict. *Cadillac Cowboy, Inc. v. Jackson*, 347 Ark. 963, 69 S.W.3d 383 (2002). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to pass beyond suspicion or conjecture. *Id.* A motion for directed verdict at the close of all the evidence is a prerequisite to a post-trial motion for judgment notwithstanding the verdict. Ark. R. Civ. P. 50(b)(1).

In this case, the circuit court instructed the jury that Spears's claim against Farm Bureau was based on an insurance policy for uninsured-motorist coverage, and that to prevail on her claim, Spears had the burden of proving: (1) that she sustained damages; (2) that Joseph Watson was negligent; (3) that such negligence was a proximate cause of Spears's damages; (4) that an insurance policy issued by Farm Bureau for the benefit of Spears containing uninsured-motorist coverage was in effect at the time of the collision; and (5) that the front-end loader was an uninsured auto as defined in the insurance policy. Further, the circuit court stated:

> You are instructed that an uninsured motorist provision of the policy under which Barbara Spears was insured, provided as follows:
>
> > Uninsured Motorist Coverage. This coverage will pay bodily injury damages, except punitive damages, that you are legally

> entitled to collect from the owner or driver of an uninsured auto. Bodily injury must be caused by an accident arising out of the operation, maintenance, or use of the uninsured auto.
>
> You are instructed that the term auto, as used in plaintiff's automobile policy, means "a motor vehicle, semi-trailer or trailer designed primarily to be used on public roads."

* * *

Farm Bureau argues that the circuit court erred in denying its motion for judgment notwithstanding the verdict because Spears failed to present proof that the front-end loader was an "auto" as defined in the insurance policy. Specifically, Farm Bureau contends that Spears failed to offer substantial evidence that the front-end loader was "designed primarily to be used on public roads." Farm Bureau maintains that the focus of Spears's proof at trial was the actual use of the front-end loader, as opposed to the purpose of the design of the front-end loader.

At trial, Joseph Watson, the operator of the front-end loader at the time of the accident, stated that the City used the front-end loader for cleaning ditches or making ditches, as well as clipping buildup on the side of the street and loading gravel and dirt. He further stated that the front-end loader was used frequently on the city streets. Watson testified that the front-end loader was designed for the purpose of "mov[ing] dirt." Mayor William Lyon testified that vehicles such as front-end loaders are designed to be used "off the street." No further evidence was presented concerning the purpose of the front-end loader's design.

As stated previously, Spears had the burden of proving that the front-end loader was an uninsured "auto" under the insurance policy. We agree with Farm Bureau's contention that the evidence presented at trial failed to prove that the front-end loader was "designed primarily to be used on public roads" and, thus, an "auto" as defined in the insurance policy.[3] Since Spears failed to present sufficient evidence to prove that the front-end loader was an uninsured auto under the insurance policy, an essential element in this case, we conclude that there is not

[3] Our resolution of the issue on this basis makes it unnecessary to address whether the front-end loader was uninsured.

substantial evidence to support the jury's verdict in favor of Spears. As such, we hold that the circuit court erred in denying Farm Bureau's motion for judgment notwithstanding the verdict, and we reverse and dismiss. It is unnecessary for us to address Farm Bureau's remaining arguments on appeal.

Reversed and dismissed.

THORNTON, J., not participating.

Richard A. WEISS, Director DF&A
and Timothy Leathers, Commissioner of Revenue *v.*
AMERICAN HONDA FINANCE CORPORATION

04-617 200 S.W.3d 381

Supreme Court of Arkansas
Opinion delivered December 16, 2004

[Rehearing denied January 20, 2005.]

Akerman Senterfitt, by: *Peter O. Larsen* and *David E. Otero*; and *Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.*, by: *John K. Baker*, for appellant.

Ronna L. Abshure and *Martha G. Hunt*, Revenue Legal Counsel, for appellee.

JIM HANNAH, Justice. Appellant Arkansas Department of Finance & Administration (DF&A) appeals the partial summary judgment entered by the Pulaski County Circuit Court, Sixth Division, wherein the circuit court found that the complaint was not barred by the doctrine of sovereign immunity and that Honda is a "taxpayer" for the purposes of Ark. Code Ann. § 26-52-309 (Repl. 1997), which is commonly known as the "Bad Debt Statute." We hold that the circuit court erred in finding that Honda is a taxpayer under the "Bad Debt Statute" and entitled to a refund. This is an appeal required by law to be heard by this court; our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(8). *See also* Ark. Code Ann. § 26-18-406 (Repl. 1997).

Facts

Honda sold and leased motor vehicles and financed the sale of motor vehicles from motor-vehicle dealerships (collectively referred to as "sellers") to consumer purchasers. In a typical transaction, the consumer purchaser entered into an installment contract for the purchase of a motor vehicle from the seller. The

amount financed included the purchase price of the motor vehicle, as well as the gross receipts tax due on the vehicle, which the seller paid to the State. The seller then assigned the installment contract to Honda, and Honda collected the payments. In return, Honda paid the seller the full financed amount. At some point during the period of repayment, the purchaser defaulted on the installment contract. After resorting to available remedies against the purchaser, Honda wrote off the uncollectible portion of the debt for federal income tax purposes.

By a letter dated November 30, 2001, Honda filed a claim with the DF&A for a refund or deduction of the pro rata portion of gross receipts tax related to bad debts arising out of the sale and financing of motor vehicles in Arkansas. The claim was filed pursuant to the Bad Debt Statute, which allows taxpayers that finance sales transactions a deduction or refund for gross receipt tax that was previously reported and remitted, but is now uncollectible. DF&A determined that Honda was not a taxpayer under the Bad Debt Statute and denied Honda's claim for a refund.

Pursuant to Ark. Code Ann. § 26-18-406, Honda appealed DF&A's decision to the circuit court, and partial summary judgment was entered on March 29, 2004. A Rule 54(b) certification was obtained from the circuit court, and DF&A now appeals the partial summary judgment, arguing that the circuit court erred in finding that sovereign immunity did not bar the action and that Honda was a taxpayer under the Bad Debt Statute.

Standard of Review

As a general rule, in reviewing the grant of a motion for summary judgment, the appellate 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. *Mack v. Brazil, Adlong, & Winningham, PLC*, 357 Ark. 1, 159 S.W.3d 291 (2004). The appellate 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, the granting of this summary judgment motion was based upon the circuit court's interpretation of the Bad Debt Statute. The question of the correct application and interpretation of an Arkansas statute is a question of law, which this court decides *de novo*. *Cooper Realty Invs., Inc. v. Arkansas Contractors Licensing Bd.*, 355 Ark. 156, 134 S.W.3d 1 (2003).

A tax deduction is allowed only as a matter of legislative grace and one claiming the deduction bears the burden of proving that he is entitled to it and of bringing himself clearly within the terms and conditions as may be imposed by the statute. *St. Louis Southwestern Ry. Co. v. Ragland*, 304 Ark. 1, 4, 800 S.W.2d 410, 412 (1990); *Skelton v. B.C. Land Co.*, 256 Ark. 961, 513 S.W.2d 919 (1974). Similarly, we have held in numerous tax-exemption cases that any tax exemption must be strictly construed against the exemption and any doubt suggests the exemption should be denied. *See, e.g., Rineco Chem. Indus., Inc. v. Weiss*, 344 Ark. 118, 40 S.W.3d 257 (2001); *Technical Servs. of Ark., Inc. v. Pledger*, 320 Ark. 333, 896 S.W.2d 433 (1995); *Pledger v. C.B. Form Co.*, 316 Ark. 22, 871 S.W.2d 333 (1994); *Southwestern Ry., supra.*

In this case, the circuit court's decision denying Honda's claim to a deduction is based upon the circuit court's construction of "taxpayer" under the Bad Debt Statute. This court outlined our rules of statutory construction in *Faulkner v. Arkansas Children's Hospital*, 347 Ark. 941, 952, 69 S.W.3d 393, 400 (2002), where we stated:

> The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Raley v. Wagner*, 346 Ark. 234, 57 S.W.3d 683 (2001); *Dunklin v. Ramsay*, 328 Ark. 263, 944 S.W.2d 76 (1997). When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Stephens v. Arkansas Sch. for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000); *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997). Where the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Stephens v. Arkansas Sch. for the Blind, supra* (citing *State v. McLeod*, 318 Ark. 781, 888 S.W.2d 639 (1994)). Finally, the ultimate rule of statutory construction is to give effect to the intent of the General Assembly. *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999); *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998).

With this standard of review in mind, we turn to Honda's argument on appeal.

Sovereign Immunity

DF&A argues that sovereign immunity bars Honda's action in this case because Honda is not a taxpayer and only taxpayers may receive a refund under the "Bad Debt Statute." Article 5, § 20 of the Constitution of Arkansas provides: "The State of Arkansas shall never be made Defendant in any of her courts." Sovereign immunity is jurisdictional immunity from suit. *D.H.S. v. Crunkleton*, 303 Ark. 21, 791 S.W.2d 704 (1990). However, sovereign immunity may be waived. *Newton v. Etoch*, 332 Ark. 325, 965 S.W.2d 96 (1998). In its complaint, Honda sought to enforce its rights as a taxpayer under the Bad Debt Statute. Ark. Code Ann. § 26-18-406 (Supp. 2003). This case is a suit to compel a refund under a statute that provides for a refund. As DF&A indicates, if Honda is a taxpayer, then suit would be proper. By providing the remedy of a refund under the proper circumstances, the State waived sovereign immunity. There is no merit to DF&A's argument that sovereign immunity bars this action.

Meaning of "Taxpayer" for the Purposes of the Bad Debt Statute

DF&A asserts that Honda is not a taxpayer under the "Bad Debt Statute." Section 26-52-309 provides:

> (a) In computing the amount of tax due under the Arkansas Gross Receipts Act, § 26-52-101 et seq., and any act supplemental thereto, taxpayers may deduct bad debts from the total amount upon which the tax is calculated for any report. Any deduction taken or refund paid which is attributed to bad debts shall not include interest.
>
> (b)(1) For purposes of this section, "bad debt" means any portion of a debt for an amount which a taxpayer has reported as taxable which the taxpayer legally claims as a bad debt deduction for federal income tax purposes.
>
> (2) Bad debts include, but are not limited to, worthless checks, worthless credit card payments, and uncollectible credit accounts.
>
> (3) Bad debts do not include financing charges or interest, uncollectible amounts on property that remain in the possession of the taxpayer or vendor until the full purchase price is paid, expenses

incurred in attempting to collect any debt, debts sold or assigned to third parties for collection, and repossessed property.

(c) Bad debts incurred for sales made prior to November 9, 1983, shall not be deducted.

(d) Bad debts must be deducted within three (3) years of the date of the sale for which the debt was incurred.

(e) If a deduction is taken for a bad debt and the taxpayer subsequently collects the debt in whole or in part, the tax on the amount so collected shall be paid and reported on the next return due after the collection.

While Honda was the ultimate source of the funds used to pay the gross receipt tax due on the motor vehicles, the gross receipt tax was actually paid by the sellers. The sellers were later reimbursed by Honda. However, the party who actually paid the gross receipts tax is not automatically a "taxpayer" for the purposes of the Bad Debt Statute. To be a "taxpayer" for the purposes of the Bad Debt Statute, Honda must be a "person liable to remit a tax hereunder or to make a report for the purpose of claiming any exemption from payment of taxes levied by [the Gross Receipts Act.]" Ark. Code Ann. § 26-52-103(a)(5) (Repl. 1997). We first note that Honda is a "person" under the Bad Debt Statute, as corporations are included within the definition of "person." *See* Ark. Code Ann. § 26-52-103(a)(1) (Repl. 1997). While it is clear that Honda was the source of payment of the gross receipts tax to the State, the parties disagree on the issue of whether Honda was *liable* to remit the tax. "Liable" is not defined for the purposes of the Bad Debt Statute. *Black's Law Dictionary* defines "liability," in part as:

1. The quality or state of being legally obligated or accountable; . . .

2. A financial or pecuniary obligation; DEBT < tax liability > . . .

932 (8th ed. 2004).

DF&A contends that for the purposes of the motor vehicle gross receipts tax, the taxpayer, or person liable to remit the tax, is the consumer. Section 26-52-510(a)(1)(A) (Repl. 1997) provides:

> *The tax levied* by this chapter and all other gross receipts taxes levied by the state *in respect to the sale of new or used motor vehicles*, trailers, or semitrailers *required to be licensed in this state shall be paid by the consumer* to the Director of the Department of Finance and Administration instead of being collected by the dealer or seller, and it is the mandatory duty of the director to require the payment of such tax at the time of registration before issuing licenses for new or used motor vehicles or trailers.

(Emphasis added.) DF&A's argument is well-taken. Clearly, Honda is not liable to remit the tax.

[redacted] Honda notes that it possesses an Arkansas Sales and Use Tax Permit and pays substantial tax in Arkansas. Because Honda is not *required* to remit taxes and make reports of those taxes for motor vehicle gross receipts tax and make reports of that tax, then Honda cannot claim that it is a "taxpayer" in the sale of motor vehicles. It is possible to be a taxpayer for one kind of tax, while not a taxpayer for another kind of tax.

DF&A argues that Honda is not a "taxpayer" as defined under § 26-52-103(a)(5) and, therefore, it is not a taxpayer under DF&A's Regulation 1994-3.

That regulation provides in part:

> Pursuant to authority given the Commission of Revenues by subsection (b) of Section 1 of Act 293 of 1991 (Ark. Code Ann. §§ 27-14-906(b)), after the effective date of this regulation, *lienholders* and motor vehicle dealers *may apply for registration and certificates of title on behalf of the purchasers* of new or used vehicles. . . . The dealer or *lienholder* shall file the application with the Commissioner, shall attach thereto a copy of the instrument creating and evidencing the lien or encumbrance and *shall pay all taxes* and fees due *for such registration and issuance of a title.*

[redacted] The only party who is *liable* to pay the motor vehicle gross receipts tax is the consumer. Regulation 1994-3 *allows* lienholders to pay gross receipts tax *on behalf of* consumers; however, this allowance does not transfer ultimate liability of payment of the gross receipts tax from the consumer to the lienholder.

Honda further argues that it is a "taxpayer" because it meets the requirements of a "taxpayer" as defined by the Arkansas Tax Procedure Act, which is codified at Ark. Code Ann. § 26-18-101 (Repl. 1997). A "taxpayer" under this Act is defined as follows:

(A) Any person subject to or liable for any state tax;

(B) Any person required to file a return, or to pay, or withhold and remit any tax required by the provisions of any state tax law; or

(C) Any person required to obtain a license or a permit or to keep any records under the provisions of any state tax law; . . .

Ark. Code Ann. § 26-18-104(14) (Repl. 1997).

We need not address the merits of Honda's argument that it is a "taxpayer" under the Arkansas Tax Procedure Act. The Bad Debt Statute is a part of the Arkansas Gross Receipts Act, and "taxpayer" is specifically defined under that Act, for the purposes of that Act. We have long held that a general statute must yield when there is a specific statute involving particular subject matter. *See, e.g., Ozark Gas Pipeline Corp. v. Arkansas Pub. Serv. Comm'n*, 342 Ark. 591, 29 S.W.3d 730 (2000); *Shelton v. Fiser*, 340 Ark. 89, 8 S.W.3d 557 (2000).

Assignment

DF&A argues that Honda acquired no rights as a taxpayer by way of assignment of the contracts by the sellers. We agree. As already discussed, under the current statutes, it is only the purchaser that is liable to pay the tax and therefore the taxpayer. The seller was thus not a taxpayer, and Honda could not acquire from the sellers a right they did not have. An assignee can receive no better right than that possessed by the assignor. *Guaranty Nat'l. Ins. Co. v. Denver Roller*, 313 Ark. 128, 854 S.W.2d 312 (1993).

Reversed.

BROWN, J., concurs on the grounds set out in his concurrence to *DaimlerChrysler Services North America, LLC v. Weiss*, 360 Ark. 188, 200 S.W.3d 405 (2004).

THORNTON, J., not participating.

AUTOMATED CONVEYOR SYSTEMS *v.* Calvin DOOLEY

04-1256 200 S.W.3d 442

Supreme Court of Arkansas
Opinion delivered December 16, 2004

Roberts Law Firm, P.A., by: *John D. Webster*, for petitioner.

Fogleman & Rogers, by: *Joe M. Rogers*, for respondent.

PER CURIAM. Automated Conveyer Systems (Automated) petitions this court for a writ of prohibition alleging that the Crittenden County Circuit Court is without jurisdiction to hear this case because the exclusive remedy for an injury sustained in the course and scope of employment is provided under the Worker's Compensation Act. On January 21, 2004, Calvin Dooley filed a complaint based in negligence in the circuit court alleging that he suffered a gradual onset neck injury in the course and scope of employment. Dooley's employer Automated brought a motion to dismiss alleging that pursuant to Ark. Code Ann. § 11-9-105(a)(Repl. 2002), Dooley had sought damages under the Worker's Compensation Act and was limited to that remedy. The circuit court denied the motion to dismiss, and Automated now seeks a writ of prohibition.

This petition for a writ of prohibition will be treated as a case. We order the parties to brief the following issues:

1. Whether the Worker's Compensation Act remains the exclusive remedy for all non-intentional injuries arising out of the course and scope of employment;

2. Whether amendments to Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2002), which states that "administrative law judges, the

commission, and any reviewing court shall construe the provisions of this chapter strictly," affect the analysis in this case;

3. Whether the definition of "accidental" in Ark. Code Ann. § 11-9-102(4)(A)(Repl. 2002) excludes the injury in the present case from the Worker's Compensation Act; and

4. Whether the injury in the present case is one that may be brought in negligence against Automated.

The appropriate briefing schedule will be established by the clerk of the court.

Jim McDONALD *v.* STATE of Arkansas

CR 04-719 200 S.W.3d 443

Supreme Court of Arkansas
Opinion delivered December 16, 2004

The Lisk Firm, by: *Lynn Lisk*, for petitioner.

No response.

PER CURIAM. Appellant's attorney, Lynn Lisk's, motion to be relieved as counsel and to appoint substitute counsel is granted pursuant to Rule 16 of the Rules of Appellate Procedure—Criminal.

Appellant, Jim McDonald, was sentenced to life imprisonment in the Arkansas Department of Correction after pleading guilty to the charge of rape. Appellant was recognized as indigent by the trial court, and appellant's appeal to this court was filed *in forma pauperis*. Appellant's underlying appeal requested that the court review the propriety of appellant's sentence of life imprisonment. Appellant's attorney, Lynn Lisk, has been hired as the full-time Director and Professor of Paralegal Studies at the University of Arkansas at Fort Smith. Also, appellant's attorney anticipates appellant will petition the court for Rule 37 relief, thereby creating a potential for a conflict of interest.

Rule 16 states in pertinent part that the appellate court has exclusive jurisdiction to relieve counsel and appoint new counsel in the "interest of justice or for other good cause." Accordingly, the court relieves attorney Lynn Lisk and appoints David Dunigan as attorney for appellant.

Calvin Lamont WALKER *v.* STATE of Arkansas

CA CR 04-456 200 S.W.3d 442

Supreme Court of Arkansas
Opinion delivered December 16, 2004

Darrell Brown, for R. S. McCullough.

No response.

PER CURIAM. By *per curiam* opinion delivered May 20, 2004, R.S. McCullough, counsel for appellant, Calvin Lamont Walker, was ordered to appear before this court on June 3, 2004, to show cause why he should not be held in contempt for his failure to perfect this appeal. *Walker v. State*, No. CR 04-456 (May 20, 2004). Although Mr. McCullough filed a timely notice of appeal from Walker's conviction judgment, he failed to file the record with this court in order to perfect Walker's appeal. *Id.*

Mr. McCullough appeared before this court on June 3, 2004, and entered a plea of not guilty to the contempt citation. We appointed a master, Hon. John E. Jennings, to determine the facts in this case. *Walker v. State*, No. CR 04-456 (June 10, 2004). On November 30, 2004, Judge Jennings issued his Report of Special Master in which he found "no good reason for Mr. McCullough's failure to obtain a certified partial record nor his failure to pursue the application to have Mr. Walker declared indigent." He further found "no reason at all for Mr. McCullough's failure to respond to the efforts by the clerk to try to resolve the problem." In sum, Judge Jennings concluded that no reasonable cause had been shown for Mr. McCullough's failure to perfect Walker's appeal.

Based on the foregoing, we hold that Mr. McCullough is in contempt of court for failing to perfect this appeal on behalf of Calvin Lamont Walker. We assess a fine of $250.00 plus the court reporter expenses incurred by this court as a result of the hearing before the Special Master. The total amount assessed shall be paid within thirty days from the date of this *per curiam*. A copy of this order will be forwarded to the Committee on Professional Conduct.

ARKCO CORPORATION, *et al.* *v.* Jess ASKEW

04-441 200 S.W.3d 444

Supreme Court of Arkansas
Opinion delivered December 22, 2004

Timothy O. Dudley, for appellants.

Wright, Lindsey & Jennings, LLP, by: *Bettina E. Brownstein, Justin T. Allen*, and *Troy A. Price,* for appellee.

TOM GLAZE, Justice. This is an attorney malpractice case in which appellant Arkco Corporation ("Arkco") sued appellee, attorney Jess Askew, for failing to perfect Arkco's appeal in a civil case out of Phillips County. In 1995, Arkco retained Askew to represent it in a lawsuit it filed against W.T. Paine in Phillips County Chancery Court ("the Paine case"). The trial court in the Paine case announced in mid-December of 1996 that it was going to rule against Arkco. However, before a judgment was filed in Paine's favor, Arkco

filed a bankruptcy petition in federal bankruptcy court on December 24, 1996. The notice of removal to bankruptcy court was filed with the state court at 8:15 a.m. on December 31, 1996; the state court judgment in the Paine case was file-marked and entered at 11:15 a.m. on that same day.

On January 15, 1997, Askew filed, in the state proceedings, what he characterized as "protective" post-trial motions in the state court. Askew noted in those motions that the state court's orders were invalid due to the removal of the case to bankruptcy court, but that they were being filed "to protect the record in this case." On March 12, 1997, Askew also filed a timely notice of appeal from the December 31, 1996, order in the Paine case, making Arkco's record due in ninety days, or on June 10, 1997. Later in March, Arkco's bankruptcy case was dismissed, though the bankruptcy court did not immediately remand the case to the state court.

On June 6, 1997, the eighty-sixth day after the filing of the notice of appeal, Askew filed a motion in the Paine case in state court to extend the time to lodge the record on appeal; the trial court signed that order on June 9, 1997, but the order extending the time was not entered until June 12, 1997, two days after the deadline for filing the record had expired. When Askew attempted to tender the record to the supreme court clerk's office on September 12, the clerk rejected the record as untimely.

On October 3, 1997, the bankruptcy court entered an order of remand, sending the Paine case back to the state court. The remand order purported to return the proceeding to the state court "effective from the date of the earliest decree of the state court," which was December 31, 1996. However, the bankruptcy court remanded the case "*nunc pro tunc* [to] December 30, 1996." Apparently, that court's intent was to return the case so as to validate the state court's December 31, 1996, order, which had been entered *after* the removal of the Paine case to bankruptcy court.

On May 20, 2002, Arkco filed a malpractice action against Askew, alleging that Askew failed to timely appeal the Paine case, thereby causing Arkco to lose its right to appeal that case. On September 12, 2003, Askew filed a motion for summary judgment, arguing that he was not negligent in failing to perfect the appeal, because the order appealed from — i.e., the December 31, 1996, state court order — was void, since the state court lacked jurisdic-

tion to enter that order once the case had been removed to bankruptcy court. *See, e.g., Allstate Ins. Co. v. Bourland*, 296 Ark. 488, 758 S.W.2d 700 (1988); *Harris v. State*, 41 Ark. App. 207, 850 S.W.2d 41 (1993) (generally, any judicial action taken by a state court, after removal is effected but before remand by the federal court, is null and void). In his summary-judgment motion, Askew further asserted that the appeal from the state court decree was unnecessary and was done out of an abundance of caution and only for "protective purposes." Because the judgment was void, he argued, there was no judgment from which to appeal. Thus, he claimed, whether he timely lodged the appeal from an invalid judgment was immaterial.

The trial court agreed with Askew and partially granted his summary-judgment motion at a December 12, 2003, hearing, finding that Askew was not negligent in failing to perfect Arkco's appeal in the Paine case. At that same hearing, the court informed the parties that it was going to recess for the holidays from December 19, 2003, until January 5, 2004. On December 16, 2003, Arkco's counsel, Tim Dudley, contacted Askew's attorney to advise that Arkco had decided to seek an interlocutory appeal of the court's order granting partial summary judgment. As a result, Dudley modified that original precedent that Askew had submitted in order to include a Rule 54(b) certificate; Dudley asked Askew to approve the amended precedent and return it before December 18. The trial court then signed the precedent on December 18, 2003, and the order, partially granting summary judgment and certifying the matter for appeal under Ark. R. Civ. P. 54(b), was entered on December 19, 2003.

Arkco's notice of appeal from that order would therefore have been due within thirty days, or on or before January 19, 2004.[1] Arkco failed to meet this deadline, and instead waited until January 26, 2004, to file a motion for extension of time to file its notice of appeal, wherein Arkco alleged that it had not received a file-marked copy of the order partially granting summary judgment. Over Askew's objection, the trial court granted Arkco's motion for extension of time on the grounds that the court had not sent out a notice to counsel for Arkco that the order had been filed. The court gave Arkco an additional fourteen days to file its notice of appeal, and Arkco filed its notice of appeal on February 5, 2004.

[1] The thirtieth day after December 19, 2003, was January 18, 2004; however, January 18 fell on a Sunday, extending the deadline to the next business day. *See* Ark. R. Civ. P. 6(a).

In its appeal to this court, Arkco argues that the trial court erred in granting Askew's motion for summary judgment, because the bankruptcy court's *nunc pro tunc* order of remand was not appealed; therefore, Arkco submits it had no avenue to either appeal or collaterally attack the state court judgment. Askew, on the other hand, has filed a motion to dismiss Arkco's appeal, contending that the trial court improperly granted Arkco's motion for extension of time to file its notice of appeal.

We first consider Askew's motion to dismiss Arkco's appeal.[2] In his motion, Askew asserts that Arkco made no showing of reasonable diligence in seeking to become informed about the entry of the trial court's order; accordingly, he claims, the court should have denied Arkco's request for additional time to file its notice of appeal. Askew argues that, because Arkco knew that the order had been signed by the judge before December 19, 2003, it should have known it would have been filed in the clerk's office either the day it was signed or shortly thereafter. Further, Askew contends, if Arkco and its attorney did not know that the order had been filed, such lack of knowledge was due to a failure to monitor the status of the case. In addition, Askew asserts that, even if Arkco could have reasonably believed that the order was not going to be entered until sometime around January 5, 2004, there was no reason to have waited until January 26, 2004, to check on the status of the order's filing.

Ark. R. App. P.—Civ. 4 (2004) governs the time for filing a notice of appeal and extensions thereof; that rule provides in relevant part as follows:

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[2] In response to Askew's motion, Arkco argues that Askew did not file a notice of appeal from the trial court's order granting Arkco's motion to extend the time to file its notice of appeal. Arkco contends that this deprives this court of jurisdiction to consider Askew's motion to dismiss the appeal. *See, e.g.*, *Brown v. Minor*, 305 Ark. 556, 810 S.W.2d 334 (1991) (notice of cross-appeal is necessary when an appellee seeks something more than it received in the lower court). However, in *Boothe v. Boothe*, 341 Ark. 381, 17 S.W.3d 464 (2000), this court noted that, in some circumstances, cross-appeals have been addressed even when no formal notice was filed. Citing *Hasha v. City of Fayetteville*, 311 Ark. 460, 845 S.W.2d 500 (1993), the *Boothe* court noted that, while a failure to file a cross-appeal would ordinarily end the matter, when an appellee does not seek any relief he did not receive in the lower court, the court would address the issues raised. Here, Askew is not seeking anything in this court that he did not receive from the lower court; he is ultimately only asking this court to affirm the trial court's grant of partial summary judgment in his favor. Therefore, no notice of appeal or cross-appeal was necessary on his part, which allows us to address his motion.

> Upon a showing of failure to receive notice of the judgment, decree, or order from which appeal is sought and a determination that no party would be prejudiced, *the circuit court shall*, upon motion filed within 180 days of entry of the judgment, decree, or order, *extend the time for filing the notice of appeal* for a period of 14 days from the day of entry of the extension order.

Rule 4(b)(3) (emphasis added).

This rule was amended on January 22, 2004; prior to that time, it had provided the trial court with discretion to extend the time for filing the notice of appeal. *See* Ark. R. App. P.—Civ. 4(b)(3) (2003) ("Upon a showing of failure to receive notice of the judgment . . . the circuit court *may* . . . extend the time for filing the notice of appeal"). The Reporter's Notes to the 2004 version of the rules points out that the word "shall" replaced "may," "thereby requiring the circuit court to extend the time under the circumstances described in this provision."[3]

In *Arnold v. Camden News Publishing Co.*, 353 Ark. 522, 110 S.W.3d 268 (2003), this court held that the trial court did not abuse its discretion in refusing to grant an appellant's motion for extension of time to file her notice of appeal, because the appellant had not exercised due diligence to apprise herself of the status of the trial court's order and whether or not that order had been entered.[4] Although the rule itself did not contain the due diligence verbiage, this court held that the trial court was "applying a standard that this court has consistently interpreted as being part of the rule, that *a lawyer and litigant must exercise reasonable diligence in keeping up with the docket.*" *Arnold*, 353 Ark. at 528 (emphasis added). In acknowledging that this due diligence requirement was not an explicit part of the rule, the *Arnold* court wrote as follows:

> [I]t is only logical and reasonable that parties assume some modicum of obligation to exercise diligence in keeping up with the status of

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[3] The Reporter's Notes also assert that the effect of this amendment was to overrule *Arnold, supra.* However, the Reporter's Notes are not precedent for this court. *See Green v. Mills*, 339 Ark. 200, 4 S.W.3d 493 (1999).

[4] The *Arnold* court also distinguished the federal rules of appellate procedure, noting that, although our appellate Rule 4 had been amended to "incorporate some features of Rule 4 of the Federal Rules of Appellate Procedure," the federal rules required the clerk to send entered precedents to counsel of record. Arkansas' rules contain no such requirement, the *Arnold* court pointed out, and it therefore remains the duty of the parties to make themselves aware of the status of their cases. *Arnold*, 353 Ark. at 528.

> their case, *particularly when they know that a precedent has been submitted and approved by both sets of counsel and is simply waiting approval by the court.* It is, in fact, mandated by the Model Rules of Professional Conduct that attorneys exercise due diligence on behalf of their clients. See Model Rules of Professional Conduct 1.3.

Id. (emphasis added).

In his motion to dismiss Arkco's appeal, Askew argues that, despite the amendment to Rule 4(b)(3), the due diligence requirement must still be read into the rule. He relies on the language in *Arnold*, cited above, that it is "only logical and reasonable that parties assume some modicum of obligation to exercise diligence" in keeping up with the court's docket. Askew also asserts that the amendment to Rule 4(b)(3) did not do away with this reasonable diligence requirement, because, according to the *Arnold* court, the diligence requirement had been considered part of the rule prior to the *Arnold* decision.

We agree with Askew. As discussed above, the court has "consistently interpreted" the rule as containing a diligence requirement, and "once this court has interpreted its rules or statutes, that interpretation subsequently becomes a *part* of the rule or statute itself." *Arnold*, 353 Ark. at 528 (emphasis in original). The diligence requirement on the part of the attorneys is unaffected by the substitution of "shall" for "may," as those words speak to the trial court's duty, rather than to the attorney's responsibilities. It is not apparent from the plain language of the 2004 version of the rule that the amendment was intended to relieve attorneys of their burden to comply with their professional responsibilities, as those responsibilities are described, not only in *Arnold*, but also in Rule 1.3 of the Model Rules of Professional Conduct ("A lawyer shall act with reasonable diligence and promptness in representing a client"). Tellingly, the Comments to Rule 1.3 provide the following:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed.

The amendment to the rule changes only the trial judge's burden and duty; when the court is faced with an attorney who has acted diligently but who has nevertheless not received

notice of the entry of an order, that judge *shall* grant an extension. It is mandatory. The amendment simply does not, however, relieve an attorney of acting diligently. Unfortunately, Arkco's attorney failed to exercise due diligence in keeping up with the court's docket to determine whether the December 19, 2003, order had been entered. Had Arkco's attorney followed up on the entry of the order, and shown that he otherwise met the requirements of Rule 4, the trial court would have been under an absolute obligation to grant his motion for extension of time. However, because Dudley offered no proof that he acted diligently, the trial court erred in granting his motion.

Arkco's notice of appeal was untimely, and an untimely notice of appeal deprives this court of jurisdiction to consider the matters raised on appeal. *See U.S. Bank v. Milburn*, 352 Ark. 144, 100 S.W.3d 674 (2003); *Rossi v. Rossi*, 319 Ark. 373, 892 S.W.2d 246 (1995). Therefore, we grant Askew's motion and dismiss Arkco's appeal.

Special Justices HEFLEY, MCKISSIC, and VITTITOW join this opinion.

BROWN, IMBER, and THORNTON, JJ., not participating.

David MCELYEA *v.* STATE of Arkansas

CR 04-771 200 S.W.3d 881

Supreme Court of Arkansas
Opinion delivered January 6, 2005

[Rehearing denied February 17, 2005.]

Charles L. Stutte, for appellant.

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

JIM HANNAH, Chief Justice. David McElyea appeals his conviction for robbery. In this case, McElyea was convicted of

robbery by the use of physical force in resisting apprehension for theft, and he asserts that his conviction must be reversed because the State failed to prove all the elements of the crime. Specifically, McElyea argues that the State failed to prove that he purposefully struck Wal-Mart employee Derek Brown to effect his escape. We hold that the facts presented to the jury showing that McElyea purposefully used physical force in resisting apprehension were sufficient to allow the jury to decide the issue of intent.

[redacted] McElyea appealed to the Arkansas Court of Appeals, which affirmed. *See McElyea v. State*, 87 Ark. App. 103, 189 S.W.3d 67 (2004). We granted the State's petition for review of this decision, pursuant to Ark. Sup. Ct. R. 2-4. 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. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004).

Standard of Review

[redacted] By asserting that the circuit court erred in failing to require sufficient proof of intent, McElyea challenges the sufficiency of the evidence. The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Moore v. State*, 355 Ark. 657, 144 S.W.3d 260 (2004). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State, and only evidence supporting the verdict will be considered. *Id.*

Facts

McElyea admits that he is guilty of theft. On January 7, 2003, McElyea put two water purifiers and a bottle of hand lotion in his coat and left a Wal-Mart store without paying for the items. Wal-Mart employee Brown observed McElyea conceal the merchandise inside his coat, and then followed McElyea outside the store where he confronted McElyea. Brown identified himself as a Wal-Mart loss prevention employee, showed McElyea his badge, and asked that the merchandise be returned. McElyea took one purifier out, handed it to Brown or dropped it on the ground, and started to leave. Brown told McElyea he had to return to the store

to fill out paperwork. McElyea then attempted to leave by stepping around Brown. Brown grasped McElyea by the coat sleeve and an altercation ensued during which McElyea struck Brown in the face in an attempt to free himself from Brown's attempt to apprehend him. Brown was struck hard enough to leave a red mark and to make his eyes water. McElyea then escaped and was later arrested by police.

Robbery

In this case, "[a] person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs . . . physical force upon another." Ark. Code Ann. § 5-12-102 (Repl. 1997). What makes theft robbery is the use of force. As this court noted in *Jarrett v. State*, 265 Ark. 662, 580 S.W.2d 460 (1979), in adopting the criminal code in 1975, the primary emphasis in robbery changed from the taking of property to "the threat of physical harm to the victim." *Jarrett*, 265 Ark. at 664. Where in resisting apprehension for theft a person employs physical force or threatens the use of physical force to avoid apprehension, a robbery is committed. *Jarrett*, 265 Ark. at 665.

Criminal liability in this case was submitted to the jury where the evidence showed that McElyea used physical force in striking Brown in the face as a means to resist apprehension for theft.

The circuit court instructed the jury as follows:

> Robbery. To sustain this charge the State must prove beyond a reasonable doubt that with the purpose of committing a theft or resisting apprehension immediately thereafter, David McElyea employed or threatened to immediately employ physical force upon another. Physical force means any bodily impact, restraint, or confinement. Purpose. A person acts with purpose with respect to his conduct when it is his conscious object to engage in the conduct.

The jury could have rejected this interpretation of the facts but did not do so.

Physical force is defined as "any bodily impact, restraint, or confinement or the threat thereof." Ark. Code Ann. § 5-12-101 (Repl. 2002). In *Becker v. State*, 298 Ark. 438, 768 S.W.2d 527 (1989), Becker struck an officer and started off for the door. A fight followed in which Becker was subdued. Becker was found guilty

of robbery by using force in resisting apprehension for theft. A robbery conviction was also affirmed by the court of appeals in *White v. State*, 271 Ark. 692, 610 S.W.2d 266 (Ark. Ct. App. 1981), where a shoplifter "rammed" a store employee from behind who was attempting to lock a door to stop White's flight, and where she struggled with employees to escape. In *Jarrett, supra*, Jarrett broke free of the attempt to place restraints on him and engaged in a fight with an officer attempting to arrest him. In *Wilson v. State*, 262 Ark. 339, 556 S.W.2d 657 (1977), physical force transforming theft to robbery was found where the defendant broke loose from restraints of an arresting officer and engaged in a fight with the officer.

In the case before us, McElyea was confronted and accused of shoplifting. He was asked to return to the store, and when he tried to leave, Brown grasped his coat. McElyea responded by striking Brown in the face to avoid apprehension and escape. Brown suffered a red mark on his face that made his eyes water. McElyea did escape. There was substantial evidence that McElyea purposefully used physical force to resist apprehension, and the issue was properly submitted to the jury.

Affirmed.

GUNTER, J., not participating.

Judy DAVIS *v.* Tony DAVIS

04-351 200 S.W.3d 886

Supreme Court of Arkansas
Opinion delivered January 6, 2005

Center for Arkansas Legal Services, by: *Lynn Pence* and *Dustin Duke*, for appellant.

No response.

TOM GLAZE, Justice. Appellant Judy Davis brings this appeal after the circuit judge held a hearing and entered an order dismissing Judy's petition for order of protection entered in case number DR 2003-5841. Judy's petition was filed pursuant to the State's Domestic Abuse Act, codified at Ark. Code Ann. § 9-15-101 to -216 (Repl. 2003). The circuit judge initially issued an ex parte temporary order of protection on November 5, 2003, which would have expired on December 4, 2003. However, at a hearing held on December 4, 2003, the judge dismissed the domestic abuse case, number DR 2003-5841, because her husband, appellee Tony Davis, had sued Judy for divorce in a separate case, number DR 2003-6143, in which, on November 26, 2003, the judge had already issued a restraining order enjoining both Judy and Tony "from doing, attempting to do, or threatening to do, any act injuring, mistreating, molesting, or harassing the adverse party, or any of the children of the parties."

In this appeal, Judy raises the following issues:

(1) Did the circuit court misapply the state's Domestic Abuse Act by dismissing Judy's petition for an order of protection just because a mutual restraining order had been entered in the parties' divorce case?

(2) Did the dismissal of Judy's petition for a protection order run contrary to the legislative intent of the Domestic Abuse Act in case number DR2003-5841, because of the mutual restraining order entered in the divorce case number DR2003-6143?

(3) Does the reconciliation of the parties render the above two issues moot?

In our attempt to consider and decide the issues raised on appeal, we are met with considerable difficulty because of the inadequate and confusing record filed in this appeal. At the December 4, 2003, hearing below, in the domestic abuse case number DR 2003-5841, Judy appeared without counsel and Tony appeared with an attorney; however, Judy was the only witness who testified. At the end of Judy's testimony, the judge stated she would dismiss Judy's domestic abuse case and the parties could pursue the dispute in their divorce suit. The judge entered an order dismissing Judy's domestic abuse suit on the same day of the hearing, December 4, 2003. At that hearing, Judy testified that Tony had abused her since 1990, and he recently threatened to beat, choke, and kill her. Judy said that she had prior problems with Tony in 1996 and 1997, but the parties had reconciled.

Judy's testimony at the hearing then led to the custody and visitation problems regarding the parties' four children; two of their children had been born prior to the Davises' marriage in 1994, and two were born during their marriage. Judy testified that the children were living mostly with Tony at his parents' home, and Tony would let her see the children from time to time, but added, "half the time he would not bring the children after he had set a time and place for her to see them." Tony's attorney countered that Tony had not seen the children since October 2003, to which the judge remarked, "That's why you need to set . . . a temporary hearing [in the divorce proceeding]."

After listening to Judy's testimony and Tony's attorney's comments, the circuit judge suggested that the questions concerning custody, visitation, and paternity would have to be worked out in a divorce or separate maintenance action. After Tony's attorney told the judge that Tony had already filed a divorce action, the judge then pointed out to Judy and Tony that they were protected by a mutual restraining order entered in the divorce action which "binds both" parties wherever they may be. The judge then stated the existing restraining order in the divorce case was actually "better" than the domestic abuse order, so what the judge would probably do was to "fold" the domestic abuse action into the divorce case.

The judge then informed Judy that she needed an attorney and that she should request a temporary hearing to be set in the divorce action. Judy said, "OK," and Tony's attorney said, "I understand." The judge admonished Judy and Tony that they did not need to be around each other and the "true cause of action"

for them was one for divorce, whereby the court could fully address all issues, the divorce, paternity, custody, visitation, child support, and abuse, if any. At the hearing's end, the judge invited Judy to get a hearing set and again advised Judy that she would need an attorney. At the judge's urging, the parties quickly asked for a temporary hearing date in the divorce case, DR 2003-6143, and a hearing was set for December 17 — only thirteen days after the December 4th hearing on Judy's petition for a protective order.

The record now before us in this appeal does not reflect anything further regarding the divorce action or what occurred on December 17th. The two separate cases were apparently not formally consolidated at the trial level, although it does appear that the circuit court expressed to the parties that they should seek their relief in the divorce case. It is also clear that the cases were not consolidated in this appeal, nor is there a record of the divorce case in this appeal. If and when the divorce occurred is not shown in the record.

The major hurdles to our reaching and resolving the three issues Judy argues on appeal are that neither Judy nor Tony objected below to anything the circuit court did. In fact, both parties agreed to pursue their paternity, custody, visitation, and restraining order issues in their divorce case, and, as already discussed, the parties obtained a prompt temporary hearing date of December 17, 2003, in the divorce case for such purposes. Judy's objection to the circuit judge's dismissal of Judy's domestic abuse action was asserted only after she obtained attorneys who raised these issues and arguments for the first time on appeal. *See Collins v. Collins*, 347 Ark. 240, 61 S.W.3d 818 (2002).

This appeal is a one-brief case with Tony making no appearance with counsel or filing a responsive brief. Only now, Judy offers an argument that relief and protections are available to the abused party in an order of protection under the State's domestic abuse statute that are not available through the mutual restraining order entered by the circuit court in the divorce case. While this may be true,[1] this issue and argument were not posed to

[1] Among other things, Judy argues that anyone who violates a mutual restraining order is subject only to penalties for civil contempt which are less than the penalties provided by the domestic abuse statutes, and the judge misinterpreted and misapplied the statute. Again, Judy did not raise that argument below.

the judge, nor was Tony permitted to testify to rebut Judy's charges, since the parties agreed with, or at the very least acquiesced in, the judge's direction for them to pursue their several and various differences in their divorce suit.

Citing *Smith v. Campbell*, 71 Ark. App. 23, 26 S.W.3d 139 (2000), Judy argues further that a court's erroneous interpretation of the law manifests an abuse of discretion, and contends that is what happened here. *See also Craig v. Carrigo*, 340 Ark. 624, 12 S.W.3d 229 (2000). Once again, however, Judy made no such argument to the judge; in addition, as already mentioned, the parties had a number of marital issues to resolve, and the judge concluded that these matters could best be addressed in the divorce case that was pending at the same time as Judy's petition for a protection order.

Confronted with these facts and the dual actions pending, it is not at all clear that the judge abused her discretion by taking the parties' collective marital problems and directing Judy and Tony to resolve them in the divorce proceeding. In accordance with the judge's instructions, the parties obtained a temporary hearing in the divorce case for December 17, 2003, which was only thirteen days after the December 4, 2003, hearing held in the domestic abuse proceeding.

Because the issues raised by Judy in this appeal have not been preserved, we must affirm.

IMBER, J., concurs.

BROWN, J., dissents.

GUNTER, J., not participating.

ANNABELLE CLINTON IMBER, Justice, concurring. I concur with the majority that the issues raised by Appellant Judy Davis in this appeal have not been properly preserved for appellate review. I write, however, to note that the record in the divorce proceeding need not be included in order to appeal the trial court's ruling in the domestic abuse case, which is a separate action.

ROBERT L. BROWN, Justice, dissenting. Judy Davis filed a petition *pro se* for an order of protection against domestic abuse based on her husband's actions which included specific threats, a choking incident, an attempt to set her on fire, and ramming her car with another car. The circuit judge dismissed her petition and ruled as

follows after referring to a mutual restraining order which had been entered in a separate divorce action filed by the husband:

> THE COURT: . . . [the mutual restraining order is] better than this domestic abuse order. And the reason it's better is because it protects you wherever you are. This domestic abuse order only pertains to your residence, which, one, is not disclosed, and you don't work. And so it's really not what you need. What you need is the mutual restraining order. It binds both you and Mr. Davis, and it's anywhere. You can be at Wal-Mart, wherever. So it's actually better. So what I'll probably do is fold this case into the other — into the divorce.

It is this ruling and the subsequent dismissal of her petition that Mrs. Davis contests on appeal.

After the ruling, a question was raised by Mr. Davis's attorney about visiting the children, and this colloquy ensued:

> MS. MCKEEL: But if I may inquire, Mr. Davis has not seen the children since October and —
>
> THE COURT: That's why you just need to get it set for a temporary hearing. You're going to need an attorney —
>
> MS. DAVIS: Okay.
>
> THE COURT: — Ms. Davis. But you just need to get it set —
>
> MS. MCKEEL: Just set it for a temporary hearing?
>
> THE COURT: It's not —
>
> MS. MCKEEL: Okay.
>
> THE COURT: Yeah, it's not that — not in the scope of domestic abuse petitions to try to get that set, for the obvious reason. You get competing Orders out there with different situations. . . .

This discussion and the setting of the temporary hearing in the divorce action dealt with the children and visitation, not with the protection

order against domestic abuse. Though the majority opinion suggests this, at no point do I see where Mrs. Davis agreed that a protection order was not necessary or where she forfeited her right to pursue the issue on appeal.

Because of this, I cannot agree with the majority that Mrs. Davis in any way waived her right to appeal the issue of whether the protection order was improperly denied her. She had certainly made her position known to the circuit judge by filing a petition for a protection order in the first place and then testifying at the hearing. The circuit judge, however, concluded that a mutual restraining order was "better" and gave her reasons for that decision.

The majority seems to suggest that Mrs. Davis needed to object further after the judge's decision. But why? Surely, the majority is not suggesting that this court revert to the days where an attorney was required to "save his or her exceptions" after an adverse ruling. That requirement was abolished by legislative act in 1953. *See* Act 555 of 1953.

Moreover, the issue raised in this appeal is an important one. The circuit judge ruled that a mutual restraining order in a divorce case affords more protection to a battered spouse than an order of protection issued pursuant to the Domestic Abuse Act of 1991, now codified at Arkansas Code Annotated §§ 9-15-101 — 9-15-303 (Repl. 2002 & Supp. 2003). Mrs. Davis contends that this is simply wrong and urges that the circuit judge erred as a matter of law. She asserts, for example, that a protection order is enforced by law enforcement, and violation of such an order is a misdemeanor, all of which is statutory. *See* Ark. Code Ann. § 9-15-207 (Repl. 2002). She also underscores the point that our General Assembly passed the Domestic Abuse Act to assure the safety and protection of victims of domestic violence. *See* Ark. Code Ann. § 9-15-101 (Repl. 2002).

In short, I disagree that Mrs. Davis needed to take the additional step of "objecting" to the dismissal of her petition, as the majority would require, or that she "agreed to" abandon her quest for a protection order, thereby waiving her right to appeal the issue. Such reasoning unduly hampers a petitioner like Mrs. Davis in having a vital issue heard on appeal. Finally, I disagree that Mrs. Davis is raising new issues on appeal. Surely, the circuit judge knew the Domestic Abuse Act is enforced by law enforcement and

carries a misdemeanor sanction. In my opinion, Mrs. Davis has every right to appeal the circuit judge's ruling and the dismissal of her petition.

For these reasons, I respectfully dissent.

Marrio Terrell DEDNAM *v.* STATE of Arkansas

CR 04-573 200 S.W.3d 875

Supreme Court of Arkansas
Opinion delivered January 6, 2005

[Rehearing denied February 10, 2005.]

Clint Miller, for appellant.

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

ROBERT L. BROWN, Justice. Appellant Marrio Terrell Dednam appeals from his judgment of conviction for capital murder and his sentence to life imprisonment without parole. His sole allegation of error is that the circuit court erred in allowing a police detective to testify to statements made to her by the murder

victim with respect to another case, which allegedly constituted a motive for Dednam's acts. We find no reversible error, and we affirm the judgment and sentence.

The facts, which are garnered from the testimony at trial, are these. On December 4, 2002, Dednam and his friend, Willie Davis, contacted Alissa "Lisa" Jackson and asked her to call her friend Jerry Otis, the victim in this case.[1] Lisa was instructed to tell Otis that she wanted to meet him at a trailer park in southwest Little Rock. Otis agreed and had his friend, Herman Stevenson, drive him to the rendezvous spot. Upon arriving, Stevenson drove his car down the dead-end street in the park and saw Lisa Jackson. He reached the end of the road, turned around, and pulled his car up to Ms. Jackson. Otis got out of the passenger-side front seat of Stevenson's vehicle and began to enter the car's back seat on the passenger side so that Ms. Jackson could get in the front seat. As he was getting in the back seat of the car, he was fatally shot in the right side of the head. Dednam was arrested for the crime and charged with capital murder.

At the ensuing jury trial, the State sought to prove that Dednam's motive in the killing was to silence Otis for the benefit of Dednam's cousin, Antoine Baker, who was in jail at the time due to a crime allegedly perpetrated against Otis. Baker had allegedly tried to rob Otis some months earlier, and Otis was the prosecuting witness against him. To establish motive, the State put on proof that earlier on the day of December 4, 2002, the date of Otis's murder, Dednam had visited Baker in the Pulaski County Jail. In addition, both Stevenson and Ms. Jackson identified Dednam at the trial as Otis's murderer. Dednam was convicted of premeditated and deliberate capital murder and sentenced to life imprisonment without parole.

Dednam argues on appeal that this case is governed by the United States Supreme Court's decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), which he claims stands for the proposition that formal statements given by a declarant in the course of a police interrogation of the declarant are testimonial in nature and not admissible. He claims that *Crawford* is directly on point for purposes of the instant case in that in this case, the circuit court permitted the State to introduce statements made to a police detective by the victim, Otis, which served as the probable cause to arrest Antoine

[1] At the time, Davis was Jackson's boyfriend.

Baker. Dednam asks this court to apply *Crawford* retroactively and asserts that Otis's out-of-court statements to the police detective were admitted to establish the truth of the matter asserted therein, which was that Baker robbed Otis. He maintains that without Otis's statements, which provided the motive for the crime, the State's proof of Dednam's guilt consisted solely of the uncorroborated identification testimony of Stevenson and Jackson. He claims that the erroneous admission of this evidence could not be considered harmless, because the jury's consideration of Otis's statements describing the robbery by Baker influenced the jury's finding of Dednam's guilt for the capital murder.

This court has been constant and adamant that matters pertaining to the admissibility of evidence are left to the sound discretion of the circuit court. *See, e.g., Martin v. State*, 346 Ark. 198, 57 S.W.3d 136 (2001). Moreover, we will not reverse a circuit court's ruling on a hearsay question unless the appellant can show that the circuit court abused its discretion. *See id.*

At issue in the case before us is the testimony of Detective Lynda Keel of the Little Rock Police Department. She was called as a witness for the State at trial and testified that Antoine Baker was arrested on November 26, 2002, on an aggravated-robbery warrant. Upon further questioning by the prosecutor, Detective Keel continued:

> PROSECUTOR: And what caused that warrant to be issued?
>
> DETECTIVE KEEL: On August the 5th, 2002, there was [an] aggravated robbery reported where Jerry Otis was the victim, and I consequently, about five days later, interviewed him, showed a photo spread. He knew the initials of the suspect and the name and I showed a photo spread.

At that time, defense counsel objected on the grounds that anything Otis said to Detective Keel constituted hearsay and violated Dednam's Sixth Amendment right to confront and cross-examine a witness against him, as well as his due-process rights under both the United States and Arkansas Constitutions. The State responded that it was not offering Detective Keel's testimony as evidence that Baker did in fact commit aggravated robbery or for the truth of the matter asserted but, instead, was offering it to show that Otis made the statements, true or not true, and that as a result, Baker was arrested and charged. The circuit court overruled Dednam's objection.

Later in Detective Keel's testimony, the following, and most pertinent, colloquy occurred:

> PROSECUTOR: You said that Jerry Otis made a report that Antoine Baker robbed him. Tell the jury briefly what he said that Antoine Baker did to him.
>
> DEFENSE COUNSEL: May we approach?
>
> (Conference at the bench, out of the hearing of the jury, as follows:)
>
> DEFENSE COUNSEL: What Jerry Otis said is hearsay, and there is no exception that fits. This denies us our right to confront and cross-examine witnesses under the U.S. Constitution's Sixth Amendment and the due process clause of both Constitutions, Arkansas and U.S.
>
> PROSECUTOR: This is the same objection counsel made a moment ago, and I had the same response. This is not the trial of Antoine Baker, and we are certainly not offering this evidence as proof that Antoine Baker did, in fact, commit this crime. That would be for another trial and another place, but simply that Jerry Otis made these statements, true or not true, and Antoine Baker was arrested because of these statements. And so they are not being offered for the truth of the matter asserted. They are not hearsay, and the Court should admit those statements.
>
> DEFENSE COUNSEL: I would also argue to the Court that this would be confusing to the jury about the issues in this case.
>
> THE COURT: Okay. I will overrule it, but I think you have already — all right.
>
> (Return to open court.)
>
> PROSECUTOR: Just summarize what this aggravated robbery case was.
>
> DETECTIVE KEEL: Jerry Otis went to an address on Crenshaw to visit a female friend. When he arrived at that

address, he was confronted by several subjects outside who pointed a gun at him, made him undress and took his clothes from him, $500 in cash and then fired shots at him.

PROSECUTOR: And this was Antoine Baker?

DETECTIVE KEEL: Yes. He identified Antoine Baker.

PROSECUTOR: And as a result of statements Jerry Otis made to you, what did you do in response?

DETECTIVE KEEL: Had a warrant issued.

Dednam relies on the United State's Supreme Court decision in *Crawford v. Washington, supra,* as his primary authority. In that case, the petitioner, Michael Crawford, was accused of stabbing Kenneth Lee, who had allegedly tried to rape Crawford's wife, Sylvia. Following Crawford's arrest, he and his wife gave statements to police officers regarding the stabbing, and Crawford was charged with the crime. At his trial, Crawford asserted self-defense, and Sylvia did not testify because of the state's marital privilege which prohibited a spouse from testifying without the other spouse's consent. The prosecutor attempted to refute Crawford's defense using a tape recording of Sylvia's statement to police officers in which she stated that she did not see anything in Lee's hand at the time Crawford attacked him. The Washington State Court of Appeals reversed Crawford's conviction and held that Sylvia's statement lacked any indicia of reliability, as required by *Ohio v. Roberts*, 448 U.S. 56 (1980). The Washington Supreme Court, however, reinstated the conviction and held that while the statement did not fall within a firmly-rooted hearsay exception, it did possess guarantees of trustworthiness. The United States Supreme Court granted *certiorari* to determine whether the State's use of Sylvia's statement violated Crawford's confrontation-clause rights.

The United States Supreme Court reversed the decision of the Washington Supreme Court. The Court noted that the principal evil at which the clause was directed was the use of *ex parte* examinations as evidence against an accused and added that the framers of the United States Constitution would not have allowed the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant

had had a prior opportunity for cross-examination. The Court further said that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." 124 S. Ct. at 1364. It concluded that where testimonial evidence is at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374. The Court added with respect to Crawford:

> In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

Id.

In order for *Crawford* to apply in the instant case, Otis's statements to Detective Keel must in fact constitute testimonial hearsay. The Arkansas Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ark. R. Evid. 801(c) (2004). With respect to an out-of-court statement, however, this court has held that it is not hearsay under Rule 801(c), where the statement is offered to show the basis for the witness's actions. *See Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998). Furthermore, we have held that out-of-court statements are not hearsay if they are not offered for the truth of the matter asserted in the statement. *See Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997). Statements may be admissible to show they were made, however, as opposed to showing the truth of the matter asserted. *See Jackson v. State*, 274 Ark. 317, 624 S.W.2d 437 (1981).

In *Martin v. State*, 316 Ark. 715, 875 S.W.2d 81 (1994), this court examined Martin's contention that the circuit court erred in allowing a police officer to testify regarding information he received from an alleged informant on the basis that the information was inadmissible hearsay. The police officer's testimony consisted of his explanation of how he learned that the suspect in an aggravated robbery "left the store in a dark blue, dirty, Ford

pickup, with the driver's window covered with plastic rather than glass." 316 Ark. at 723, 875 S.W.2d at 85-86. The police officer further explained that in reliance on the information, he broadcast a description of the truck to other police units in the area and that another sergeant was alerted that a truck he had seen matched the description of the robber's vehicle, causing another police officer to be on the lookout for it. While not addressing Martin's constitutional arguments because they were not raised below, this court, on appeal, did conclude that the statements were not hearsay:

> An out-of-court statement is not hearsay if it is offered to show the basis of action. Ark. R. Evid. 801(c); *Bliss v. State*, 282 Ark. 315, 668 S.W.2d 936 (1984). Officer Otis's testimony was given in order to explain why Sergeant Bailey instructed [Officer] Zeke to locate the truck and determine the identity of the driver and why Martin's photograph was placed in a lineup to show to the victim. *See Dandridge v. State*, 292 Ark. 40, 727 S.W.2d 851 (1987). Because his testimony was provided in order to show the "basis of action," we hold that the trial court did not err in overruling Martin's hearsay objection.

Id., 875 S.W.2d at 86.

In the case at hand, Otis's statements to Detective Keel were not introduced to establish the truth of the matter asserted regarding Baker's crime against Otis, but, instead, were introduced to demonstrate Otis's connection to Baker and, thus, Dednam's connection to Otis. As evidenced from Detective Keel's testimony, she relayed the information that she received from Otis and the actions she took based upon that information, which were to secure a warrant for Baker's arrest. As the statements were presented to establish the basis for her actions in obtaining an arrest warrant for Baker and not the truth of whether Baker actually robbed Otis, which was a separate crime, we hold that Otis's statements to Detective Keel did not constitute hearsay.

We recognize that there is no question but that Detective Keel's testimony was helpful in establishing Dednam's motive for the crime. The State's theory in the instant case was that Dednam killed Otis as a favor to Baker, perhaps either in retaliation for identifying Baker as the one who robbed him or to eliminate the testimony of the victim of Baker's alleged crime. While the state is not required to prove motive, this court has held

that the state is entitled to introduce evidence showing all circumstances which either explain the act, show a motive for acting, or illustrate the accused's state of mind. *See Richmond v. State*, 302 Ark. 498, 791 S.W.2d 691 (1990). But even so, establishing motive does not equate to proving the truth of whether Otis was robbed or not. Where a statement is admitted for a legitimate, non-hearsay purpose, that is, not to prove the truth of the assertions therein, the statement is not hearsay under the traditional rules of evidence and the non-hearsay aspect raises no confrontation-clause concerns. *See Tennessee v. Street*, 471 U.S. 409 (1985) (holding that Street's confrontation-clause rights were not violated by the introduction into evidence of an accomplice's confession for the non-hearsay purpose of rebutting Street's testimony that his confession was coercively derived from the accomplice's statement) (cited by the Supreme Court in *Crawford v. Washington, supra*, for the proposition that the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted).

Dednam argues further that the admission of the statements by Otis to Detective Keel violated his rights under the Confrontation Clause. This too is a meritless argument. In *Crawford v. Washington, supra*, the Court noted that "[t]he [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 124 S. Ct. at 1369, n.9. While Otis's statements to Detective Keel may have been testimonial in nature, they were admitted to demonstrate the basis of Detective Keel's actions in seeking an arrest warrant for Baker, whom Dednam subsequently visited in jail the night of Otis's murder, and further to establish motive, and not to prove that Baker actually robbed Otis. Because the statements were not admitted for the truth of the matter asserted, cross-examination was not required to test their veracity. Hence, the statements are not barred by the Confrontation Clause. *See Tennessee v. Street, supra.*

Because we affirm on the basis that the circuit court did not abuse its discretion in admitting Detective Keel's testimony, we need not address the State's alternative argument of harmless error.

The record in this case has been reviewed for other reversible error pursuant to Supreme Court Rule 4-3(h), and none has been found.

Affirmed.

GUNTER, J., not participating.

Barbara MITTRY, as Personal Representative of the Estate of F.K. "BILL" Mittry, Deceased and Joseph Harvey, Both On Behalf of All Others Similarly Situated *v.* BANCORPSOUTH BANK f/k/a/ First United Bank (Stuttgart)

04-829 200 S.W.3d 869

Supreme Court of Arkansas
Opinion delivered January 6, 2005

Perroni, James & House, P.A, by: *Samuel A. Perroni* and *Patrick R. James,* for appellants.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Herman Ivester,* for appellee.

ANNABELLE CLINTON IMBER, Justice. This is an appeal from an order by the circuit court denying class certification under Rule 23 of the Arkansas Rules of Civil Procedure. The appellants in this appeal are Barbara Mittry, who is the personal representative of the Estate of F.K. "Bill" Mittry, deceased, and Joseph Harvey, as representatives in their individual capacities and of all others similarly situated. The appellee is Bancorpsouth Bank, formerly known as First United Bank (Stuttgart). On April 5, 2001,

Bill Mittry filed a class-action complaint against the appellee for breach of fiduciary duty, gross negligence, and breach of contract as a result of a separate lawsuit initiated and pursued by the appellee at a time when it served as trustee in connection with the issuance and sale of bonds to the public to help finance improvements by four development districts in the city of Maumelle (the "Maumelle Bonds").[1] *First United Bank v. Phase II, et al.*, 347 Ark. 879, 69 S.W.3d 33 (2002). According to the allegations in the complaint, which Harvey later joined, the appellee's pursuit of the litigation caused a decrease in the secondary market sale price that appellants received when they sold their bonds, thereby causing them to sustain a financial loss. The appellants sought class certification of a class of Maumelle bondholders "who (a) purchased their bonds before April 5, 1998, and (b) sold their bonds between April 5, 1998 and October 7, 2002." In its answer, the appellee denied any liability to the bondholders.

Shortly after the filing of the complaint, Mittry filed a motion to certify class and the parties proceeded with discovery. In late 2003, the appellants amended their complaint and motion to certify the class. On April 8, 2004, after a hearing on the issue of class certification, the circuit court denied the appellants' motion for class certification. That ruling is the subject of this interlocutory appeal. We review a circuit court's denial of class certification under an abuse-of-discretion standard. *Fraley v. Williams Ford Tractor & Equip.*, 339 Ark. 322, 5 S.W.3d 423 (1999); *USA Check Cashers of Little Rock, Inc., v. Island*, 349 Ark. 71, 76 S.W.3d 243 (2002).

The crux of the appellants' appeal concerns whether the proposed class satisfies the predominance, numerosity, and superiority requirements under Ark. R. Civ. P. 23 (2004).[2] In certifying a class action under Ark. R. Civ. P. 23, the circuit court must certify that the following conditions are satisfied:

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[1] Mittry and Harvey bought certain Maumelle Bonds that they subsequently sold.

[2] While the circuit court's order reflects specific findings on the predominance, numerosity, and superiority requirements, the parties disagree as to whether the order includes a finding on the commonality requirement. Moreover, the order is completely silent on the requirement of typicality. In the instant appeal, however, the appellants do not contend that the circuit court's order should be reversed because the court failed to set forth specific findings in regard to the Rule 23 elements following a request for specific findings of fact and conclusions of law under Ark. R. Civ. P. 52 (2004).

> (1) The class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of a class, and (4) the representative parties will fairly and adequately protect the interest of the class. Ark. R. Civ. P. 23(a). Additionally, the court must find that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Ark. R. Civ. P. 23(b).

Fraley v. Williams Ford Tractor & Equip., 339 Ark. at 333, 5 S.W.3d at 430. Here, the circuit court's order denying class certification states in relevant part:

> [T]he questions of law and fact common to the members of the proposed class do not predominate over any questions affecting individual members, and a class action is not superior to other methods for the fair and efficient adjudication of the controversy.
>
> Although facts and legal issues may be common to the class, the heart of Plaintiffs' claim is based upon the contention that a court action by the defendant caused low bond prices and a diminished sales price. The proposed class consists of approximately nineteen (19) sales of unrated bonds in odd lots by brokers in over the counter transactions during a period of changing interest rates. Given the individual question of causation relative to these sales, joinder and individual determination would be the superior method of achieving fair adjudication. The numerosity requirement is not satisfied and joinder is not impracticable.

The appellants appeal the circuit court's order, arguing that the circuit court abused its discretion when it determined that the predominance, numerosity, and superiority factors were not satisfied. We affirm the circuit court.

As stated above, Rule 23(b) provides that an action may be maintained as a class action if the prerequisite requirements of Rule 23(a) are satisfied, and the court finds that "*the questions of law or fact common to the members of the class predominate over any questions affecting only individual members*" and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Ark. R. Civ. P. 23(b) (2004) (emphasis added). With regard to the predominance requirement of Rule 23, we

must decide if the issues common to all plaintiffs "predominate over" the individual issues. *Baker v. Wyeth-Ayerst Laboratories*, 338 Ark. 242, 992 S.W.2d 797 (1999).

In concluding that the predominance factor was not satisfied in the *Baker v. Wyeth-Ayerst Laboratories* case, we noted the admonition by the Sixth Circuit Court of Appeals that a court should " 'question the appropriateness of a class action' where 'no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and the individual issues outnumber common issues.' " *Baker v. Wyeth-Ayerst Laboratories*, 338 Ark. at 247, 992 S.W.2d at 800. (citing *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988)). Similarly, in *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 813 S.W.2d 240 (1991), class certification was proper because the common issues of the defendant's conduct and causation predominated over and could be resolved prior to addressing the individual and less difficult issues of damages and injuries. This court reiterated in *Arthur v. Zearley,* 320 Ark. 273, 895 S.W.2d 928 (1995), that a case with "numerous individual issues" can be better resolved on a case-by-case basis.

In contrast, the claim of misrepresentation was the "common linchpin" of every class member's case in *BNL Equity Corp. v. Pearson*, 340 Ark. 351, 10 S.W.3d 838 (2000), and the resolution of that issue predominated over potential individual issues. Moreover, in *SEECO, Inc. v. Hales*, 330 Ark. 402, 954 S.W.2d 234 (1997), because the alleged scheme to defraud royalty owners was the "overarching issue" and the starting point in resolving the matter, there was no abuse of discretion by the circuit court in certifying the class. Once again, the predominance issue was satisfied in *F & G Financial Serv., Inc. v. Barnes*, 349 Ark. 420, 82 S.W.3d 162 (2002), where the "overarching common questions" were whether the check casher's transactions were loans with interest accruing and whether those transactions violated the Arkansas Constitution. Finally, in *Williamson v. Sanofi Winthrop Pharm.*, 347 Ark. 89, 60 S.W.3d 428 (2001), we concluded that class certification is not appropriate when "the questions on which the case turns" are not common to each class member.

In the instant case, the "thrust" of the appellants' complaint is that the appellee's actions in pursuing the litigation in Pulaski County Chancery Court adversely impacted and depressed the secondary market prices that the appellants received for their Maumelle bonds and thereby caused their losses. On appeal, the

appellants contend that there are common questions of fact and law in this case relating to: (1) the propriety of the actions and decisions taken by the appellee in deciding to file and prosecute the earlier lawsuit, such actions and decisions affecting the financial standing of each class member; (2) whether the appellee had contractual obligations to the bondholders and whether those obligations were breached; and (3) whether the appellee, in taking its actions and making its decisions, committed gross negligence and breached its fiduciary duties while acting as trustee for the bond issues. Even under the very categories listed by the appellants, however, individual issues predominate over the issues common to the class as the appellants would be required to establish that the appellee's conduct was the proximate cause for the specific low price received by *each member* of the proposed class. In other words, there would have to be a review of each class member's individual situation concerning the sale of his or her Maumelle Bonds. Because the over-the-counter market for municipal bonds is not a centralized exchange and offers no specific "market price" for such bonds, the price a class members obtained for his or her bonds would vary based upon at least eight factors that are unique to each seller's transaction: (1) interest rates, (2) duration of marketing, (3) block size of bond to be sold, (4) U.S. Treasury Bond rates, (5) the rating of the Maumelle Bonds, (6) publicity, (7) the broker, and (8) the seller.

The appellants state that the appellee's causation argument is a "red herring." They cite *F & G Financial Serv., Inc. v. Barnes, supra,* for the proposition that "challenges on the statutes of limitations, fraudulent concealment, releases, causation, or reliance have usually been rejected and will not bar predominance satisfaction because these issues go to the right of the class member to recover, in contrast to the underlying issues of the defendant's liability." *F & G Financial Serv., Inc. v. Barnes*, 349 Ark. at 432, 82 S.W.3d at 169 (citing *SEECO, Inc. v. Hales*, 330 Ark. at 413, 954 S.W.2d at 240). Their reliance on *F & G Financial Serv., Inc. v. Barnes, supra,* however, is misplaced. As mentioned earlier, in the *F & G Financial Services* case, we found that there were "overarching common questions" concerning whether the check casher's transactions were loans with interest accruing and whether those transactions violated the Arkansas Constitution. The proposition cited by the appellants merely reaffirms that individual issues and defenses regarding the recovery of individual members cannot defeat class certification where there are common questions con-

cerning the defendant's alleged wrongdoing which must be resolved for *all* class members. *F & G Financial Serv., Inc. v. Barnes*, 349 Ark. at 432, 82 S.W.3d at 169. (emphasis added). In the absence if such common questions, the *F & G Financial Services* case is not apposite.

The class in the instant case, as defined by the appellants, must consist of persons who *sold* their bonds over a particular four-year period.[3] Furthermore, it is the appellee's "actions and decisions affecting the *financial standing of each class member*" that the appellants propose as a common question. The circuit court correctly noted in its order that such questions center around the contention that the appellee's participation in litigation caused low bond prices and a diminished sales price. As such, individual issues predominate over the issues common to the class because the appellants would be required to establish that the appellee's conduct was the proximate cause for the specific low price received by *each member* of the proposed class.

For the above-stated reasons, we cannot say that the circuit court abused its discretion in ruling that the predominance requirement of Ark. R. Civ. P. 23(b) has not been satisfied. Because the circuit court's order denying class certification can be affirmed solely on the predominance factor, we need not address the numerosity and superiority requirements under Rule 23(a).

Affirmed.

GUNTER, J., not participating.

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[3] Although it is improper to consider the merits of the underlying lawsuit in the context of class certification, consideration of the elements of the underlying claim is important to determine whether any questions are common to the class and whether those questions will resolve the issue. *Williamson v. Sanofi Winthrop Pharm., supra.*

ARKANSAS DEPARTMENT of HUMAN SERVICES *v.*
Honorable Gary ISBELL, Judge, Christina Starry,
Mother of Minor Child

04-852 200 S.W.3d 873

Supreme Court of Arkansas
Opinion delivered January 6, 2005

Gray Allen Turner, for petitioner.

Mike Beebe, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Ass't Att'y Gen., for respondents.

BETTY C. DICKEY, Justice. The Department of Human Services (DHS) seeks a writ of prohibition to prevent the Marion County Circuit Court from enforcing an order that DHS perform a home study in Kansas. The petition is denied because the circuit court has rescinded its order.

At issue is the placement of a fifteen-year old child with the child's biological aunt, living in Kansas. This aunt was being considered for legal custody through the Interstate Compact on

the Placement of Children (ICPC). On March 11, 2004, the circuit court ordered a home study through ICPC. On June 25, 2004, the circuit court, expressing concern that the home study through ICPC had not been completed and citing a need to place the child immediately, issued an order requiring DHS to proceed to Kansas to perform a home study on the aunt's home by August 11, 2004. Confirming from both the CASA worker and the attorney ad litem that there was no objection by DHS[1], the court stated:

> The Court finds that it is imperative with [the child's] upcoming discharge from treatment that we update his placement with [his] family in Kansas. The Court finds that the wheels of ICPC turn too slowly for that to happen in a timely fashion, so the Court has directed that DHS do a home study on the [child's] family in Kansas. The Court finds that there is an availability of time and effort because DHS is already going to be in the State of Kansas for another matter, and the Court would direct that occur on that date. The Court would note that this has been with the compliance with the CASA worker . . . as well as with. . . the attorney ad litem in this case, is that right?

On July 7, 2004, DHS filed an application for stay of the order to do the home study in Kansas, arguing that the circuit court erred in ordering DHS to undertake an out-of-state home study. On August 6, 2004, DHS petitioned for a writ of prohibition and application for temporary relief with this court. On August 10, 2004, we stayed the circuit court's order and directed the parties to submit simultaneous briefs on the issue. On August 11, 2004, the circuit court withdrew its previous order requiring DHS to perform a home study in Kansas, because the ICPC home study had been completed and had been received by the circuit court. The circuit court, awarding custody of the child to the aunt, stated:

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[1] This court notes that subject-matter jurisdiction can be raised at any time. *Parker v. Sebourn,* 351 Ark. 453, 456, 95 S.W.3d 762, 765 (2003). It is well settled that subject-matter jurisdiction may not be stipulated by the parties and, "if lacking, cannot be induced simply because there is no objection." *Id.*; *J.W. Reynolds Lumber Co. v. Smackover State Bank,* 310 Ark. 342, 352, 836 S.W.2d 853, 858 (1992).

> At this point in time then the Court would withdraw previous orders made by the Court requiring the Department to do a home study in Kansas. It's now been done by ICPC, so it's probably moot anyway.

DHS now asks this court to issue a writ and order that: (1) DHS no longer be required to perform the out-of-state home study; and, (2) no contempt or enforcement proceedings may be undertaken in the circuit court. DHS contends that "the trial court has exceeded its power in this case, and should be prevented from enforcing the order, or punishing the Department or its caseworkers for violating an order that should have never been entered." DHS argues that the circuit court must enforce the Interstate Compact on the Placement of Children, and that a circuit court does not have the statutory authority to order DHS to perform a home study in another state.

We need not address those arguments because the trial court has the inherent power to modify an order with or without notice to any party by motion of a party or on its own within ninety days of filing. *Steward v. Wurtz,* 327 Ark. 292, 938 S.W.2d 837 (1997); *Young v. Young,* 316 Ark. 456, 872 S.W.2d 856 (1994). The power of a court to modify or set aside a judgment during the term it was entered, now ninety days according to Rule 60(b)[2], exists as an inherent power and outside of any rule or statute. *Id.; Massengale v. Johnson,* 269 Ark. 269, 599 S.W.2d 743 (1980); *Cowan v. Patrick,* 247 Ark. 886, 448 S.W.2d 336 (1969); *Wright v. Ford,* 216 Ark. 55, 224 S.W.2d 50 (1949). That authority exists so that courts may review and correct any mistakes, errors, or indiscretions that might have been committed during the term. *Id.*; *Underwood v. Sledge,* 27 Ark. 295 (1871).

Because the trial court has already acted and there currently is no act to prohibit, the petition is denied.

Denied.

GUNTER, J., not participating.

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[2] After the 2000 amendment to the Rules of Civil Procedure, the power to modify or set aside a judgment during the term it was entered is now found at Rule 60(a).

Mary Nelson BOGACHOFF *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

04-1183 200 S.W.3d 884

Supreme Court of Arkansas
Opinion delivered January 6, 2005

John Atkins Crain, for appellant.

Gray Allen Turner, for appellee.

PER CURIAM. This case is an appeal from an order entered by the Baxter County Circuit Court, Juvenile Division, on February 6, 2004, terminating the parental rights of Appellant Mary Nelson Bogachoff. While counsel appointed by the circuit court to represent Ms. Bogachoff filed a timely notice of appeal on March 4, 2004, the record was not timely filed with our clerk. Ark. R. App. P.—Civ. 5(a) (2004). Eventually, on November 4, 2004, the Department of Human Services (DHS) filed a partial record along with its motion to dismiss the instant appeal. Ark. R. App. P.—Civ. 5(c) (2004).

The partial record does not contain an affidavit of indigency, but the notice of appeal filed by appointed counsel states that Ms. Bogachoff "has filed a petition for indigency concerning the

payment to the court reporter pursuant to A.C.A. 16-13-510 for preparation of the record on appeal." In Ms. Bogachoff's response to DHS's motion to dismiss, appointed counsel also indicates the circuit court ruled that Ms. Bogachoff was not entitled to a record *in forma pauperis*. The court also refused to allow appointed counsel to withdraw. Furthermore, Ms. Bogachoff states in her response that "she has not been able to afford or transmit the funds necessary for the preparation of a record or transcript," and, consequently, the record was not timely filed.

If this were a criminal case and appointed counsel failed to tender the record to this court within ninety days of the date of the notice of appeal as required by Ark. R. App. P.—Civ. 5 (2004), Mrs. Bogachoff could have petitioned this court *pro se* for a rule on the clerk to enable her to file the record and thereby perfect her appeal. *Atkins v. State*, 308 Ark. 675, 827 S.W.2d 636 (1992). Pursuant to Ark. R. App. P.—Crim. 16 (2004), trial counsel shall continue to represent a convicted defendant throughout any appeal to the appellate court, unless permitted by the trial court or the appellate court to withdraw. Even if there are insufficient funds to pay for the appeal transcript, an attorney cannot abandon the convicted defendant solely because there is no money for an appeal. *Jackson v. State*, 325 Ark. 27, 923 S.W.2d 280 (1996); *Parker v. State*, 303 Ark. 185, 792 S.W.2d 619 (1990). An attorney, knowing the convicted defendant desires to appeal, is obliged under Ark. R. App. P.— Crim. 16, regardless of the defendant's financial circumstances, to file the notice of appeal and then file a partial record, consisting of at least the judgment and notice of appeal, in the appellate court with a motion to be relieved containing a statement of the reason for the request to withdraw. *Jackson v. State, supra.* It is well settled under our case law and appellate rules of procedure that a convicted defendant may not be penalized for his or her attorney's failure to tender the record in accordance with the rules of procedure. *Atkins v. State, supra.* Therefore, this court has found such an error to be good cause to grant a *pro se* motion for rule on the clerk in a criminal case. *Norman v. State*, 323 Ark. 444, 916 S.W.2d 724 (1996). No such remedy, however, exists for appellants in civil cases. Thus, Ms. Bogachoff should not be penalized for her failure to file a motion for rule on the clerk.

Under our recent decision in *Linker-Flores v. Ark. Dept. of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), indigent parents have a right to an appeal from a judgment terminating

parental rights. In connection with such appeals, the Supreme Court has held that a state may not condition the appeal on the parent's ability to pay record preparation fees. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Furthermore, we have previously allowed an indigent parent to proceed *in forma pauperis* and ordered that the transcript be furnished at the State's expense. *Petition of Hutton*, 301 Ark. 538, 785 S.W.2d 33 (1990). Accordingly, because Ms. Bogachoff has a right to an appeal from the termination of her parental rights, and that right cannot be conditioned on her ability to pay for the preparation of a record, we must deny DHS's motion to dismiss the appeal. Ms. Bogachoff is ordered to file an affidavit of indigency within 30 days and a petition for writ of certiorari to complete the record.

Motion to dismiss denied.

GUNTER, J., not participating.

Quincy MOORE *v.* STATE of Arkansas

CR 04-927 200 S.W.3d 891

Supreme Court of Arkansas
Opinion delivered January 6, 2005

Daniel D. Becker, for appellant.

No response.

PER CURIAM. Pursuant to this court's order in *Moore v. State*, 359 Ark. 370, 197 S.W.3d 447 (2004), the circuit

court made findings of fact on the issue of attorney fault in failing to timely file the record on appeal. On November 23, 2004, the circuit court held a hearing and on December 3, 2004, the circuit court's Findings of Fact were filed in this court. We conclude that there is attorney fault.

Under Ark. R. App.—Civ. 5(a), the record on appeal must be filed within ninety days of the filing of the notice of appeal. Moore filed a *pro se* notice of appeal on June 15, 2004, making the record due by September 13, 2004. Attorney Barbara A. Ketring-Beuch filed a motion for rule on the clerk on Moore's behalf which was granted in *Moore, supra.*

The circuit court recounted that Moore's attorney testified that she discussed an appeal with Moore, but that Moore never contacted her about filing an appeal, and that she was unaware a *pro se* notice of appeal had been filed until she was contacted by the Criminal Justice Coordinator's office regarding the appeal "around the first part of August." The circuit court concluded that at the time Ketring-Beuch became aware of the appeal, she still had approximately five weeks before the record had to be filed on September 13, 2004. An attorney must continue to represent a client until relieved by the court. *Thomas v. State*, 335 Ark. 262, 983 S.W.2d 122 (1998). The circuit court further noted that up until September 13, 2004, the circuit court had authority under Ark. R. App. P.—Civ. 5 to hear and grant a motion for an extension of time within which to file the record. While noting the petition for writ of certiorari filed by Ketring-Beuch, the circuit court found that there was sufficient time for Ketring-Beuch to complete the record before the time to file it expired.

On September 2, 2004, eleven days before the time to file the record expired, Ketring-Beuch filed a "Petition for Writ of Certiorari to Complete the Record" in this court. In that petition, Ketring-Beuch sought an extension of time to complete the record and an order that the circuit clerk complete the record. The writ does serve to bring the record of the circuit court to this court so that this court may examine it here. *Huffman v. Ark. Jud. Disc. & Disab. Comm'n*, 344 Ark. 274, 42 S.W.3d 386 (2001). However, review is limited to errors appearing on the face of the record. *Id.* There was no issue of error in the circuit court upon which a petition for certiorari could act, and filing the petition was

a nullity. Ketring-Beuch erred when she filed a petition for a writ of certiorari. She should have sought an extension of time from the circuit court. Rule 5 provides that a circuit court may grant extensions of time to file the record on appeal up to seven months from the date of the entry of judgment. *Coggins v. Coggins*, 353 Ark. 431, 108 S.W.3d 588 (2003). As the circuit court noted, about five weeks were remaining when counsel was told that a *pro se* notice of appeal had been filed. An attorney is expected to know the law. *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (Feb. 12, 2004). Attorney Ketring-Beuch should have filed the record and is at fault. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Joe MORGAN *v.* STATE of Arkansas

CR 04-1088 200 S.W.3d 890

Supreme Court of Arkansas
Opinion delivered January 6, 2005

Appellant, pro se.

No response.

PER CURIAM. On December 8, 2003, judgment was entered reflecting that Joe Morgan had entered a plea of guilty to rape and sexual assault in the first degree. An aggregate sentence of 60 years' imprisonment was imposed. On February 25, 2004, Morgan filed in the trial court a petition for postconviction relief pursuant to Criminal Procedure Rule 37.1, challenging the judgment.[1] The petition was denied on June 18, 2004.

Although Rule 37.2(d) precludes the filing of a motion for reconsideration following the denial of a Rule 37.1 petition, Morgan filed a motion for modification of the order on June 29, 2004. On July 28, 2004, he filed a notice of appeal. On August 2, 2004, the court denied the motion for modification of the June 18, 2004, order. Morgan filed a second notice of appeal on August 8, 2004, and lodged an appeal here from both the June 18, 2004, and August 2, 2004, orders. He subsequently filed a series of motions.

The appeal is dismissed and the motions are declared moot because appellant could not prevail on appeal. First, the notice of appeal filed on July 28, 2004, was not timely with respect to the June 18, 2004, order. Secondly, while the notice of appeal filed on August 8, 2004, was timely with respect to the August 2, 2004, order, Rule 37.2(d), as stated, does not allow for a petition to modify an order, and appellant was accordingly entitled to no relief on the motion.

This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *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

[1] The petition was labeled "amended petition," but it does not appear from the record that a prior petition had been filed.

(1994); *see Chambers v. State*, 304 Ark. 663, 803 S.W.2d 932 (1991); *Johnson v. State*, 303 Ark. 560, 798 S.W.2d 108 (1990); *Williams v. State*, 293 Ark. 73, 732 S.W.2d 456 (1987).

It may be that appellant was relying on the "deemed denied" provision of Ark. R. App. P.—Civ. 4(c), applicable to criminal appeals through Ark. R. App. P.—Crim. 2(a)(3), to render the notice of appeal filed on August 8, 2004, timely as to both orders entered, but that appellate rule does not apply to Rule 37 appeals. *See Chavis v. State*, 328 Ark. 251, 253, 942 S.W.2d 853, 854 (1997) (citing *Dodson v. State*, 326 Ark. 637, 934 S.W.2d 198 (1996)).

Appeal dismissed; motions moot.

Brady CARTER *v.* STATE of Arkansas

CR 04-164 200 S.W.3d 906

Supreme Court of Arkansas
Opinion delivered January 13, 2005

[Rehearing denied February 10, 2005.]

[redacted]

[redacted]

[redacted]

[redacted]

James Law Firm, by: *William O. "Bill" James, Jr.*, for appellant.

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

TOM GLAZE, Justice. Appellant Brady Carter brings this appeal from his convictions of kidnapping, third-degree battery merged with first-degree terroristic threatening, and robbery. Carter argues that, at the bench trial of this case, the trial court erred in denying his motion for directed verdict, claiming the State's evidence fell short in proving these convictions. We hold that the trial court correctly found the evidence sufficient to support the kidnapping and terroristic threatening convictions.

Carter also asserts that the State failed to prove either a robbery or an aggravated robbery conviction. However, the State, in its cross-appeal, contends the trial court misinterpreted this court's holding in *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003), causing the trial court to erroneously reduce Carter's aggravated robbery charge to the lesser included crime of robbery. We grant the State's cross-appeal because the trial court erred when it concluded *Smith* was legal precedent which required the trial court to reduce the State's aggravated robbery to robbery.

We first address the sufficiency of evidence issues Carter raises, because an appellant's right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of any asserted trial errors. *Young v. State*, 316 Ark. 225, 871 S.W.2d 373 (1994). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002). In reviewing the sufficiency of the evidence, this court views the evidence in a light most favorable to the State and considers only the evidence that supports the verdict. *Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805 (1998).

As previously noted, this case was a bench trial, and in such trials, the trial judge is in a superior position to evaluate the witnesses and to weigh their credibility. *Johnson v. State*, 337 Ark. 196, 202, 987 S.W.2d 694, 698 (1999). Moreover, when the defendant takes the stand in his defense and offers his own account of the events, as Carter did here, it is well settled in this state that the factfinder 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. *Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000).

With these standards in mind, we consider Carter's suggestion that the State failed to prove his kidnapping conviction. In Arkansas, a person commits the offense of kidnapping by intentionally restraining another person without his or her consent for the purpose of obtaining a ransom or reward, or for any act to be performed or not performed for the person's 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) and (4) (Repl. 1997). "Restraint without consent" includes "restraint by physical force, threat, or deception[.]" Ark. Code Ann. § 5-11-101(2) (Repl. 1997).

[redacted] At trial, the State presented the testimony of the victim, Albert McVay, who said that Carter robbed and kidnapped him on March 21, 2002. McVay testified that Carter came to his home with three other individuals, and, after duct-taping his mouth and arms, they forced him at gunpoint to accompany them to Carter's home. McVay further testified that Carter robbed him of $2,040 cash that he had on his person. McVay maintained that Carter and his friends continually beat him from the time he was initially kidnapped until the time he was returned to his home. Although Carter eventually returned McVay to his home, McVay averred that before Carter left, he threatened to kill both McVay and his girlfriend, Stephanie Childress, who was not home when Carter and his friends confronted McVay. Carter also threatened to blow up McVay and Stephanie's house if McVay failed to return with $2,000 more to Carter's house by 8:00 a.m. the next day. Clearly, the evidence presented by the State supports the kidnapping conviction.

Carter next questions the State's evidence that resulted in his first-degree terroristic threatening conviction. Arkansas Code Annotated § 5-13-301 (Repl. 1997) provides that a person commits the offense of terroristic threatening if, with the purpose of terrorizing another person, he threatens to cause the death or serious physical injury or substantial property damage to another person. On this point, Carter simply argues that the evidence against him was "highly suspect."

[redacted] In short, Carter challenges the veracity of the victim, McVay; however, as previously stated, a witness's credibility is a question of fact for the trial court. *Johnson, supra.* Moreover, there was sufficient evidence presented at trial that Carter threatened to kill both McVay and Stephanie and to blow up their house if McVay did not later return to Carter's home with more money. Because the trial judge was in the superior position to weigh the credibility of the evidence, Carter's conviction for first-degree terroristic threatening is affirmed.

In his third point, Carter first asserts that the State failed to prove him guilty of either robbery or aggravated robbery. His contention on this point is without merit, because the State presented sufficient evidence to prove either offense. Under Ark. Code Ann. § 5-12-102(a) (Repl. 1997), 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 or threaten physical force upon another. Aggravated robbery, on the other hand, occurs when a person commits a robbery while "armed with a deadly weapon" or if the assailant "represents by word or conduct that he is so armed or inflicts or attempts to inflict death or serious physical injury upon another person." *See* Ark. Code Ann. § 5-12-103(a) (Repl. 1997).

Carter offered testimony and evidence at trial that conflicted with the State's evidence. However, we review the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Jordan v. State*, 356 Ark. 248, 254, 147 S.W.3d 691, 694 (2004); *Wilson v. State, supra.* As discussed above, McVay testified that Carter and his friends came to McVay's residence, and, after duct-taping his mouth and arms, they forced him at gunpoint to accompany them to Carter's home. Carter then took $2,040 cash that McVay had on his person. McVay maintained at trial that Carter and his friends continually beat him from the time they kidnapped him and until they returned him to his home. Before leaving, Carter threatened to kill both McVay and Stephanie and to blow up their home unless McVay returned to Carter's home the next morning with $2,000 or more. After Carter left, McVay phoned the police to give them his account of what occurred. At trial, Officer J. P. Marriet, who investigated McVay's report of events, testified that, although Carter did not admit to any of the other charges, Carter admitted to having beaten McVay. In addition, Stephanie and another friend, Stevie Owens, testified that, although they were not present when McVay was kidnapped, they did see McVay after he was returned to his house; he was wet, burned, bruised, bleeding, and scared.

Based on the foregoing evidence, the trial court specifically found that it believed McVay's story that a gun was utilized during this criminal episode, and also found "there's no question that blows to [McVay's] face and [his] head, together with the abrasions and burn marks . . . constituted serious physical injury." Although the trial court made these factual findings that supported the aggravated robbery charge, it cited this court's recent decision of *Smith v. State, supra*, for the proposition that to prove aggravated robbery, the State was required to show the "gun" was used as a gun, and not as a club. The trial court held that, under *Smith*, it had no legal or statutory authority to convict Carter of aggravated robbery because the State failed to prove the element that Carter had employed his firearm as a firearm. We agree with the issue

raised by the State on cross-appeal, namely, that the trial court erred in its interpretation and application of the rule of law established in *Smith*.

In *Smith*, the defendant was charged with the crime of *first-degree battery* under § 5-13-207(a)(1) and (7) (Repl. 1997). In the present case, Carter was charged with *aggravated robbery*, a crime which contains different statutory elements. To prove first-degree battery under § 5-13-207, the State must show the defendant had both the intent to cause physical injury to another person by means of a firearm and that such injury resulted. In the *Smith* case, this court had to determine whether the striking of a person with the butt of a pistol constituted *first-degree battery*; the State's *robbery* statutes were not involved in *Smith*. By way of contrast, this case involves the aggravated robbery statute. In order to obtain a conviction for aggravated robbery, the State did not need to show that a deadly weapon was actually used upon McVay, but only that Carter either was armed or represented that he was armed when he threatened to harm McVay. Consequently, the aggravated robbery was complete when physical force was *threatened*. *See Williams v. State*, 351 Ark. 215, 225, 91 S.W.3d 54, 60 (2002). Therefore, the trial court's application of *Smith* to the present matter was erroneous. The State presented evidence that unquestionably showed that Carter employed or threatened to employ physical force while he was armed with a deadly weapon. *See* §§ 5-12-103(a) and 5-12-102(a).

For the above reasons, we affirm Carter's convictions on the sufficiency of the evidence; however, we reverse and remand the robbery conviction for further proceedings. *See State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997) (when a trial judge makes an error of law rather than an error of fact, double jeopardy is not implicated).

STATE of Arkansas *v.* Robert PITTMAN, Jr.

CR 04-821 200 S.W.3d 893

Supreme Court of Arkansas
Opinion delivered January 13, 2005

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

Gary Potts, for appellee.

DONALD L. CORBIN, Justice. The State of Arkansas brings this interlocutory appeal from the order of the Desha

County Circuit Court granting Appellee Robert Pittman Jr.'s motion to suppress a custodial statement. The trial court suppressed the statement because it concluded that the officer had continued the interrogation environment after Appellee had invoked his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and that the officer knew or should have known that his actions would have likely caused Appellee to incriminate himself. The State contends that the trial court's ruling is based upon an erroneous interpretation of the law. We agree, and we reverse and remand.

The record reflects that Appellee was one of several suspects arrested for forgery and theft of property by the Dumas Police Department. He was brought to the police station, where Officer Charles Blevins advised him of his *Miranda* rights. Appellee told the officer that he would not give a statement without a lawyer present. At that point, the interrogation ceased. However, Appellee remained in the interrogation room with Blevins, while the officer reviewed Appellee's case file. No conversation of any sort occurred during this time. After the passage of approximately ten minutes, Blevins realized that he should ask Appellee for handwriting samples. To Blevins's surprise, Appellee agreed to give the samples. Blevins then spent approximately three minutes comparing the samples to the forged check. Again, no conversation occurred during this time. The silence was subsequently broken by Appellee's spontaneous statement that he had signed the check.

The trial court held that Officer Blevins's actions violated Appellee's constitutional rights. The trial court explained that the offensive action was the officer's preservation of "the interrogatory environment for fifteen to twenty minutes after the suspect invoked his right to remain silent," coupled with the request for handwriting samples. The trial court relied on the holding in *Rhode Island v. Innis*, 446 U.S. 291 (1980).

The State asserts that the trial court made an error of law in suppressing Appellee's statement, because the statement was spontaneous and was therefore not the product of custodial interrogation. Appellee does not dispute the State's assertion that his statement was not the result of direct questioning by the officer. However, he contends that the officer's actions in holding him in the interview room and requesting handwriting samples from him after he had invoked his *Miranda* rights was the functional equivalent of interrogation under *Innis*, 446 U.S. 291 (1980).

Before we may address the merits of the issue on appeal, we must first determine whether this is a proper State's appeal under Ark. R. App. P.—Crim. 3. This court has recently discussed this issue:

> 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.*

State v. Markham, 359 Ark. 126, 127-28, 194 S.W.3d 765, 767 (2004).

[redacted] As set out above, the issue presented in this appeal is whether an officer's mere presence with the accused in an interview room together with a request for handwriting samples after the accused has invoked his *Miranda* rights is the functional

equivalent of interrogation, such that a spontaneous statement made by the accused must be suppressed. This issue is one of law for which our resolution is of significant importance to the correct and uniform administration of the criminal law. Accordingly, we accept the State's appeal.

We initially note that it is well settled that once an accused has invoked his right to remain silent, it must be scrupulously honored by the police. *See Michigan v. Mosley*, 423 U.S. 96 (1975); *Miranda*, 384 U.S. 436; *Whitaker v. State*, 348 Ark. 90, 71 S.W.3d 567 (2002); *Bunch v. State*, 346 Ark. 33, 57 S.W.3d 124 (2001). It is equally well settled that a suspect's voluntary or spontaneous statement, even though made in police custody, is admissible against him. *See Innis*, 446 U.S. 291; *Miranda*, 384 U.S. 436; *Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003); *Fairchild v. State*, 349 Ark. 147, 76 S.W.3d 884 (2002). A spontaneous statement is admissible because it is not compelled or the result of coercion under the Fifth Amendment's privilege against self-incrimination. *Arnett*, 353 Ark. 165, 122 S.W.3d 484; *Fairchild*, 349 Ark. 147, 76 S.W.3d 884. In determining whether a statement is spontaneous, we focus on whether the statement was made in the context of a police interrogation, meaning direct or indirect questioning put to the accused by the police with the purpose of eliciting a statement from him. *Id.*

In *Innis*, 446 U.S. 291, the Supreme Court observed that the evils sought to be avoided by the *Miranda* decision were certain techniques of persuasion, coercion, or psychological ploys employed by the police, that, in a custodial setting, were thought to amount to interrogation. Thus, the Court held that the safeguards of *Miranda* "come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Id.* at 300-01. The Court then held that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (footnotes omitted). The Court explained:

> The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection

> against coercive police practices, without regard to objective proof of the underlying intent of the police. *A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.* But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Id. at 301-02 (footnotes omitted) (emphasis added).

The facts of that case were that Innis had been arrested for robbing a cab driver at gunpoint. When he was read his *Miranda* rights, he declined to give a statement without a lawyer. While he was being transported to the jail, two of the officers in the patrol car had a brief conversation about the missing gun used during the robbery and how they were concerned about it being left near the crime scene, which was near a school for mentally handicapped children. Innis interrupted the officers' conversation and told them where they could find the gun. The Supreme Court concluded that Innis had not been subjected to interrogation, reasoning:

> [I]t cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.
>
> The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few offhand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond.

Id. at 302-03 (footnote omitted).

More recently, in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), the Court held that an officer's statements or actions made during the administration of physical sobriety tests "were not

likely to be perceived as calling for any verbal response and therefore were not 'words or actions' constituting custodial interrogation[.]" *Id.* at 603. In so holding, the Court elaborated on the test from *Innis*:

> Thus, custodial interrogation for purposes of *Miranda* includes both express questioning and words or actions that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to "have . . . the force of a question on the accused," and therefore be reasonably likely to elicit an incriminating response.

Id. at 601 (quoting *Harryman v. Estelle*, 616 F.2d 870, 874 (5th Cir. 1980)).

In the present case, it is undisputed that Appellee invoked his right to remain silent after being advised of his *Miranda* rights by Officer Blevins. It is also undisputed that his subsequent admission that he had signed the forged check was not the product of any direct questioning or interrogation from the officer. The question then is whether his spontaneous statement was the product of the "functional equivalent" of interrogation. The trial court concluded that it was, because the officer had continued the interrogation environment by remaining in the interview with Appellee for approximately fifteen to twenty minutes and by initiating contact with Appellee by requesting handwriting samples. Under the foregoing precedent, we conclude that this ruling was erroneous.

[redacted] The mere fact that the officer sat silently in the interview room with Appellee for a brief period of time, while he looked over his case file, is not the sort of coercive police practice or psychological ploy that *Miranda* was designed to guard against. Nor is the officer's request for handwriting samples, because such evidence, which was sought only for comparison purposes, is not testimonial in nature and therefore not protected by the Fifth Amendment. *See United States v. Mara,* 410 U.S. 19 (1973); *Gilbert v. California*, 388 U.S. 263 (1967); *McGill v. State*, 253 Ark. 1045, 490 S.W.2d 449 (1973); *McGinnis v. State*, 251 Ark. 160, 471 S.W.2d 539 (1971). It cannot fairly be said that Officer Blevins knew or should have known his request for handwriting samples under the circumstances was reasonably likely to elicit an incriminating response from Appellee. Indeed, the officer testified that he did not believe that Appellee would oblige his request for the

samples, let alone make an incriminating statement. Moreover, the officer's request did not call for any verbal response from Appellee. Finally, there is nothing in the record to indicate that Appellee had any special susceptibilities or that the officer was aware of any. We thus conclude that Appellee's subsequent confession was a spontaneous statement initiated by him and was not the product of police interrogation.[1] We reverse the trial court's order of suppression and remand this matter for further proceedings.

Reversed and remanded.

SPRINGDALE SCHOOL DISTRICT NO. 50 *v.*
The EVANS LAW FIRM, P.A., and Hirsch Law Firm, P.A.

04-436 200 S.W.3d 917

Supreme Court of Arkansas
Opinion delivered January 13, 2005

[1] There was some dispute below as to whether Appellee invoked his right to counsel, as opposed to his right to remain silent, when he told Officer Blevins that he would not give a statement without a lawyer present. In so far as that may be viewed as a specific request for counsel, our determination that his confession is admissible remains. Because Appellee initiated the confession, he waived his right to counsel at that time. *See Edwards v. Arizona*, 451 U.S. 477 (1981); *Lacy v. State*, 345 Ark. 63, 44 S.W.3d 296 (2001), *overruled on other grounds in Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003).

Cypert, Crouch, Clark & Harwell, by: *Charles L. Harwell* and *Marcus W. Van Pelt*, for appellant.

Taylor & Janis, by: *Joel Taylor*, for appellees, cross-appellants.

DONALD L. CORBIN, Justice. At issue in this case is the propriety of a trial court's order regarding attorneys' fees. In *Butt v. The Evans Law Firm, P.A.*, 351 Ark. 566, 98 S.W.3d 1 (2003), this court reversed the trial court's award of attorneys' fees and remanded the matter to the circuit court. On appeal, the Appellant Springdale School District No. 50 argues that the trial court erred in ordering it to pay an additional $280,974.00 in attorneys' fees to Appellees The Evans Law Firm, P.A., and Hirsch Law Firm, P.A. As this is a subsequent appeal, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(7). Because the trial court erred in modifying the award of attorneys' fees where there was no proper plaintiff before it, we reverse and dismiss this case.

It is unnecessary for us to recite the detailed facts set forth in *Butt I*. Some procedural background leading up to that case will be helpful, though. In 1997, a series of illegal-exaction lawsuits were

filed in Washington County, Arkansas. These separate lawsuits were eventually consolidated, but settlement of each separate lawsuit was ultimately reached between the respective class representatives and the taxing units. Each settlement addressed the issue of attorneys' fees to be paid to class counsel. Thereafter, William Jackson Butt, acting on his own behalf and on behalf of 3,019 taxpayers, appealed the award of attorneys' fees to this court.

In *Butt I*, this court determined that Mr. Butt was the only proper Appellant, as he had timely intervened on the issue of attorneys' fees, and the 3,019 taxpayers were dismissed from the appeal. This court then addressed the issue of "what is a 'reasonable part of the recovery of the class members' to be apportioned as attorneys' fees." *Id.* at 585, 98 S.W.3d 12. In reaching this issue, this court reversed the order of the circuit court awarding Appellees attorneys' fees based on the settlement pool. This court then remanded the matter to the circuit court with instructions that the court determine the appropriate amount of attorneys' fees based on the amount of the actual recovery of illegally paid taxes. In remanding, this court further noted that the issue of the fees that had been voluntarily paid was moot; thus, only the fees owed by the Springdale School District were at issue on remand. This court also noted that the issue of whether Mr. Butt had standing to challenge the fees paid by the Springdale School District was to be decided by the trial court.

Once remanded, a hearing was held on October 31, 2003. At that hearing, Lee Ann Kizzar, Washington County Assessor, testified. According to Ms. Kizzar, Mr. Butt owned property in both the Fayetteville and West Fork School Districts but owned no property in the Springdale School District. Ms. Kizzar also testified that her records indicated that her office refunded $1,635,838.01 to Washington County taxpayers. According to her, the amount of the payments were ascertained by using a formula set out in the Settlement Agreements. She elaborated that the amount paid out by her office was the amount claimed by the taxpayers reduced by the amount of attorneys' fees paid, as well as administrative expenses.

Appellee Marshall Dale Evans also testified about his experience in negotiating the settlement agreements, including the one with the District. In that agreement, the parties agreed that the maximum amount to be paid out by the District would be $5,000,000. Evans further explained that it was understood that not all monies available for refund would be claimed thus neces-

sitating the need for a multiplier formula to determine the appropriate refund amounts. Evans then explained that the total amount owed by the District was $2,265,071.28, an amount which includes costs paid as well as the attorney's fees. According to Evans, this court awarded counsel a fee of twenty-five percent, of which half had already been paid by the District. Evans then opined that when he multiplied twelve-and-one-half percent by the total amount owed by the District, the sum equaled $283,133.91 in remaining attorneys' fees owed to Appellees.

At the conclusion of the hearing, the trial court announced several findings from the bench. First, he opined that Mr. Butt lacked standing on remand but determined that the lack of standing was irrelevant in light of this court's opinion in *Butt I*. The trial court then stated that he agreed with Appellees' position that a reasonable award of attorneys' fees was $283,133.91. These findings were included in a written order filed on February 3, 2004. This appeal followed.

There is a threshold issue involving standing that must be resolved before this court can reach the merits of the propriety of the award of attorneys' fees. The District argues that the trial court erred in ruling that Mr. Butt had no standing on remand, but further notes that the issue is irrelevant because, as the trial court ruled, the opinion of this court in *Butt I* is law of the case and is binding on all parties. Appellees counter that the trial court correctly determined that Butt had no standing on remand. Additionally, they cross-appeal the trial court's modification of the attorneys' fee award, arguing not only did Mr. Butt lack standing on remand, but he also lacked standing to pursue the appeal in *Butt I* and, thus, the trial court erred in applying the doctrine of law of the case to the issue of Butt's standing. In their reply to the cross-appeal, the District counters that Butt appealed the award of the attorneys' fees on behalf of the class and because this court remanded the whole case, the issue of Butt's standing was resolved.

Appellees are correct that the trial court erred in modifying the award of attorneys' fees, despite this court's analysis in *Butt I*, but their logic supporting that conclusion is erroneous. In sum, once the trial court determined that Butt had no standing on remand, the case should have ended. As explained below, it was error for the trial court to proceed in this case with the District unofficially substituting itself as the plaintiff.

In *Butt I*, this court stated:

> We note on this point that class counsel question Mr. Butt's standing to contest attorneys' fees paid by the Springdale School District, but we leave that issue for the circuit court to resolve.

Id. at 591, 98 S.W.3d at 16.

During the hearing in this matter on remand, Appellees argued that Butt had no standing. The trial court stated in response:

> I tend to agree with you on that, and I've read your briefs. I'm not making a final ruling, and I'll give Charlie a chance to respond, but I don't think — and he's not here today, but I think it's pretty clear he doesn't have any financial interests in this matter, and I don't think at this point has any standing. But I can't tell that it matters. He filed the appeal, the Supreme Court took his appeal, and they wrote an Opinion, and they remanded it back to me with regard to the Springdale School District. And the law that they stated is the law of the case independent of whether Mr. Butt is here or not. I mean, it's just the law of the case.

Later, in his actual findings, the trial court stated from the bench that Butt did not have any standing on the remand portion of this case. Despite this determination, the trial court concluded that it was obligated by the doctrine of law of the case to determine the appropriate amount of attorneys' fees to be awarded to Appellees.

We begin our analysis by reviewing our general rules on the issue of standing. This court has held that a person must have suffered an injury or belong to a class that is prejudiced in order to have standing to challenge the validity of a law. *Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997); *Hamilton v. Hamilton*, 317 Ark. 572, 879 S.W.2d 416 (1994). Stated differently, plaintiffs must show that the questioned act has a prejudicial impact on them. *Chapman v. Bevilacqua*, 344 Ark. 262, 42 S.W.3d 378 (2001). Moreover, our courts have recognized the concept of "standing to appeal." *See Arkansas State Hwy. Comm'n v. Perrin*, 240 Ark. 302, 399 S.W.2d 287 (1966); *see also First Natal Bank v. Yancey*, 36 Ark. App. 224, 826 S.W.2d 287 (1991). Only a party aggrieved by the court's order can appeal that order. *Beard v. Beard*, 207 Ark. 863, 183 S.W.2d 44 (1944).

We are convinced that the trial court correctly determined that Mr. Butt lacked standing on remand. The evidence demonstrated that Mr. Butt owned no property and thus was not

a taxpayer in the Springdale School District. He was simply not aggrieved by this court's decision that the fee award to be paid by the District was in error. A determination that he lacked standing on remand does not equate, however, with a conclusion that he lacked standing in *Butt I*, as Appellees now argue. In that case, this court specifically stated:

> We deny the motion to dismiss with regard to Mr. Butt, who did specifically intervene on the issue of attorneys' fees before the circuit court and, thus, is not subject to the *Haberman* decision. Furthermore, we conclude that Mr. Butt does have a financial interest in this matter because he has a pecuniary interest affected by the circuit court's disposition of the attorneys'-fees issue. *See In Re: $3,166,199*, 337 Ark. 74, 987 S.W.2d 663 (1999). Therefore, he has standing to appeal. *See id.*

351 Ark. at 578, 98 S.W.3d at 7. In light of our clear holding on this issue, it would have been error for the trial court to determine that Mr. Butt lacked standing in the prior appeal.

Having so determined, our analysis must then focus on the question of how the trial court proceeded on the issue of attorneys' fees on remand after it properly determined Mr. Butt, as the only remaining plaintiff, lacked standing at that point. This issue is made more confusing by an examination of the record which reveals that Mr. Butt withdrew from participation in this case on remand.

The record reflects that immediately after the case was remanded by this court, Appellees filed a motion to dismiss. Therein, Appellees alleged that Mr. Butt lacked standing to pursue this matter on remand and requested that the court decline to further address the issue of attorneys' fees. Moreover, in their supporting brief, Appellees argued that the District never participated in the appeal and, as such, was precluded from doing so now. The District filed a response to the motion to dismiss, claiming that it was allowed to participate on remand because it is the entity that would be required to pay the fees. The District also argued that its agreement with Appellees concerning the payment of attorneys' fees was now void because it would require the payment of fees deemed illegal by this court. Despite Appellees' objection to the District's participation, the trial court allowed the District to proceed on remand. In its final order, the trial court summarily overruled Appellees' objection on this point. We must now determine if the District was a proper party on remand, thus,

providing the trial court with an opportunity to revisit the issue of attorneys' fees and subsequently modify them.

In deciding this issue, we first note that the District asserts no argument regarding the issue of whether it was entitled to participate in this action on remand. Instead, the District argues that the trial court erred in ruling that Mr. Butt lacked standing on remand. In their cross-appeal, Appellees argue that the District lacked standing to participate on remand as it never appealed the award of attorneys' fees. According to Appellees, the District's standing would necessarily be premised on Mr. Butt's standing, and since Mr. Butt had no standing, neither did the District.

With regard to the District's arguments that Mr. Butt had standing, we note that the District cannot pursue the standing of another party. *See Boyle v. A.W.A, Inc.*, 319 Ark. 390, 892 S.W.2d 242 (1995); *Insurance From CNA v. Keene Corp.*, 310 Ark. 605, 839 S.W.2d 199 (1992). In the latter case, this court noted that "[j]udgments, though erroneous as to parties who do not appeal, will not be reversed upon the appeal of a party as to whom there is no error." *Id.* at 610, 839 S.W.2d at 202 (citing *Mann v. State*, 37 Ark. 405 (1881)). Moreover, a party who does not appeal from an order of the trial court cannot benefit on remand. *See Scott v. State*, 230 Ark. 766, 326 S.W.2d 812 (1959) (holding that this court will not disturb a trial court's order for errors committed against a party who does not appeal that order). It is well settled that a party cannot appeal the claim of another party. *Falbo v. Howard*, 271 Ark. 100, 607 S.W.2d 369 (1980).

Finally, we disagree with the District's contention that Appellees' argument regarding standing raised in their cross-appeal is moot. On this point, the District contends that this court clearly "decided the circuit court had the power to hear the issue of the amount of attorneys' fees owed by the District by this Court's remand of the matter over the objection of class counsel and Mr. Butt himself." As previously stated, this court determined that Mr. Butt had standing to pursue the initial appeal but specifically left to the trial court a determination of his standing on remand. Thus, our review of the trial court's determination of standing is not now barred by law of the case. *See First Commercial Bank, N.A. v. Walker*, 333 Ark. 100, 969 S.W.2d 146, *cert. denied*, 525 U.S. 965 (1998).

In sum, we are not persuaded by the District's argument that our ruling in *Butt I* would constitute an advisory opinion if we accept Appellees' argument that Butt lacked standing and the

trial court erred in modifying the award of attorneys' fees. It is clear from our opinion in the preceding appeal that the trial court, as a threshold issue, was to determine whether or not Mr. Butt had standing on remand. Such was a factual determination properly left to the discretion of the trier of fact. If the trial court had determined that Mr. Butt had standing, then it was obligated to follow our mandate regarding the proper method for ascertaining attorneys' fees. However, once the trial court determined that Mr. Butt had no standing on remand, the case should have ended, as there was no remaining party to pursue the issue on remand. Accordingly, we affirm the trial court's determination that Mr. Butt lacked standing but reverse and dismiss its modification of the attorneys' fee award. Because we are dismissing this case, the cross-appeal is moot.

Reversed and dismissed.

GLAZE and GUNTER, JJ., not participating.

Jerome Militan DEASIS *v.* STATE of Arkansas

CR 03-818 200 S.W.3d 911

Supreme Court of Arkansas
Opinion delivered January 13, 2005

[Rehearing denied February 17, 2005.]

Kathy L. Hall, for appellant.

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

ANNABELLE CLINTON IMBER, Justice. This case is a criminal appeal from convictions for capital murder and arson. Appellant Jerome DeAsis raises four points of error: (1) the trial court erred in denying his motion to dismiss for want of a speedy trial; (2) the trial court erred in permitting the State to introduce certain

photographs; (3) the trial court erred in refusing to grant a mistrial after the State's witness was questioned during the sentencing phase of the trial as to whether or not he knew Mr. DeAsis used to steal cars and buy guns without serial numbers; (4) the trial court erred in permitting the State to amend the felony information to add the charge of arson. We affirm the circuit court on all points.

Jerome DeAsis, his wife, Angela, and their infant son, Dominic, resided in Rogers, Arkansas. Jerome had a history of alcoholism and depression. When Angela began spending time with another man, Jerome believed she was having an affair. On June 17, 2000, Angela left the house with the other man, and Jerome began drinking gin. Eventually, he went to the kitchen, grabbed a knife, and began stabbing himself. He ultimately decided to take his life and the life of his child. After killing Dominic by cutting his throat, he set fire to the trailer by igniting some clothes in the closet. He then went to the bathroom and laid in the bathtub, where he saw a shadow he believed to be the Lord telling him to survive. In his vision, the Lord chased him and he fell out of a window. He was immediately taken to the hospital, where he was arrested on June 19, 2000.

Following a jury trial on September 26, 2002, Mr. DeAsis was convicted of capital murder and arson. He was sentenced to life imprisonment without parol for the capital murder conviction and twenty years on the arson conviction. Thus, this court's jurisdiction is proper pursuant to Ark. R. Sup. Ct. 1-2(a)(2).

1. Speedy Trial

For his first point on appeal, Mr. DeAsis argues that his right to a speedy trial was violated. The State has twelve months within which to bring a defendant to trial, unless there are periods of delay that are excluded. Ark. R. Crim. P. 28.3 (2004). The speedy trial period begins to run on the earlier of the date the defendant is arrested and the date he is charged. Ark. R. Crim. P. 28.2 (2004). Here, Mr. DeAsis was arrested on June, 19, 2000, and he was formally charged on June 20, 2000. Thus, the speedy trial calculation begins on June 19, 2000. Mr. DeAsis filed his motion to dismiss for violation of speedy trial on August 28, 2002. Between the date of his arrest and the date Mr. DeAsis filed the motion to dismiss, a total of 800 days elapsed. Once a defendant establishes a *prima facie* case of a speedy trial violation, the State bears the burden of showing that the delay was the result of the

defendant's conduct or otherwise justified. *Gondolfi v. Clinger*, 352 Ark. 156, 98 S.W.3d 812 (2003).

The chronology of events pertaining to the speedy-trial calculation are as follows. On June 20, 2000 a probable-cause hearing was held while Mr. DeAsis was still in the hospital. At that hearing, the court set an arraignment for July 10, 2000. However, the date of the arraignment was accelerated, and it was actually held on June 23, 2000. At the arraignment, the defendant requested that the proceedings be suspended so that he could be evaluated at the State Hospital. The circuit court granted that motion, and set a status hearing for October 30, 2000. An order to this effect was entered on July 5, 2000. The docket indicates that the status hearing originally set for October 30 was rescheduled to January 8, 2001. At the January 8, 2001 status hearing, the circuit court noted that it would be another two or three months before the State Hospital could complete its evaluation of Mr. DeAsis, so the circuit court rescheduled the status hearing for April 30, 2001. The order entered on January, 8, 2001 specifically notes that the time from January 8, 2001 until April 30, 2001 would be charged to the defendant. On April 30, 2001, Mr. DeAsis still had not been evaluated, and the court rescheduled the status hearing for June 25, 2001. The court's order did not specifically charge this time to either side.

Mr. DeAsis was finally admitted to the State Hospital for evaluation on June 21, 2001. At the June 25, 2001 hearing, the circuit court stated that the State Hospital had not completed its evaluation of Mr. DeAsis and rescheduled the status hearing for August 13, 2001. The court also said, "Just so that the record is clear, the time from June 23rd of last year until August 13th is excluded for this mental evaluation." Mr. DeAsis did not object to the court's ruling on the exclusion of time for speedy trial purposes. On August 13, Mr. DeAsis reported for the status hearing and requested time to obtain an additional, independent evaluation. The judge rescheduled the status hearing for September 10, 2001 and stated, "Time continues to be excluded." Again, no objection was made by Mr. DeAsis. On September 10, 2001, Mr. DeAsis requested additional time to complete his independent evaluation, and the trial court set a status hearing for October 29, 2001 and expressly excluded the time. Once again, Mr. DeAsis made no objection. On October 29, 2001, Mr. DeAsis advised the court that the evaluations had been completed and that he was waiting for the report. The court set a competency hearing for

December 10, 2001 and charged the time to Mr. DeAsis, who did not object. At the December 10 competency hearing, the defendant was found competent, and an arraignment was set for January 3, 2002. Defendant filed a motion to dismiss for violation of speedy trial on August 28, 2002. The motion was subsequently denied by the circuit court.

To preserve a speedy trial objection for appeal, the defendant must make a contemporaneous objection at the hearing where the time is excluded. *Gondolfi v. Clinger*, 352 Ark. 156, 98 S.W.3d 812 (2003); *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000); *Mack v. State*, 321 Ark. 547, 905 S.W.2d 842 (1995). The reason for requiring a contemporaneous objection is to inform the trial court of the reason for a disagreement with its proposed action prior to making its decision or at the time the ruling occurs. *Ferguson v. State, supra.* The idea is to give the trial court the opportunity to fashion a different remedy. *Id.* Here, the trial court expressly noted the exclusion at numerous hearings. At the hearing on June 25, 2001, the court excluded the time from June 23, 2000 through August 13, 2001. At the hearing on August 13, 2001, the court excluded time until September 10, 2001. On September 10, 2001, the court excluded time until December 10, 2001. Mr. DeAsis *never* made a contemporaneous objection at any of the hearings when the trial court charged time to him. Consequently, his speedy trial claim based on the trial court's exclusion of the period of time between June 23, 2000, and December 10, 2001, totaling 535 days, is not preserved for appellate review.

Our decision in *Moody v. Arkansas County Circuit Court So. Dist.*, 350 Ark. 176, 85 S.W.3d 534 (2002), does not suggest otherwise. In that case, the appellant was permitted to raise a speedy trial issue in a motion to dismiss despite failing to make a contemporaneous objection when time was entered against him. *Id.* However, the exclusion of time in the *Moody* case was not specifically discussed during a hearing where the defendant and his counsel were present. Similarly, in *Tanner v. State*, 324 Ark. 37, 918 S.W.2d 166 (1996), we refused to charge time to a defendant when the record did not reflect that either he or his counsel were present at the hearing where the excludability of time was discussed. In contrast, Mr. DeAsis and his counsel were present for every hearing where time was excluded. He simply failed to make a contemporaneous objection to the circuit court's numerous rul-

ings on the exclusion of time. Thus, the speedy-trial argument is not preserved for appellate review.

2. Photographs

For his second point on appeal, Mr. DeAsis argues the circuit court erred in admitting into evidence two photographs of the deceased child. This court will not reverse a trial court regarding the admission of photographs absent an abuse of discretion. *Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001). The mere fact that a photograph is inflammatory or is cumulative is not, standing alone, sufficient reason to exclude it. Even the most gruesome photographs may be admissible if they assist the trier of fact in any of the following ways: shedding light on some issue, by providing a necessary element of the case, by enabling a witness to testify more effectively, by corroborating testimony, or by enabling jurors to better understand the testimony. *Id.* Two photographs — State's Exhibits 46 and 48 — are at issue here.

State's Exhibit 48 is a photograph of the front of the infant, showing the burned skin and the neck wound. Mr. DeAsis suggests this picture is not relevant because another picture of the cut on the throat was introduced. As previously noted, the mere fact that a photograph is inflammatory or is cumulative is not, standing alone, sufficient reason to exclude it. *Ramaker v. State, supra.* Moreover, we have allowed the introduction into evidence of multiple pictures showing a victim's wounds from various angles. *Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993). Here, the picture in question shows the wound in proportion to the rest of the body, and thus serves a purpose beyond the close-up picture of the neck wound. Thus, we hold that the circuit court did not abuse its discretion in allowing the photograph to be introduced into evidence.

State's Exhibit 46 is a photograph of the baby's back. Mr. DeAsis argues this photograph did not serve any useful purpose outside of inflaming the jury, and the fact that the infant had no burning on its back was not relevant to the case. To the contrary, the picture explained and supported the testimony of Dr. Sturner concerning the severity and location of the burns. The State further notes that this information helped to explain the difficulty Dr. Sturner encountered in performing the autopsy. While Mr. DeAsis claims that the difficulty of the autopsy is not

relevant, this argument is not convincing. The jury has a right to know about the factors that went into the decision of the expert witness, including any autopsy difficulties because of the state of the body. The circuit court did not abuse its discretion in admitting State's Exhibit 46 into evidence.

3. Motion for Mistrial

For his third point on appeal, Mr. DeAsis contends the circuit court should have declared a mistrial because of statements made by the prosecutor during the sentencing phase of the trial. Specifically, the prosecutor asked whether the witness was aware that Mr. DeAsis "used to steal cars and buy guns with no serial numbers on them."

A mistrial is a drastic remedy, to be employed only when an error is so prejudicial that justice cannot be served by continuing the trial, and when it cannot be cured by an instruction to the jury. *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003). The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned absent a showing of abuse or manifest prejudice to the *appellant. Id.*

No prejudice resulted from the question posed by the prosecutor in this case, especially in view of the witness's answer that he was not aware Mr. DeAsis used to steal cars and buy guns with no serial numbers. *See Standridge v. State*, 329 Ark. 473, 951 S.W.2d 299 (1997). In *Standridge v. State*, the prosecutor asked an inappropriate character-evidence question, but the witness never answered the question. We held that there could be no prejudice to the defendant because the jury received no prejudicial information. Similarly, here, where the witness answered the offending question in the negative and the trial court instructed the jury to disregard the question and the answer, the jury did not receive any information likely to prejudice the defendant. Accordingly, we affirm the circuit court on this point.

4. Amendment to Felony Information

The last point Mr. DeAsis raises on appeal is that the circuit court erred in allowing the prosecution to amend the original information thirty-four days before trial to include a charge of arson. The State is entitled to amend an information at any time prior to the case being submitted to the jury so long as the

amendment does not change the nature or degree of the offense charged or create unfair surprise. *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999). The decision of *Stewart v. State*, the only case cited by the appellant for this argument, actually supports the State's argument. In that case, we allowed the State to amend an information and add a charge one day before trial where the defense counsel was not surprised by the amendment. Likewise, Mr. DeAsis could not have been "surprised" by the amendment of the information, because of numerous prior references to the fire. First, the affidavit for probable cause for his arrest alleged that there had been a fire at his home, that he had been drinking and wanted to kill himself, that his wife had reported that he "had previously set fire to his belongings when he was upset," and that the autopsy revealed that the child was killed before the fire started. Furthermore, six months before the trial, a witness testified his investigation of the cause of the fire revealed "suspicious burn patterns" that caused him to suspect arson. These references should have alerted Mr. DeAsis to the possibility that he would also be charged with arson. Thus, we hold that the circuit court did not err in allowing the State to amend the information thirty-four days before trial.

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.E.3d 413 (2003).

Affirmed.

GUNTER, J., not participating.

Iris BROOKS *v.* BOARD of CERTIFIED COURT REPORTER EXAMINERS

04-828 200 S.W.3d 900

Supreme Court of Arkansas
Opinion delivered January 13, 2005

Sheila F. Campbell, for appellant.

Mike Beebe, Att'y Gen., by: *Larry Crane*, Ass't Att'y Gen., for appellee.

JIM GUNTER, Justice. This appeal arises from an order revoking the certificate of a court reporter. On May 8, 2003, appellee, the Board of Certified Court Reporter Examiners ("Board") revoked the certificate of appellant, Iris L. Brooks, for her failure to prepare a trial transcript in the case of *Hamilton v. Jones*, 351 Ark. 382, 93 S.W.3d 694 (2002) ("*Hamilton I*"). We affirm the Board's findings.

Attorney S. Butler Bernard, Jr. filed a notice of appeal on behalf of his client, Richard Hamilton, and we granted appellant's petition for writ of *certiorari*, requesting that we direct appellant Brooks to complete the record on September 5, 2002. On September 24, 2002, we granted a final extension with a deadline of December 8, 2002. On December 6, 2002, Mr. Bernard filed a motion for extension of time, stating that Ms. Brooks would not have the record ready to file until the following week. On December 19, 2002, we issued a *per curiam* opinion ordering Ms. Brooks to show cause why she should not be held in contempt of court for failing to prepare the record on time. *Id.*

A partial record, which consisted of approximately five-hundred pages, was tendered by Ms. Brooks to the clerk of our court on January 9, 2003.

On January 16, 2003, we held the show-cause hearing. Ms. Brooks pleaded guilty and offered mitigating circumstances, including that she worked long hours, was too ill and tired to continue working, and had two disabled children for whom she provided care. We issued a *per curiam* order on January 23, 2003, and entered a contempt citation with a fine of $100.00. We referred the matter to the Board of Certified Court Reporter Examiners. *See Hamilton v. Jones*, 351 Ark. 561, 95 S.W.3d 809 (2003) ("*Hamilton II*").

In *Hamilton v. Jones*, 352 Ark. 569, 102 S.W.3d 479 (2003) ("*Hamilton III*"), dated April 10, 2003, we issued a writ of *certiorari* directing Ms. Brooks to complete the record within thirty days of our *per curiam* order. In response to our order, Ms. Brooks filed a motion for clarification, as she was no longer licensed to work as a court reporter and could not perform the duties as we directed in our order. On April 24, 2003, we revised *Hamilton III*, entered an order granting clarification, and directed Ms. Brooks to deliver all the records and tapes of the underlying case to Circuit Judge Victor Hill for delivery to the present court reporter, Mr. William

Kisselberg, to complete the record within sixty days. *See Hamilton v. Jones*, 352 Ark. 569, 102 S.W.3d 479 (2003) (order granting clarification) ("*Hamilton IV*").

On July 22, 2003, we granted Mr. Kisselberg an additional sixty days to complete the record and denied the appointment of a new court reporter. On September 4, 2003, we issued a writ of *certiorari* establishing November 3, 2003, as the deadline for submitting the completed record in the underlying *Hamilton* case.

On October 31, 2003, Mr. Hamilton through his attorney, Mr. Bernard, filed another writ of *certiorari*, requesting that his briefing schedule be suspended until the complete trial transcript was prepared, and that we issue a new writ of *certiorari* to Ms. Brooks to complete the record. Mr. Hamilton filed an affidavit with his motion in which Donna Palmer, a Crittenden County clerk, stated that she had not received anything from Ms. Brooks.

In *Hamilton v. Jones*, 355 Ark. 257, 132 S.W.3d 724 (2003) ("*Hamilton V*"), we noted that we had ordered Mr. Kisselberg to complete the record. We further noted that a record had been tendered to our court, but that Mr. Kisselberg had not certified the record because he was not present at the proceedings. We directed the attorneys of record to review the record within thirty days of our *per curiam* opinion to determine what portions of the record, if any, were omitted and to certify to our court by an affidavit that the record was true, accurate, and complete. *Id.*

Meanwhile, pursuant to our order in *Hamilton II*, *supra*, the Board conducted a hearing on April 5, 2003, to determine if disciplinary action against Ms. Brooks was warranted for her failure to prepare the record in this case. At the hearing, Ms. Brooks testified that, notwithstanding our order in *Hamilton II*, she had not yet prepared and submitted the final transcript. She estimated that there was an additional 1,000 to 1,500 pages left to prepare. She also testified that she had been paid $5,000.00 in advance to prepare the transcript, but that she used the money to purchase a car after having been involved in an accident. She also admitted that she failed to pay the $100.00 fine imposed by our court in *Hamilton II*, *supra*, following her plea of guilty to contempt. She explained to the Board her reasons for failing to prepare the transcript and for failing to pay her fine. She testified that she had "farmed out" the typing of the transcript to someone else, but she had not proofread it.

The Board made the following findings of fact:

1. Ms. Brooks' failure to prepare the transcript in *Hamilton v. Jones, supra,* was without excuse or justification, and constituted gross incompetence or habitual neglect of duty and intentional violation of, noncompliance with, or gross negligence in complying with any rule or directive of the Arkansas Supreme Court.

2. Ms. Brooks' failure to pay the $100.00 fine levied by the Arkansas Supreme Court for contempt within a reasonable time was without excuse or justification, and constituted intentional violation of, noncompliance with, or gross negligence in complying with any rule or directive of the Arkansas Supreme Court.

In making these findings, the Board concluded that Ms. Brooks violated sections 19(d) and 19(c) of the Regulations of the Board of Certified Court Reporter Examiners and that her reporter's certificate should be permanently revoked. Ms. Brooks was ordered to deliver all court records and tapes in her possession to Circuit Judge Victor Hill's present court reporter.

On June 4, 2003, Ms. Brooks timely filed her notice of appeal with the Pulaski County Circuit Court. On February 24, 2004, Ms. Brooks, the Board and separate appellees filed a joint motion to certify the case to our court. On March 3, 2004, the Pulaski County Circuit Court entered an agreed order, stating that "this matter should properly be certified directly to the Arkansas Supreme Court for review" as provided by our October 30, 2003, *per curiam* opinion that amended Section 7 of the Rules Providing for Certification of Court Reporters to require review of appeals of suspensions and revocations to be made by our court rather than the circuit court. Ms. Brooks brings her appeal from the Board's findings.

At the outset, we note that Ms. Brooks urges our court to use two standards of review: a "clearly erroneous" standard and a "substantial evidence" standard. We review bar admission, reinstatement, and disbarment cases *de novo* and will not reverse the findings of fact of the Law Examiners unless they are clearly erroneous. *In Re Application of Crossley*, 310 Ark. 435, 839 S.W.2d 1 (1992); *In Re Petition for Reinstatement of Lee*, 305 Ark. 196, 806 S.W.2d 382 (1991); *Scales v. State Board of Law Examiners*, 282 Ark. 578, 669 S.W.2d 895 (1984).

With regard to court-reporter cases, in *In re: Rule Providing for Certification of Court Reporters; Regulations for the Board of Certified Court Reporter Examiners*, 354 Ark. Appx. 730 (2003) (*per curiam*),

we amended Section 7 of the Rules Providing for Certification of Court Reporters to require review of appeals of suspensions and revocations to be made by our court. The amended rule provides in pertinent part:

> Within thirty (30) days of receipt of written findings of the Board suspending or revoking a certificate, the aggrieved court reporter may appeal said findings to the Supreme Court of Arkansas for review *de novo* upon the record. . . .

Ct. Reporters Rule § 7 (2003).

Thus, like the bar-admission cases, our inquiry on appeal is not whether there is substantial evidence to support the factual findings of the court, but upon our *de novo* review of the record, whether the findings of the Board are clearly erroneous. *Gillaspie v. Ligon*, 357 Ark. 50, 160 S.W.3d 332 (2004). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Taylor v. Hinkle*, 360 Ark. 121, 200 S.W.3d 387 (2004).

With this standard of review in mind, we turn to Ms. Brooks's points on appeal. First, she argues that the Board's decision to revoke her certificate was clearly erroneous. Second, she argues that the Board's decision to revoke her certificate was not supported by substantial evidence. Because we have established the applicable standard of review in this case, the question on appeal is whether the Board's findings to revoke Ms. Brooks's certificate were clearly erroneous.

In *Hamilton II, supra*, we accepted Ms. Brooks's guilty plea to the charge of contempt, imposed a reduced fine of $100.00, and referred the matter of Ms. Brooks to the Board. After conducting a hearing, the Board found that Ms. Brooks (1) failed to prepare the transcript and (2) failed to pay the $100.00 fine as ordered by our court. The Board further found that Ms. Brooks violated subsections 19(c) and 19(d) of the Regulations of the Board of Certified Court Reporter Examiners ("Regulations"), which provides in pertinent part:

> Section 19. Pursuant to Section 7 of the Rules of the Board of Certified Court Reporter Examiners, the Board may revoke or suspend any certificate issued after proper notice and hearing on the following grounds:

* * *

> c. any intentional violation of, noncompliance with or gross negligence in complying with any rule or directive of the Supreme Court of Arkansas, any other court of record within this state, or this Board.
>
> d. fraud, dishonesty, gross incompetence or habitual neglect of duty. . . [.]

Id.

In the present case, the Board correctly found that Ms. Brooks failed to prepare the record, failed to pay the fine, and violated subsections 19(c) and 19(d) of the Regulations. With regard to Ms. Brooks's failure to prepare the transcript, the following colloquy occurred:

> Ms. Brooks: I pled guilty [at the contempt hearing] to not finishing what I thought was — just not finishing it. That portion was done. That's about 500-and-some pages. There's another thousand or so pages that I have not done.
>
> Mr. Fitzhugh: Why not?
>
> Ms. Brooks: Now, you want to understand — I mean —
>
> Mr. Ashcraft: You still have more to do?
>
> Ms. Brooks: Yes, I still have more to do.
>
> * * *
>
> Ms. Helms: How many pages per volume?
>
> Ms. Brooks: That's about 500. I estimate there are at least another 1,000 to 1,200 pages.
>
> Mr. Ashcraft: You filed it in Crittenden County Circuit on December 9, one day after?
>
> Ms. Brooks: Uh-huh.

MR. ASHCRAFT: So —

Ms. WORTHINGTON: When did you take all of this?

Ms. BROOKS: It's a year old.

Ms. HELMS: How many volumes have you completed?

Ms. BROOKS: I've just done that one and filed that one.

Ms. HELMS: You've completed one volume?

Ms. BROOKS: Right.

Ms. HELMS: You still have three or four more?

Ms. BROOKS: I have three, I think[.]

Ms. Brooks, by her own admission, stated that she failed to prepare the transcript, and that one year had transpired and the job was still incomplete.

With regard to her failure to pay the fine, Ms. Brooks testified at the hearing that she had not paid the $100.00 fine as we directed in *Hamilton II, supra.* When the chairman of the Board asked Ms. Brooks if she had paid the $100.00 fine in compliance with our *per curiam* order, she replied, "I don't have it." Additionally, Ms. Brooks admitted that she was paid $5,000.00 in advance for the preparation of the transcript, but that she "bought a car because [the $5,000.00] came the day that [her] car burned up." Based upon that testimony, the Board was correct in finding that she violated subsections 19(c) and 19(d) of the Regulations.

Ms. Brooks further argues that her "mitigating circumstances of the action of the appellant ha[ve] to be considered in determining if there was sufficient evidence presented to revoke her certificate as a court reporter." She cites *Wilson v. Neal,* 332 Ark. 148, 964 S.W.2d 199 (1998), for the proposition that the Board should have taken certain mitigating circumstances into account when making its decision. Those mitigating circumstances include her long work days, illness, travel time, and caring for two adult children with disabilities.

Here, it appears that the Board weighed Ms. Brooks's mitigating circumstances, as evidenced by its statement in its order that "Ms. Brooks described to the board several instances of

personal and financial misfortune which she said caused her to be late in preparing the transcript and paying her $100 fine." However, notwithstanding those mitigating circumstances, and after weighing the evidence in its entirety, the Board permanently revoked Ms. Brooks's certificate.

Ms. Brooks also asserts that her certification is a property interest that should be afforded the protection of due process. While Ms. Brooks does not challenge the constitutionality of the Regulations, she makes the general claim that her license is a property interest that must be protected. Her argument, however, is misplaced. In *Cambiano v. Neal*, 342 Ark. 691, 35 S.W.3d 792 (2000), we stated:

> Cambiano's argument [that rules providing for disbarment are unconstitutional] is premised on the idea that once licensed, he was then conferred a "property right" to practice law. However, this court has stated again and again that "the practice of law is a privilege and not a right." *See In re Petition Butcher*, 322 Ark. 24, 907 S.W.2d 715 (1995); *In re Petition for Reinstatement of Lee*, 305 Ark. 196, 806 S.W.2d 382 (1991). As such, any protections to a law license are only subject to the very lowest review under Due Process and Equal Protection Clauses of the Constitution.

Cambiano, supra.

Similarly, Ms. Brooks's practice as a court reporter is a privilege and not a right. *See Cambiano, supra.* Here, there were sufficient reasons that justified that Board's decision to revoke Ms. Brooks's license. Those reasons include that she failed to prepare the transcript after our extensions, that she was found in contempt in *Hamilton II, supra*, and that, based upon her own testimony, she failed to prepare the transcript and pay the fine in violation of our order. Because we have the power to regulate the practice of court reporters pursuant to our Regulations, we conclude that the Board's sanction to revoke Ms. Brooks's certificate was proper.

Based upon the foregoing conclusions, as well as our standard of review, we cannot say that a mistake was committed by the Board in revoking Ms. Brooks's certificate. *See Taylor, supra.* Therefore, we hold that the Board's decision was not clearly erroneous. Accordingly, we affirm the Board's decision.

Affirm.

Arthur E. DICKERSON a/k/a Bolden *v.* STATE of Arkansas

CR 04-1320 200 S.W.3d 899

Supreme Court of Arkansas
Opinion delivered January 13, 2005

John Joplin, for appellant.

No response.

PER CURIAM. John Joplin, a full-time, state-salaried public defender in Sebastian County, was appointed by the trial court to represent Appellant Arthur Dickerson, a/k/a Bolden, an indigent defendant, on the charge of first-degree murder. Following a trial, he was convicted and sentenced to life imprisonment. Joplin timely filed a notice of appeal and has timely lodged the record in this court.

Joplin now moves to withdraw as counsel on appeal, based on this court's case of *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000), which held that full-time, state-salaried public defenders were ineligible for compensation for their work on appeal.

Since, *Rushing*, the General Assembly has passed legislation providing that only those full-time, state-salaried public defenders who do not have state-funded secretaries may seek compensation for their work on appeal. *See* Ark. Code Ann. § 19-4-1604(b)(2)(B) (Supp. 2003).

Joplin states in his motion that he is provided with a full-time, state-funded secretary to engage in his day-to-day office operations. Accordingly, he would not be eligible for compensation for appellate work, and we grant his motion to withdraw. It is not necessary for us to appoint substitute counsel at this time, as Ben Beland is the attorney of record for this appeal, and he has not filed a motion to withdraw. Appellant's *pro se* motion for appointment of counsel is therefore moot.

It is so ordered.

Billy Dale GREEN *v.* STATE of Arkansas

CR 04-1379 200 S.W.3d 898

Supreme Court of Arkansas
Opinion delivered January 13, 2005

Steven M. Harper, Arkansas Public Defender Commission, for appellant.

No response.

PER CURIAM. Appellant, Billy Dale Green, by and through his attorney, has filed a motion for a rule on the clerk. His

attorney, Steven M. Harper, states in his motion that the record was tendered late due to a mistake on his part. We find that such an error, admittedly made by an attorney for a criminal defendant, is good cause to grant the motion. *See In Re Belated Appeals in Criminal Cases*, 265 Ark. 964 (1979) (*per curiam*).

Therefore, the motion is granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Steve ROBINSON *v.* STATE of Arkansas

CR 03-1251 200 S.W.3d 905

Supreme Court of Arkansas
Opinion delivered January 13, 2005

Appellant, *pro se*.

No response.

PER CURIAM. Steve Robinson was found guilty by a jury of terroristic threatening and sentenced by the court to 120 months' imprisonment. The court of appeals affirmed. *Robinson v. State*, CACR 02-558 (Ark. App. April 30, 2003). Robinson subse-

quently filed in the trial court a timely petition pursuant to Criminal Procedure Rule 37.1 seeking to vacate the judgment. The petition was denied, and the record on appeal from the order has been lodged here.

Appellant Robinson sought and was granted an extension of time to file the appellant's brief, making the brief due on March 30, 2004. *Robinson v. State*, CR 03-1251 (Ark. February 19, 2004) (*per curiam*). On July 8, 2004, appellant tendered one copy of the brief with a motion to file a belated brief and a motion asking that the brief be duplicated at public expense.

We granted the motion, declaring that appellant would be allowed one *final* opportunity to submit a brief in this appeal. The motion to have the brief duplicated at public expense was denied. *Robinson v. State*, CR 03-1251 (Ark. October 14, 2004) (*per curiam*).

The appellant's brief was due October 28, 2004. He tendered on that date two separate items, one of which was entitled "Appellant's Brief"and the other "Brief for Appellant." (No copies of either was received.) It was not clear whether the two items were intended to be one brief or were submitted as separate briefs. Neither contained a proper addendum.

The two briefs were returned to appellant because neither could be filed as the appellant's brief. He was advised to submit seventeen copies of a brief that conformed to the rules of this court no later than November 4, 2004.

On November 8, 2004, appellant tendered two separate items entitled "Appellant's Brief" and "Brief in Support." (Seventeen copies of each were received.) He also submitted the instant motion for rule on clerk seeking to file the two belatedly as one brief. He contends that to deny him the right to file the brief in the form tendered would constitute a denial of access to the court. He further states that the reason he did not submit an addendum is that he had only copy of the order being appealed and it was not returned to him when he tendered the brief here in July. He urges this court to consider that he is an indigent prison inmate. He also asks that the requirement that he serve the brief on the appellee be wavied.

This appeal was lodged on November 3, 2003. Appellant has been afford more than one year to submit a brief that conforms to our rules. While he is proceeding *pro se* and is incarcerated, neither factor in itself entitles him to special consid-

eration on appeal. *Brown v. Post-Prison Transfer Bd.* 343 Ark. 118, 32 S.W.3d 754 (2000) (*per curiam*); *see Gibson v. State*, 298 Ark. 43, 764 S.W.2d 617 (1989) (*per curiam*). We take notice that this court has many appeals on its docket in which the appellant is both *pro se* and incarcerated and yet manages to submit a brief in less than one year's time. As appellant has been given ample opportunity to submit a conforming brief and has failed to do so, the motion to file a belated nonconforming brief is denied and the appeal is dismissed. The motion to waive service is accordingly moot.

Motion for rule on clerk to file belated nonconforming brief denied and appeal dismissed; motion for waives of service moot.

Guy DIXON, *Deceased v.* The SALVATION ARMY

04-545 201 S.W.3d 386

Supreme Court of Arkansas
Opinion delivered January 20, 2005

[redacted]

Tolley & Brooks, P.A., by: *Jay N. Tolley*, for appellant.

Rieves, Rubens & Mayton, by: *Kent J. Rubens, Michael J. Mayton*, and *David C. Jones*, for appellee.

JIM HANNAH, Chief Justice. This is an appeal from a decision of the Workers' Compensation Commission that Guy Dixon was not an employee of the Salvation Army at the time he suffered injury. Based on this finding, the Commission denied worker's compensation benefits. At the time of the injury, Dixon was enrolled in and performing duties assigned him in a Salvation Army alcohol rehabilitation program. Although Dixon suffered injury while oper-

ating a forklift, he was not operating the forklift in the performance of employment duties for the Salvation Army, but instead was engaged in work therapy as part of his rehabilitation program. We affirm the Workers' Compensation Commission. This case is here on a petition for review from a decision of the Arkansas Court of Appeals reversing the Workers' Compensation Commission. *Dixon v. Salvation Army*, 86 Ark. App. 132, 160 S.W.3d 723 (2004). Our jurisdiction is pursuant to Ark. Sup. Ct. R. 2-4.

Facts

On June 11, 2001, Dixon filled out an application asking the Salvation Army to admit him into its Rehabilitation Center. Dixon had been admitted to the Salvation Army alcohol rehabilitation program four times previously and was admitted again. Dixon agreed to the conditions of the program: that he attend services on Sunday and on Wednesday, that he live at the Rehabilitation Center for sixteen weeks, that he engage in forty hours of work each week, and that he receive a beginning stipend of seven dollars per week. Dixon also agreed to attend therapy such as Alcoholics Anonymous meetings.

On August 24, 2001, Dixon suffered injury while operating a forklift as part of his work therapy in the rehabilitation program. He was released from the program at that time because the Salvation Army had neither the facilities nor the resources to care for Dixon once he was injured. He was initially confined to a wheelchair. Later, he was able to use crutches and ultimately recovered.

On October 9, 2001, after Dixon was released from the Rehabilitation Center program, and after he recovered from his injuries, he was offered and accepted a full-time job with the Salvation Army. His duties included work that was similar to the work therapy he was provided while he was in the alcohol rehabilitation program. The Salvation Army has a practice of hiring past enrollees in its rehabilitation programs to fill full-time positions necessary to run the programs.

Standard of Review

Upon a petition for review, we consider a case as though it has been originally filed in this Court. *Sharp County Sheriff's Office v. Ozark Acres*, 349 Ark. 20, 22, 75 S.W.3d 690 (2002). We view the evidence in a light most favorable to the

Commission's decision, and we uphold that decision if it is supported by substantial evidence. *Deffenbaugh Indus. v. Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998).

Employee Status

In this case, we must determine whether Dixon was employed by the Salvation Army at the time he suffered injury on August 24, 2001. The purpose of the Workers' Compensation Act is to pay benefits to workers who suffer injury or disease arising out of and in the course of employment. Ark. Code Ann. § 11-9-101 (Repl. 2002).

Employment is defined in the statutes as "[e]very employment in the State in which three (3) or more employees are regularly employed by the same employer in the course of business. . . ." Ark. Code Ann. § 11-9-102(11) (Supp. 2003). The typical worker's compensation case on employee status presents the question of whether a person is an employee or an independent contractor. *See, e.g., Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001). In other words, the cases assume that the person is performing labor or services for the benefit of another, and the only issue is whether that person is performing services as an employee or an independent contractor. The facts in our case are different because it is not clear that Dixon was performing labor or services for the Salvation Army. Clearly, Dixon was performing labor or services, but he was performing them as part of the alcohol rehabilitation program in which he had enrolled himself with the laudable goal of freeing himself from his addiction to alcohol.

The question that must be answered is whether Dixon was performing labor and services for the benefit of the Salvation Army or for his own benefit. Typically, an employee is one who renders labor or services to another for salary or wages. *Liberty Mut. Fire Ins. Co. v. Canal Ins.* Co., 177 F.3d 326 (5th Cir. 1999). *See also Colonial Ins. Co. of Cal. v. Am. Hardware Mut. Ins. Co.*, 969 P.2d 796 (Colo. 1998). According to Donald Montgomery, Salvation Army's Drug and Alcohol Rehabilitation Program Director in Fayetteville, Dixon voluntarily entered a sixteen-week work-therapy

program to assist him in gaining control over his alcohol addiction. Dixon was housed and fed at the facility at no cost as part of the program. Montgomery further testified that Dixon agreed to perform whatever work was assigned as a part of the program and that he agreed to attend therapy sessions and various meetings designed to assist him in his recovery.

Appellant cites *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1996), for the proposition that all this court need do in determining whether workers' compensation benefits are due is decide whether Dixon provided a direct or indirect benefit to the work of the Salvation Army. The issue is a good deal more complicated than that.

The Salvation Army is a charity. *Ramsey v. American Auto. Ins. Co.*, 234 Ark. 1031, 356 S.W.2d 236 (1962). It is a religious movement. *People v. Sparks*, 335 Ill. App. 3d 249, 780 N.E.2d 781 (2002). It collects and sells donated items to raise money to pay for its operations. *See, e.g., Vaughn v. State*, 289 Ark. 31, 709 S.W.2d 73 (1986). However, the Salvation Army is not in the business of selling used items. Rather it sells used items to pay in part for its religious and philanthropic programs designed to assist those in need in our society. It derives a substantial portion of its income from its investments. *Coulombe v. The Salvation Army*, 790 A.2d 593 (Me. 2002). Its adult rehabilitation centers are only funded in part by the sale of donated items. *City of Lewiston v. The Salvation Army*, 710 A.2d 914 (Me. 1998).

The Salvation Army operates adult rehabilitation centers in multiple states. *Id.* In California, the courts have made successful completion of Salvation Army drug rehabilitation programs a condition of probation. *See, e.g., People v. Correll*, 229 Cal. App. 3d 656, 280 Cal. Rptr. 266 (1991). In *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996), this court observed that the circuit court sentenced appellant to perform thirty hours of public service for the substance abuse program at the Salvation Army in Fayetteville. The nature of the Salvation Army rehabilitation program was described in *United States v. Rutherford*, 323 F. Supp. 2d 911 (E.D. Wis. 2004):

> On December 26, 2002, he entered a drug treatment program at the Salvation Army Rehabilitation Center in Dallas, Texas. He completed the program on May 1, 2003. Defendant complied with all requirements of the program, including passing random drug tests and attending numerous classes, such as Narcotics Anonymous,

> Alcoholics Anonymous, Relapse Prevention, Family Matters, Character Building and a host of others. Defendant attended Chapel every Wednesday and Sunday, and paid for his participation in the program by working as a floor person in a Salvation Army store.

Rutherford, 232 F. Supp. 2d at 912. According to Montgomery, Dixon performed well and made progress.

Dixon was promised and received a gratuity that began at $7.00 per week and increased by one dollar per week to a maximum of $20.00 per week. He did not receive hourly or other compensation based on labor or services performed. Dixon was paid an hourly wage after his injury when he was hired subsequent to recovery from his injury upon application for employment.

The sum Dixon was given while in the alcohol rehabilitation program was intended to allow him to purchase minor personal items he might need that were not provided by the program. Later after the injury, when he went to work for the Salvation Army, Dixon filled out an employment application and was paid a wage of about $7.00 per hour. At that point, he was an employee, but what is at issue is Dixon's status at the time of his injury.

Where a person engages in conduct that might be considered work, but does it to further his own benefit rather than to further the benefit of another, the person is not an employee. *Lance v. New Mexico Military Inst.*, 70 N.M. 158, 371 P.2d 995 (1962). In *Joyce v. Pecos Benedictine Monastery*, 119 N.M. 764, 895 P.2d 286 (1995), the court concluded that Joyce was not an employee entitled to workers' compensation benefits where she was injured while carrying out work designed to facilitate her spiritual development as a novice preparing to join the monastery. Joyce received room, board, and $25.00 per week, and she indicated her motivation was the love she had for God. Dixon similarly received room, board, a nominal sum, worked as assigned to assist in his goal to free himself from alcohol, and was at the Salvation Army Rehabilitation Center out of a desire to improve himself.

The burden is on the claimant to show a causal connection between his or her injury and employment. *C.J. Horner Co. v. Stringfellow*, 286 Ark. 342, 691 S.W.2d 861 (1985). In order to qualify for workers' compensation, there must be employment. Ark. Code Ann. § 11-9-101.

Schneider v. Salvation Army, 217 Minn. 448, 14 N.W.2d 4671 (1944), and *Hall v. Salvation Army*, 261 N.Y. 110, 184 N.E. 691 (1933), are cited by both parties in the briefs. Both cases involve injured persons who were employed by the Salvation Army to work and who received both wages and other compensation in room and board. The facts of these cases are not analogous to the facts of this case, where the work Dixon performed was temporary work therapy designed to assist him in overcoming his addiction. In *Schneider,* the Minnesota Supreme Court expressly stated that its decision did not affect earlier decisions finding no employment relationship where indigent men were given temporary work for the purpose of building up their stamina. In *Hall*, the claimant was "on the pay roll," and received $3.00 per week plus room and board.

The parties also cite *McBeth v. Salvation Army*, 314 So.2d 468 (La. Ct. App. 1975). In *McBeth*, McBeth came to the Salvation Army as an alcoholic and entered the rehabilitation program just as Dixon did. McBeth was injured in an accident when he was working on a Salvation Army truck picking up discarded items. The discussion of the Louisiana Court of Appeals is helpful:

> The Salvation Army is a Christian Protestant church and a nonprofit Georgia corporation. Every Salvation Army officer is an ordained minister. It has a Men's Social Service Center in New Orleans which operates a rehabilitation program for homeless men with treatable handicaps. Most of those who come to the Center are alcoholics. They are given food, clothing, a place to sleep and a small weekly gratuity for such expenses as cigarettes, soft drinks, razor blades, etc. The gratuity varies and is dependent on the needs of each recipient; it is not based upon the type or amount of work he performs. There is no minimum allowance for beneficiaries but about $4.50 to $5 a week is considered sufficient for those newly admitted. In the case of alcoholics, for rehabilitation purposes The Salvation Army has found it inadvisable to give too much money. As a part of the rehabilitation program, all beneficiaries are required to do some sort of work to get their minds off their problems and as a matter of personal pride in themselves. The maximum given a beneficiary is $15 per week and for those who progress satisfactorily, it is possible to work up to employee status where they can earn a regular hourly wage, can accept outside employment and can live in the community rather than in the Center.

> The Center in New Orleans is self-supporting. It obtains discarded items which are donated. These items are processed, refurbished and sold to the public. The program generates gross sales of approximately $450,000 per year, income derived from the donation of the discarded items and from the work of the beneficiaries and employees. The income so obtained pays for the operation of the Center, including the maintenance of the beneficiaries and employees, such as room, board and gratuities to the beneficiaries and salaries to the employees.

McBeth, 314 So.2d at 469-70. McBeth was denied workers' compensation benefits. The court in *McBeth* held that the program was provided for McBeth's benefit, and that he was not employed or rendering service to the Salvation Army. Likewise, Dixon was not in the employment of the Salvation Army at the time he was injured, and he is not entitled to workers' compensation benefits.

Ronnie POLSTON *v.* STATE of Arkansas

CR 04-651 201 S.W.3d 406

Supreme Court of Arkansas
Opinion delivered January 20, 2005

[redacted]

[redacted]

[redacted]

John Wesley Hall, Jr., for appellant.

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

JIM HANNAH, Chief Justice. Appellant Ronnie Polston entered a plea of guilty to possession of methamphetamine, possession of marijuana with intent to deliver, possession of drug paraphernalia, and possession of drug paraphernalia with intent to use. The Independence County Circuit Court sentenced Polston to two years' confinement in a Regional Punishment Facility, to be followed by a five-year suspended sentence. In addition, Polston was assessed a $2500 fine, court costs of $150, and a $250 DNA testing fee. Polston does not appeal the plea or the sentence of the circuit court. Rather, he argues that DNA testing of non-violent offenders or non-sexual offenders, pursuant to the State Convicted Offender DNA Database Act ("DNA Act"), constitutes an unreasonable search and seizure under the Fourth Amendment of the United States Constitution and article 2, section 15, of the Arkansas Constitution. Further, Polston argues that DNA testing of non-violent drug offenders is an unreasonable search and violates a basic right of privacy, the "right to be let alone" guaranteed in the Bill of Rights to the United States Constitution and Arkansas Constitution, as well as Arkansas privacy law as a whole.

This appeal presents questions concerning the interpretation or construction of the Constitution of Arkansas, as well as issues concerning federal constitutional interpretation. Therefore, we have jurisdiction of this matter pursuant to Ark. Sup. Ct. R. 1-2(a)(1) and (b)(6). We hold that the collection of DNA samples

of felons pursuant to the DNA Act is reasonable and not unconstitutional. Accordingly, we affirm.

DNA Act

[redacted] In 1997, the General Assembly enacted the "DNA Detection of Sexual and Violent Offenders Act," codified at Ark. Code Ann. § 12-12-1101 (Repl. 1999). The purpose of the DNA Act is to assist in criminal investigations, to exclude individuals who are the subjects of criminal investigations or prosecutions, and to deter and detect recidivist acts. *See* Ark. Code Ann. § 12-12-1102(1), (3) (Repl. 2003).

[redacted] In 2003, the General Assembly renamed the Act the "State Convicted Offender DNA Database Act," *see* Ark. Code Ann. § 12-12-1101 (Repl. 2003), and amended it to provide for DNA testing of all individuals convicted of all "qualifying offenses." Ark. Code Ann. § 12-12-1109(a) (Repl. 2003). A "qualifying offense," in pertinent part, means "any felony offense as defined in the Arkansas Criminal Code." Ark. Code Ann. § 12-12-1103(9) (Repl. 2003). Under the Act, any person adjudicated guilty of a felony is required to have a DNA sample drawn upon intake to confinement, as a condition of any disposition that does not require confinement, or, if already confined, immediately after sentencing. *See* Ark. Code Ann. § 12-12-1109(a).

DNA samples are sent to the State Crime Laboratory, where they undergo typing analysis and are stored on the State DNA Database. *See* Ark. Code Ann. § 12-12-1112(a)(1) (Repl. 2003). In addition to storing samples obtained from offenders, the State Crime Lab stores DNA records related to crime scene evidence, unidentified persons or body parts, and relatives of missing persons. *See* Ark. Code Ann. § 12-12-1105(b) (Repl. 2003). Further, the State Crime Lab may include the offender's DNA records in an anonymous population database compiled for statistical purposes. *See* Ark. Code Ann. § 12-12-1112(d) (Repl. 2003). The State Crime Lab transmits DNA records to the Federal Bureau of Investigation for storage and maintenance in CODIS,[1] the FBI's national DNA identification system that allows the storage and

[1] The term "CODIS" is derived from Combined DNA Index System. Ark. Code Ann. § 12-12-1103(3)(B) (Repl. 2003). All fifty states participate in CODIS. *CODIS Combined DNA Index System, available at* http://www.fbi.gov/hq/lab/codis/index1.htm.

exchange of DNA records submitted by state and local forensic laboratories. *See* Ark. Code Ann. §§ 12-12-1105(a)(2) & 12-12-1103(3)(A) (Repl. 2003).

Fourth Amendment Challenge

[redacted] Polston argues that the DNA testing of non-violent or non-sexual offenders pursuant to the DNA Database violates Fourth Amendment rights against unreasonable searches and seizures. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." "The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their discretion." *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 613-14 (1989). It is well settled that the taking of blood by a law enforcement officer amounts to a Fourth Amendment search and seizure. *Schmerber v. California*, 384 U.S. 757 (1966); *Haynes v. State*, 354 Ark. 514; 127 S.W.3d 456 (2003); *Russey v. State*, 336 Ark. 401, 985 S.W.2d 316 (1999); *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995). However, only those searches and seizures that are deemed unreasonable are proscribed by the Fourth Amendment. *Skinner*, 489 U.S. at 619. What is reasonable " 'depends on all of the circumstances surrounding the search or seizure and the nature of the search and seizure itself.' " *Id.* (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

The State concedes that the drawing of DNA pursuant to the DNA Act is a search for the purposes of the Fourth Amendment; however, the State argues that the search is constitutional for two independent reasons. The State first argues that the DNA Act is constitutional because the collection of a DNA sample from non-violent felons is a "special needs" search that is reasonable even in the absence of individualized suspicion.[2] Additionally, the

[2] As a general rule, a search or seizure is unreasonable "in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). However,

State argues that even if the collection of a DNA sample from non-violent felons is not a "special needs" search, it is nonetheless constitutional because it is reasonable under the totality of the circumstances.

The United States Supreme Court has not addressed the issue of whether the DNA testing of non-violent offenders is an unreasonable search and seizure under the Fourth Amendment. Courts that have reviewed the constitutionality of DNA collection statutes have used differing approaches in addressing a Fourth Amendment challenge. Some courts have determined that the collection of DNA samples from offenders falls within the "special needs" exception. *See, e.g., Green v. Berge*, 354 F.3d 675 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003); *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999); *Vore v. United States Dep't of Justice*, 281 F. Supp. 2d 1129 (D. Ariz. 2003); *Miller v. United States Parole Comm'n*, 259 F. Supp. 2d 1166 (D. Kan. 2003); *United States v. Sczubelek*, 255 F. Supp. 2d 315 (D. Del. 2003); *United States v.Reynard*, 220 F. Supp. 2d 1142 (S.D. Cal. 2002); *State v. Martinez*, 276 Kan. 527, 78 P.3d 769 (2003); *State v. Olivas*, 122 Wash. 2d 73, 856 P.2d 1076 (1999); *State v. Surge*, 122 Wash. App. 448, 94 P.3d 345 (Wash. Ct. App. 2004); *State v. Steele*, 155 Ohio App. 3d 659, 802 N.E.2d 1127 (2003); *In re D.L.C.*, 124 S.W.3d 354 (Tex. Ct. App. 2003). Other courts have used the totality-of-the-circumstances approach, weighing the interests of the State and those offenders involved. *See, e.g., United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004); *Groceman v. United States Dep't of Justice*, 354 F.3d 411 (5th Cir. 2004); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992); *United States v. Stegman*, 295 F. Supp. 2d 542 (D. Md. 2003); *Padgett v. Ferrero*, 294 F. Supp. 2d 1338 (N.D. Ga. 2003); *Shelton v. Gudmanson*, 934 F. Supp. 1048 (W.D. Wis. 1996); *Kruger v. Erickson*, 875 F. Supp. 1210 (D. Minn. 1995); *Sanders v. Coman*, 864 F. Supp. 496 (E.D.N.C. 1994); *Ryncarz v. Eikenberry*, 824 F. Supp. 1493 (E.D. Wash. 1993); *In re Maricopa Juvenile County Action*, 187 Ariz. 419, 930 P.2d 496 (Ct. App. 1996); *People v. King*, 82 Cal. App. 4th 1363, 99 Cal. Rptr. 2d 220 (2000); *L.S. v. State*, 805 So. 2d 1004 (Fla. Dist. Ct. App. 2001); *Landry v. Attorney General*, 429

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the Court has recognized exceptions to this rule in cases where " 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " *Skinner*, 489 U.S. at 619 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987), quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

Mass. 336, 709 N.E.2d 1085 (1999), *cert. denied*, 528 U.S. 1073 (2000); *Cooper v. Gammon*, 943 S.W.2d 699 (Mo. Ct. App. 1997); *Gaines v. State*, 116 Nev. 359, 998 P.2d 166 (2000); *State ex rel. Juv. Dep't v. Orozco*, 129 Or. App. 148, 878 P.2d 432 (1994); *Johnson v. Commonwealth*, 259 Va. 654 (2000), 529 S.E.2d 769, *cert. denied*, 531 U.S. 981 (2000); *Doles v. State*, 994 P.2d 315 (Wyo. 1999).

[redacted] We agree with those courts that have adopted the totality-of-the-circumstances test when asked to determine whether a DNA collection statute constitutes an unreasonable search and seizure under the Fourth Amendment. Accordingly, in this case, we need not address whether the DNA Act falls within the special-needs exception to the Fourth Amendment.

[redacted] The question before us is whether a felon's expectation of privacy in the intrusive nature of the DNA test outweighs the State's interest in collecting DNA samples and maintaining a DNA database. As to the felon's expectation of privacy, the United States Supreme Court has recognized that "those who have suffered a lawful conviction" are subject to a "broad range of [restrictions] that might infringe constitutional rights in a free society." *McKune v. Lile*, 536 U.S. 24, 36 (2002). The United States Supreme Court has held that a convicted person has a diminished expectation of privacy in the penal context. *See Hudson v. Palmer*, 468 U.S. 517, 530 (1984). Further, the Court has held that probationers have limited privacy rights under the Fourth Amendment. *See Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

[redacted] Another factor to consider is the intrusion occasioned by the search. The Supreme Court has held that "the intrusion occasioned by a blood test is not significant, since such 'tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.' " *Skinner*, 489 U.S. at 625 (quoting *Schmerber*, 384 U.S. at 771). Moreover, the Court has stated "that blood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity." *Winston v. Lee*, 470 U.S. 753, 762 (1985). We agree with the State's contention that because the privacy rights of felons are diminished by virtue of their conviction and the intrusion of the blood test is not significant, the privacy rights implicated by searches under the DNA Act are minimal. However, our analysis does not end there.

We must now determine whether the State's interest in collecting and maintaining DNA samples outweighs the privacy interests of the affected offenders.

The State contends that its interests are substantial, in that the collection of samples under the DNA Act contributes to the State's important interest of a more accurate criminal justice system, as well as its obvious interest in preventing and solving future crimes. In addition, the State contends that this interest would be jeopardized by requiring individualized suspicion prior to collecting a felon's DNA because any matching DNA from a crime scene is most likely in the database because other evidence collected there did not definitively point to any suspect. As a result, the State contends that requiring individualized suspicion would frustrate the State's interests in accurately solving crimes and preventing future offenses.

We believe that the collection and maintenance of DNA samples pursuant to the DNA Act is reasonable in light of the substantial interests of the State and the diminished privacy interests of convicted felons. Polston concedes that the State has a compelling interest in collecting DNA samples from violent offenders and sexual offenders due to the high rates of recidivism of those offenders. However, he states that there is no rational basis for requiring DNA testing of non-violent offenders and non-sexual offenders because the State cannot demonstrate that those offenders will likely commit a violent offense in the future. The State disputes this, citing the testimony of Dr. Paul Ferrara, the Director of the Virginia Division of Forensic Science, who testified recently before the House Judiciary Committee concerning the inclusion of non-violent felons within the scope of the Virginia DNA Act:

> It is tempting to suggest limiting the use of DNA testing to violent crimes and only collect samples from violent felons. That is an approach used in other states. While on the surface this seems like a reasonable strategy, I submit to you that to do so is short-sighted and will dramatically reduce the efficacy of DNA databanks. By analyzing carefully these first 1000 "hits," our research revealed the following:
>
> Of the 894 case to offender "hits," i.e., where a match between crime scene evidence and a convicted offender occurred, 344 "hits" (38.5%) were to offenders in our database for prior felony property

crime convictions. The crimes assisted/solved by these 344 "hits" included 54 sex offenses, 27 homicides, 6 assaults, 10 robberies, one rape/homicide, 2 abduction/car jackings and 214 burglaries/B&Es/larcenies.

Another 172 of the 894 case to offender "hits" (19.2%) were to offenders in our database for prior felony drug convictions. The crimes assisted/solved by these 172 "hits" include 35 sex offenses, 42 homicides (including two double homicides), 3 assaults, 18 robberies, 13 abduction/car jackings, and 41 property crimes.

Even 47 "hits" were to offenders in our database for prior felony/forgery/uttering convictions. The crimes assisted/solved by these 47 "hits" include 12 sex offenses, 8 homicides, 4 other violent crimes against persons and 22 B&Es/burglaries/larcenies.

Our database shows similar trends with respect to juveniles. Eighty (80) of the 894 case to offender "hits" were to juveniles in our database. The crimes assisted/solved by these 80 "hits" include 12 sex offenses, 8 homicides, 2 assaults, 7 robberies, one rape/homicide, 3 abduction/car jackings and 41 property crimes.

To summarize, 37% of violent crimes solved or assisted by a DNA databank hit were perpetrated by individuals with only prior property crime convictions as their most serious qualifying offense. Looked at another way, 82% of these case to offender "hits" would have been completely missed if our databank was limited to only violent crimes.

* * *

Further, the State argues that according to a Bureau of Justice Statistics Special Report, *Recidivism of Prisoners Released in 1994*, 21.9% of state prisoners whose most serious offenses were burglaries were rearrested for violent offenses including homicide, kidnapping, rape, other sexual assaults, assault, robbery, and other violence. Further, the report stated that of other prisoners who had previously committed non-violent offenses such as larceny, automobile theft, fraud, drug offenses, and public order offenses were rearrested for violent offenses at the following percentages: larceny (22.3%), automobile theft (26.5%), fraud (14.8%), drug offenses (18.4%), public order offenses (18.5%). The State contends that this data shows that violent recidivism is not confined to violent felons, and, therefore, a need to include them within the scope of

the statute clearly exists. Polston offers no authority to the contrary, and counsel for Polston conceded at oral argument that he had no evidence to rebut the findings presented by the State.

In addition, the State has an interest in deterring and detecting all recidivist acts, not just those considered to be violent. Even assuming the drug offenses at issue here are non-violent offenses, we note that other jurisdictions have indicated that DNA evidence may be used to determine who committed a drug offense. *See, e.g., State v. White*, 850 So. 2d 751, 759 (La. Ct. App. 2003) (presence of defendant's DNA on bag of cocaine sufficient to prove direct physical contact and control of the drug); *Birdsong v. Commonwealth*, 37 Va. App. 603, 609-10, 560 S.E.2d 468, 471-72 (2002) (defendant's DNA used as evidence to convict defendant of possession of cocaine and possession of firearm). The collection and storing of DNA may indeed be useful in helping to solve future drug crimes.

In further support of collecting DNA samples from non-violent offenders, the State points out that the State Crime Lab stores DNA records for purposes other than those associated with criminal investigations, namely those records related to unidentified persons or body parts, and relatives of missing persons. *See* Ark. Code Ann. § 12-12-1105(b). Polston has failed to demonstrate that in the context of DNA testing, non-violent offenders have greater privacy rights than violent offenders and sexual offenders. We hold that the DNA testing of convicted felons, pursuant to the DNA Act, is reasonable and does not violate the Fourth Amendment.[3]

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[3] All fifty states have enacted statutes providing for the collection and retention of DNA samples. In addition to Arkansas, the following states include "all felons" in the list of persons required to provide DNA samples: Alabama (Ala. Code §§ 36-18-24 and 36-18-25); Alaska (Alaska Stat. § 44.41.035); Arizona (Ariz. Rev. Stat. § 13-610); Colorado (Colo. Rev. Stat. § 16-11-102.3); Connecticut (Conn. Gen. Stat. § 54-102g); Delaware (Del. Code Ann. tit. 29, § 4713); Florida (Fla. Stat. Ann. § 943.325); Georgia (Ga. Code Ann. § 24-4-60); Illinois (730 Ill. Comp. Stat. Ann. § 5/5-4-3); Kansas (Kan. Stat. Ann. § 21-2511); Louisiana (La. Rev. Stat. Ann. § 15:609); Maryland (Md. Code Ann., Public Safety § 2-504); Massachusetts (Mass. Gen. Laws ch. 22E, § 3); Michigan (Mich. Comp. Laws § 750.520m); Mississippi (Miss. Code Ann. § 47-5-183); Montana (Mont. Code Ann. § 44-6-102); New Mexico (N.M. Stat. Ann. § 29-16-3); North Carolina (N.C. Gen. Stat. § 15A-266.4); Oregon (Or. Rev. Stat. § 137.076); South Dakota (S.D. Codified Laws § 23-5A-1); Tennessee (Tenn. Code Ann. § 40-35-321); Utah (Utah Code Ann. § 53-10-403); Virginia (Va. Code

Article 2, Section 15

[redacted] Additionally, Polston argues that the DNA testing of non-violent offenders violates article 2, section 15, of the Arkansas Constitution. We have noted that in various search-and-seizure contexts, this court has viewed the protections of article 2, section 15, of the Arkansas Constitution to be parallel to those provided by the Fourth Amendment. *State v. Sullivan*, 348 Ark. 647, 74 S.W.3d 215 (2002). However, we have also noted that in other search-and-seizure contexts, this court has not been in lock-step with federal Fourth Amendment interpretation. *Id.* There are occasions and contexts in which federal Fourth Amendment interpretation provides adequate protections against unreasonable law enforcement conduct; there are also occasions when this court will provide more protection under the Arkansas Constitution than that provided by the federal courts. *Id.* We have stated that one pivotal inquiry in this regard is whether this court has traditionally viewed an issue differently than the federal courts. *Id.*

[redacted] The State contends that this court has followed the United States Supreme Court's interpretation of the Fourth Amendment in the context of parole searches and suspicionless seizures. To support its proposition, the State cites to *Cherry v. State*, 302 Ark. 462, 791 S.W.2d 354 (1990), where this court held that a warrantless search of a parolee's vehicle did not violate the Fourth Amendmen, and *Mullinax v. State*, 327 Ark. 41, 938 S.W.2d 801 (1997), where this court, noting that the language of article 2, section 15, was "virtually identical" to the Fourth Amendment,

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Ann. § 19.2-310.2); Washington (Wash. Rev. Code Ann. § 43.43.754); Wisconsin (Wis. Stat. § 165.76); Wyoming (Wyo. Stat. Ann. § 7-19-403). Maine does not classify crimes as felonies or misdemeanors. Crimes other than murder are classified as Class A, B, C, D, and E. All persons convicted of murder or a Class A, B, or C crime must provide a DNA sample. *See* Me. Rev. Stat. Ann. tit. 17-A, § 1574. New Jersey requires DNA samples from persons convicted of a "crime." *See* N. J. Stat. Ann. § 53:1-20.20. The remaining states, the District of Columbia, and the federal government require collection of DNA samples from all persons convicted of certain enumerated offenses.

Courts have consistently held that the collection of DNA samples is reasonable and does not violate the Fourth Amendment. Two cases cited by Polston where courts found that the collection of DNA was unconstitutional, *United States v. Miles*, 228 F. Supp.2d 1130 (E.D. Cal. 2002), and *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), *vacated on grant of rehearing en banc*, 354 F.3d 1000 (9th Cir. 2004), are no longer good law. *See United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004).

held that a vehicle roadblock was a reasonable "seizure" under both the Fourth Amendment and article 2, section 15. While the United States Supreme Court has not specifically addressed the issue before us — whether the DNA testing of non-violent offenders is an unreasonable search and seizure under the Fourth Amendment — Polston cites no case suggesting that this court has traditionally viewed the issue of searches or suspicionless seizures in the penal context in a manner inconsistent with the view of the federal courts. We have repeatedly stated that we will not consider an argument, even a constitutional one, when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Wooten v. State*, 351 Ark. 241, 91 S.W.3d 63 (2002).

Privacy

Polston next appears to argue that collecting DNA samples from non-violent offenders interferes with a right of privacy apart from an individual's right to be free from unreasonable searches and seizures. Polston cites *Winston v. Lee*, 470 U.S. 753 (1985), where the United States Supreme Court held that forcing a suspect to undergo major surgery to remove a bullet was a search in violation of the Fourth Amendment, even where the search would produce evidence of a violent crime. We do not believe that the intrusion occasioned by forcing a suspect to undergo major surgery is analogous to the minimal intrusion occasioned by compelling a convicted felon to provide a blood sample for DNA testing. As previously stated, we believe the collection of DNA is reasonable.

Polston next cites *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), where this court held that Arkansas's sodomy statute was unconstitutional when applied to consenting adults in their homes. We further explained our holding in *Jegley v. Picado, supra*, in *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004), where we stated:

> . . . [T]he right to privacy implicit in the Arkansas Constitution is a fundamental right which requires a compelling state interest to override it. This rich tradition of protecting the privacy of our citizens in their homes justified our deviating from federal common law in *Picado* with respect to constitutional protection in our homes.

> Indeed, the legal principle that a person's home is a zone of privacy is as sacrosanct as any right or principle under out state constitution and case law. *Jegley v. Picado, supra; Griffin v. State, supra.* Arkansas has clearly embraced a heightened privacy protection for citizens in their homes against unreasonable searches and seizures, as evidenced by our constitution, state statutes, common law, and criminal rules.

Brown, supra. We fail to see how our precedents recognizing a citizen's fundamental right to privacy in his or her home offer any support for Polston's argument that he, a convicted felon, has a fundamental right to privacy implicit in Arkansas law that would exempt him from the DNA testing at issue in this case.

Affirmed.

Damien ECHOLS *v.* STATE of Arkansas

CR 94-928, CR 99-1060 202 S.W.3d 1

Supreme Court of Arkansas
Opinion delivered January 20, 2005

[Rehearing denied February 24, 2005.]

[redacted]

Dennis P. Riordan, *Donald M. Morgan*, and *Theresa A. Gibosno*; and *Cauley, Bowman, Carney & Williams*, by: *Deborah R. Sallings*, for appellant.

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

TOM GLAZE, Justice. This case was first decided on March 19, 1994, when a jury found petitioner Damien Echols guilty of brutally murdering three eight-year-old boys in West Memphis on May 5, 1993. Echols appealed these capital murder convictions, and this court, on December 23, 1996, in a 77-page opinion in appellate case number CR94-928, affirmed that conviction. *See Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996) (*Echols I*). This court issued its mandate to the circuit court. Echols petitioned the United States Supreme Court for a writ of certiorari, which that Court denied on May 27, 1997. *See Echols v. Arkansas*, 520 U.S. 1244. This court then reissued its mandate in appellate case number CR94-928 — the direct appeal in *Echols I*.[1]

Echols then pursued his timely petition for postconviction relief in the trial court pursuant to Ark. R. Crim. P. 37.5. *See Echols v. State*, 344 Ark. 513, 42 S.W.3d 467 (2001) (*Echols II*). On June 17, 1999, the trial court denied Echols's Rule 37 claims, and this court, in *Echols II*, appellate number CR99-1060, affirmed the trial judge's refusal to recuse from the Rule 37 proceeding, but our court remanded this case to the trial court for entry of a written order with findings of facts in compliance with Rule 37.5(i). *See*

[1] Echols initially became eligible to file a petition on January 13, 1997, the date this court entered its mandate following his direct appeal. This court granted his motion to stay the mandate so he could petition the Supreme Court.

Echols II, 344 Ark. at 519. On remand, and after the trial court's review, the circuit court issued a new order with factual findings, rejecting Echols's Rule 37 claims. This time, on October 30, 2003, our court affirmed the circuit court on all Rule 37 claims in case number CR99-1060. *See Echols v. State*, 354 Ark. 530, 127 S.W.3d 486 (2003) (*Echols III*). Our court's mandate in this Rule 37 postconviction case, No. CR99-1060, issued on December 12, 2003.

During the period this court was considering Echols's Rule 37 proceeding, Echols had also filed a petition for writ of error *coram nobis* on February 27, 2001, asking this court to reinvest jurisdiction in the trial court. Our court ruled it would consider Echols's writ of error *coram nobis* petition as a separate case under appellate case number CR94-928 (the docket number for *Echols I*, decided on December 23, 1996). However, this court directed that both cases, CR94-928 and CR99-1060, be submitted and orally argued on the same date. Following separate oral arguments in both cases on October 2, 2003, our court first issued its opinion on October 16, 2003, denying Echols's error *coram nobis* petition. As previously set out above, this court affirmed and entered its decision on October 30, 2003, denying Echols relief under Rule 37. In sum, this court's mandates in CR94-928 and CR99-1060 were final on November 13, 2003, and December 11, 2003, respectively. Consequently, Echols's requests for postconviction relief under Rule 37 and for writ of error *coram nobis* are final unless Echols can successfully establish grounds for this court to recall its mandates in either case number CR94-928 or CR99-1060.[2]

On October 29, 2004, Echols filed the instant motion to recall the mandate and his second motion to reinvest jurisdiction in the trial court to consider a petition for writ of error *coram nobis*. In his motion and the accompanying brief in support, Echols advances two primary arguments in support of his request to recall the mandate and his error *coram nobis* petition: 1) he alleges that the

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[2] Since these mandates have issued, three attorneys who practice law in San Francisco, California have filed motions in this court seeking permission to practice by comity pursuant to Rule XIV of the Rules Governing Admission to the Bar. The attorneys have associated Deborah R. Sallings of Cauley, Bowman, Carney & Williams as local counsel.

For the purpose of considering Echols's new motions, this court grants comity. We note that these attorneys have submitted an order purportedly signed by Circuit Judge David Burnett, but the order has no file marks. In addition, we note that Echols has had as many as six attorneys in these prior proceedings and appeals, but none of the prior attorneys appear to be active or of record in the pending motions.

jury received and considered extraneous information — specifically, the confession of Jessie Misskelley — during deliberations at his trial, thus undermining the fundamental fairness of the trial process; and 2) certain members of the jury harbored an impermissible bias against him, in violation of his Fifth, Sixth, and Fourteenth Amendment rights.

Echols first argues that this court wields the inherent power to recall its mandates and cites Ark. Sup. Ct. R. 5-3(d) and *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003), to support his argument. However, this court made abundantly clear in *Robbins* that we were recalling the mandate "solely because of the unique circumstances of this case." *Robbins*, 353 Ark. at 564. Specifically, the question raised by the request to recall the mandate was whether an error in Robbins's appeal had been allegedly overlooked that would have been reversible error had it been found earlier. *Id.* The court pointed to three specific factors that prompted the decision to recall the mandate: 1) a decision had been cited to the court which was on all fours legally with the issue presented; 2) the federal district court had dismissed Robbins's federal *habeas corpus* petition because that issue had not been addressed in state court; and 3) the appeal was a death case "where heightened scrutiny is required." *Id.* These factors combined to make Robbins's case *sui generis*; the court noted that it "consider[ed] this case to be one of a kind, *not to be repeated.*" *Id.* at 564-65 (emphasis added). Thus, in order to recall a mandate, the above three factors must be established.

Although his first contention is that this court should recall its mandate under *Robbins*, Echols makes no showing that he has satisfied any of these three factors, other than the fact that his case, like Robbins's, involves the death penalty. In *Engram v. State*, 360 Ark. 140, 200 S.W.3d 367 (2004), this court refused to recall the mandate in a death penalty case. There, the federal district court had directed Engram to dismiss his *habeas corpus* petition without prejudice so our court could consider any claim of mental retardation he might have under *Atkins v. Virginia*, 536 U.S. 304 (2002); our court held that Engram had exhausted his state remedies, and he was left to pursue his relief, if any, in the federal courts.

Here, as noted above, Echols can satisfy only one of the three *Robbins* criteria — his is a death penalty case. In *Robbins*, this court stressed that the death penalty "is a unique punishment that demands unique attention to procedural safeguards," *Robbins*, 353 Ark. at 561. Here, however, Echols does not even attempt to

establish that the facts of his case comport with the three "unique circumstances" that convinced a majority of this court to recall the mandate in *Robbins*. The *Engram* court noted that "[t]he purpose of recalling the mandate and reopening the case in *Robbins* was in order to correct an error in the appellate process," not an alleged error in the trial court, as was the case in *Engram*. Echols, however, does not raise the possibility of an error in the appellate process; instead, he merely claims that "the developments described [in his motion] warrant an order recalling the court's previously issued mandate and reopening the case for further proceedings in the circuit court." This claim is plainly insufficient to satisfy the requirements of *Robbins* and to justify the recalling of the mandate.

In addition to his request to recall the mandate, Echols also asks this court to reinvest the trial court with jurisdiction to consider his petition for writ of error *coram nobis*. As noted above, this is his second such petition. The essence of his argument is that he was denied a fair trial, because his jury considered extraneous, improper, and unadmitted evidence against him in arriving at its conviction and death sentence; this alleged error, he claims, caused his jurors to harbor an impermissible bias against him. He further argues that those errors are "fundamental in nature and are founded on facts which would have prevented rendition of the judgment if known to the trial court, and which, through no negligence or fault of the defendant, were not brought forward before rendition of the judgment."

We begin with a discussion of the fundamental principles of error *coram nobis*. The writ of error *coram nobis* is an extraordinary writ, known more for its denial than its approval. *Cloird v. State*, 349 Ark. 33, 76 S.W.3d 813 (2002); *State v. Larimore*, 341 Ark. 397, 17 S.W.3d 87 (2000). The function of the writ of error *coram nobis* is to secure relief from a judgment rendered while there existed some fact which would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment. *Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975). The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Cloird*, 349 Ark. at 37; *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999).

We have held that a writ of error *coram nobis* was available to address certain errors of the most fundamental nature that are found in one of four categories: 1) insanity at the time of trial, 2)

a coerced guilty plea, 3) material evidence withheld by the prosecutor, or 4) a third-party confession to the crime during the time between conviction and appeal. *Cloird, supra*; *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984). *Coram nobis* proceedings are attended by a strong presumption that the judgment of conviction is valid. *Id.*

Although there is no specific time limit for seeking a writ of error *coram nobis*, due diligence is required in making an application for relief. *Echols*, 354 Ark. at 419; *Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997). In the absence of a valid excuse for delay, the petition will be denied. *Echols, supra.* This court has held that due diligence requires that 1) the defendant be unaware of the fact at the time of trial; 2) he could not have, in the exercise of due diligence, presented the fact at trial; or 3) upon discovering the fact, did not delay bringing the petition. *Id.* at 419 (denying error *coram nobis* relief, which Echols claimed was proper because he had only recently discovered evidence to show he was incompetent at his trial; this court held it was obvious that he was aware of his mental history at the time of his trial); *see also Larimore, supra* (citing John H. Haley, Comment, *Coram Nobis and the Convicted Innocent*, 9 ARK. L. REV. 118 (1954-55)); *Penn v. State, supra.*

[redacted] At the outset, it should be noted that the basis for Echols's claim — i.e., that the jury considered improper and extraneous information in its consideration of his guilt — does not fall within any of the four categories of errors for which error *coram nobis* constitutes appropriate relief. Although Echols maintains that his claims regarding jury-deliberation irregularities and impermissible jury bias should fall within the ambit of error *coram nobis*, this court has specifically declined to extend the writ to remedy a case involving allegedly misleading responses by a juror during voir dire. *See Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996).

[redacted] It has been more than ten years since Echols's conviction. This fact clearly demonstrates that Echols did not exercise due diligence in bringing his claims to light — especially in view of the fact that the point on which he relies (the jury's alleged consideration of Misskelley's confession) was known to the court, the prosecutor, and to Echols's defense team at the time of trial. In his memorandum brief, he points out that, during trial, the trial court denied his motion for mistrial when one of the police witnesses inadvertently mentioned Misskelley's statement. At that time, the court stated, "I suggest . . . that there isn't a soul up on

that jury or in this courtroom that doesn't know Mr. Misskelley gave a statement." Thus, Echols should have been aware from the time of his trial and conviction of the possibility that the jury might have been aware of and considered this extraneous information.[3]

For these two reasons — *coram nobis* is not applicable to address and correct the errors that allegedly occurred here, and Echols failed to exercise due diligence in raising these claims — we decline to reinvest the trial court with jurisdiction to consider Echols's petition for writ of error *coram nobis*.[4]

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[3] Indeed, Echols raised the issue of the jury's improper consideration of the fact of Jessie Misskelley's statement *during* trial; as noted above, he moved for mistrial, which was denied, and he assigned error to this ruling on appeal. In addition, Echols raised a somewhat similar argument in his Rule 37 appeal, wherein he claimed that his trial counsel was ineffective during voir dire for failing to adequately question jurors regarding pretrial publicity and their knowledge of Misskelley's confession. Thus, essentially the same arguments he now attempts to raise in a petition for writ of error *coram nobis* were known to him prior to this point in time. Thus, Echols has failed to comply with the due diligence facet of error *coram nobis*, as he could have presented these facts at trial.

[4] However, even if we were to permit the trial court to reconsider this case, Echols's claim of juror misconduct is extremely untimely. It is true that this court held in *Larimore v. State*, 309 Ark. 414, 833 S.W.2d 358 (1992), that a new trial was warranted where inadmissible materials made their way into the jury room and "could well have influenced the jury to decide . . . that appellant was guilty." *Larimore*, 309 Ark. at 360-61. However, Larimore filed a motion for new trial almost immediately after the verdict was rendered. *Id.*; *cf. Cigainero v. State*, 310 Ark. 504, 838 S.W.2d 361 (1992) (a motion for new trial that alleged jury misconduct, but which was filed more than thirty days from the date of the judgment, was untimely). *See also* Ark. Code Ann. § 16-89-130(c)(7) (new trial may be granted upon a showing of jury misconduct that causes the court to conclude that the defendant has not received a fair trial); Ark. R. Crim. P. 33.3(b) (motion for new trial must be filed within thirty days of the judgment). Echols's claim of juror misconduct has been brought over a decade after his conviction. Clearly, this is a matter which could have been brought in a motion for new trial immediately after the verdict and conviction, but the argument is now untimely.

In addition, jurors are presumed to be unbiased and are presumed to follow the instructions given to them by the court. *See Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2002); *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001); *State v. Robbins*, 342 Ark. 262, 27 S.W.3d 419 (2000); *Logan v. State*, 300 Ark. 35, 776 S.W.2d 341 (1989). Here, when the witness mentioned Misskelley's statement, the trial court admonished the jury to disregard and not consider the last response." This court will not presume bias or presume that a jury is incapable of following the trial court's instructions. *Kelly, supra.*

Finally, Echols's attempt to prove that his jury considered the Misskelley statement is improper. Ark. R. Evid. 606(b) precludes inquiry into a juror's state of mind during deliberations; the rule only permits inquiry into whether any external influence or infor-

Before we conclude this opinion, we must comment on the DNA testing Echols requested pursuant to Ark. Code Ann. § 16-112-201 *et seq.* (Supp. 2003). Although Echols first filed his motion for DNA testing in September of 2002, the motion is still pending in the circuit court, and the proceeding has remained unresolved since that time. We wish to impress upon the trial court, the State, and Echols's attorneys that this matter needs to be resolved. Although we understand that there are significant constraints and pressures upon the State Crime Laboratory, we also stress that this case has been going on since 1996, and there is a need for finality in this matter. Indeed, in our last per curiam opinion granting an extension, we declined to issue an open-ended stay. Instead, we granted a stay for a period of seventy days from the date of the opinion *rendered on June 19, 2003*. We therefore encourage the parties and the court to take action to ensure that the DNA testing is addressed and concluded.

IMBER, J., concurs.

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Opinion delivered January 20, 2005

mation could have played a part in the jury's verdict. *Davis v. State*, 330 Ark. 501, 956 S.W.2d 163 (1997). The purpose of this rule is to balance the freedom of jury deliberations with the ability to correct an irregularity in those deliberations. *Miles v. State*, 350 Ark. 243, 85 S.W.3d 907 (2002); *Davis, supra.* We have unequivocally stated that any effort by a lawyer to gather information in violation of Rule 606(b) to impeach a jury's verdict is improper. *Miles, supra.* Although Echols argues that he interviewed the jurors in order to determine whether any external influence or information played a role in the jury's deliberations, what he is essentially asking this court to do is to delve into the jury's deliberations in order to determine whether any of them disregarded the trial court's instructions — specifically, the court's instruction to not consider that a witness had mentioned Misskelley's statement.

Lisa Lundeen Gaddy, for appellant.

Gray Allen Turner, for appellee.

DONALD L. CORBIN, Justice. Appellant Linda Camarillo-Cox appeals the order of the Benton County Circuit Court terminating her parental rights to her four children. On appeal, she argues that the trial court erred in terminating her rights because there was no clear and convincing evidence supporting termination. This case is presently before us on a petition for review from the Arkansas Court of Appeals; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 2-4(c)(iii). We affirm the order of the trial court.

On August 24, 2001, DHS filed a petition seeking emergency custody of Appellant's four minor children, A.S. (d.o.b. 1/17/94); S.S. (d.o.b. 11/13/95); J.N. (d.o.b 12/9/99); and M.N. (d.o.b. 3/3/01), on the basis that the children had been abandoned. In its petition, DHS averred that Appellant threatened to commit suicide, gave the caseworker the children's birth certificates and social security cards, and then left, stating that she was going to Texas. The trial court granted DHS's motion, and all four children were subsequently placed with their mother's aunt and uncle, Noelia and David Garcia Sr.

After conducting an adjudication hearing, the trial court, in an order dated September 25, 2001, ruled that the children were dependent-neglected. The goal set in the case was reunification. The case plan established in this case required Appellant to: (1) attend parenting classes; (2) obtain and maintain housing and employment; (3) regularly attend visitation with her children; (4) continue to attend counseling; and, (5) take her prescribed medication.

A review hearing was held on November 20, 2001, and the court was apprised that Appellant had recently married Abie Cox, a convicted sex offender. Appellant testified that she was aware of her husband's past, specifically that he, at the age of seventeen, engaged in intercourse with a fourteen-year-old girl. She further testified that she was currently living with her parents but had been approved for government housing. Appellant stated that she was working but that her expenditures exceeded her income. According to Appellant, she visited her children at the Garcia's residence approximately once a week. She also gave the Garcias $20 per week for the care of her children. Appellant admitted that she was not in counseling because she owed money to Ozark Guidance

Center. She indicated that she would attend counseling in Siloam Springs, but preferred to see her regular counselor who worked for Ozark Guidance.

Stormy Randolph, a DHS family service worker, stated that the Garcias confirmed that Appellant visited the children weekly. She also stated that DHS was providing Appellant with parenting classes, but she had doubts about reunification in the near future. Randolph expressed concern because Appellant was not attending counseling, was not earning enough money to support herself or her children, had failed to obtain housing, and had married a convicted sex offender.

At the conclusion of the hearing, the trial court stated that it believed DHS had made reasonable efforts, but expressed concern that the agency should assist Appellant more in acquiring appropriate housing. The trial court also noted that Appellant was argumentative and asserted that she could take care of things on her own but failed to follow through. The trial court expressed concern about the fact that Appellant had married a convicted sex offender but ordered DHS to provide proof that the husband posed a danger to the children. Finally, the judge instructed Appellant to visit her children, to continue to look for appropriate housing, to regularly attend counseling, and to provide proof of any support payments that she made.

An emergency hearing was conducted on January 15, 2002, after the Garcias notified DHS that they were no longer willing to have custody of Appellant's four children. According to the Garcias, they believed the custody situation was only going to be temporary. The trial court returned custody to DHS and the children were placed in foster care.

A review hearing was held on February 19, 2002. Janet Bledsoe, the attorney *ad litem*, reported that the two oldest children had been receiving counseling since being placed in foster care. The court was also given notice that Appellant's husband had been arrested on a parole violation and would probably be incarcerated for six months. The court discussed the need for Appellant to obtain adequate employment and suitable housing. The trial court cautioned Appellant that six months had already elapsed and that it was not sufficient under the law that she simply attempt to remedy the deficiencies but that she had to actually accomplish the goals established in the case plan. At the conclusion of the hearing, the court determined that DHS was making reasonable efforts to

ensure reunification. It ordered counseling for the two oldest children to continue and ordered that efforts be made to ensure that S.S. wore her glasses. The trial court reiterated the requirements Appellant had to satisfy under the case plan.

The next review hearing was held on May 7, 2002. The attorney *ad litem* reported that she had met with all four of Appellant's children, and only the two oldest children were mature enough to express their desires for the future. According to the *ad litem*, the two oldest children indicated that they would like to be returned to their mother. DHS requested that the next hearing be a permanency planning hearing. The trial court reviewed an evaluation of Appellant, noting that she had been diagnosed as suffering from major depression. It reminded her that the children had been out of the home for almost one year and that if she failed to make substantial progress, she faced losing her parental rights.

On August 13, 2002, the trial court held a permanency planning hearing. At this hearing, Miguel Nava appeared for the first time and claimed to be the father of the two youngest children, J.N. and M.N. Counsel was appointed to represent him. Also at this hearing, Appellant's parents sought to intervene in the case so that they could adopt the children if Appellant's parental rights were terminated. DHS objected to the intervention on the basis that the grandparents had previously indicated that they were physically and financially unable to care for the children. The trial court granted the motion to intervene and ordered DHS to conduct an assessment of the Camarillos' home. A termination hearing was then scheduled for November 12, 2002.

Appellant requested a continuance of the termination hearing, which was ultimately held on December 30, 2002. Appellant appeared and testified that she had been living in a three bedroom, two bath apartment in Siloam Springs for approximately five or six months. Living with her was her husband, who had recently been released from prison. Appellant admitted that as part of her husband's parole conditions he could not have unsupervised contact with minor children. Appellant also testified that she had recently been employed at Dayspring, earning $7.50 per hour and that her take-home pay had been approximately $271 per week, but that she was currently laid off until January 6, 2003. Once she returned to work, Appellant would be working from 6:00 a.m. until 4:00 p.m., but her mother had agreed to take care of the children while she was at work.

With regard to her requirements under the case plan, Appellant testified that she completed parenting classes. Appellant also stated that she visited her children often but admitted to missing some of the scheduled visits. According to Appellant, she would sometimes give her children money or small gifts during her visits with them. Appellant testified that she was consistently taking medication for her depression and had been for approximately four months. Appellant also stated that she saw her counselor, Megan Lescher, a few days before the hearing but could not recall the last time she saw her before that. According to Appellant, she had been on a waiting list to see a counselor.

Appellant admitted that Miguel Nava was the father of her two youngest children. She stated that they had never been married, but lived together until April of 2001. At that time, they separated after Nava stabbed Appellant in front of the children. Appellant stated that Nava had little contact with the children following the separation but admitted that he had provided some financial support. Appellant also acknowledged that Jesus Saucedo was A.S.'s father and stated that he was dead. She further testified that Raul Marcias, S.S.'s father, had been deported to Mexico.

Jeff Bland, Abie Cox's parole officer, testified that Cox had been on parole since October 2002 and would be until 2006. According to Bland, Cox was not to have unsupervised contact with minors, was to avoid high-risk situations, and abstain from alcohol consumption. Bland stated that he cautioned Appellant that she needed to carefully consider allowing Cox into her home since she was trying to regain custody of her children but that Appellant insisted that she wanted him to move in with her. Finally, Bland stated that since his previous parole violation, Cox had complied with his parole conditions.

Megan Lescher, Appellant's counselor at Ozark Guidance, testified that she first counseled Appellant in January 2001, when she came in and expressed concern about her son A.S. According to Lescher, Appellant had a "flat affect," cried and was despondent, reported having nightmares, and seemed to be detached. After evaluating her, Lescher opined that Appellant was suffering from major depression, borderline personality traits, and post-traumatic stress disorder due to a history of physical and sexual abuse. Lescher stated that Appellant had been sporadic in seeing her, initially attending two or three sessions and then not coming at all for a while. In fact, when Appellant came in for her appointment immediately before the termination hearing, it was

the first time Lescher had seen her since February 2002. According to Lescher, Appellant would start feeling better and then stop taking her medication and fail to come to appointments.

At her most recent appointment, Appellant reported to Lescher that she had been employed for six months and was taking her medication for depression. Lescher noted that Appellant did not appear to be depressed and had stabilized since she last saw her. Based on this information, Lescher opined that Appellant's prognosis was much better than she initially anticipated, as long as Appellant remained on her medication. On cross-examination, Lescher admitted that she had not personally witnessed Appellant's recent progress and could not state how she would function with four small children. Lescher also admitted that Appellant had not been consistent in the past with taking her medication.

Don Beckman, also a counselor at Ozark Guidance, testified about his work with A.S. and S.S., whom he started counseling in February 2002, when they began experiencing difficulties after being separated from their mother and placed in foster care. According to Beckman, he diagnosed A.S. as suffering from mood disorder. He worked with him until May 2002. During that time, Beckman found it difficult to engage A.S., who often refused to talk to him. According to Beckman, A.S. made little improvement in the four months that he saw him. Beckman opined that it would be best for A.S. to be in a structured environment that would allow him to feel safe and secure. Beckman also testified that he counseled S.S. until August and that she did show improvement. He noted that the biggest improvement with S.S. occurred after she underwent surgery to correct her crossed eyes, which improved her vision. Beckman opined that S.S. also needed a structured environment.

Tina Rushing, a licensed social worker, testified that she had worked with A.S. since July 2002, when he was placed in foster care in Little Rock. According to Rushing, A.S. exhibited signs of depression, withdrawal, anxiety, and emotional sensitivity. She worked with him on ways to verbalize his feelings instead of withdrawing. She also explained that A.S. was seeing an individual therapist for help in dealing with anger issues resulting from his placement in foster care. She also testified that A.S. suffered from a learning disability that affected his reading and spelling and that he was receiving resources to help him with that disability. Rushing stated that Appellant visited A.S. once in October 2002 and that the visit went well. A.S. was glad to see his mother but

told her that he was upset with her and did not understand why he was in foster care. Finally, Rushing testified that A.S. needs structure, consistency, and permanency and also needs to be able to continue counseling to address past environment issues. She also opined that while A.S. had expressed hope that he would be returned to his family, he would be able to cope if his mother's parental rights were terminated. His main concern regarding termination was the issue of what would happen to his siblings.

Lee Wade, a counselor with Ozark Guidance, testified about his work with J.N., which primarily consisted of play therapy. Wade began working with J.N. in May 2002. According to Wade, when he initially began working with J.N., the child exhibited controlled but aggressive play. He stated that J.N. was rigid, cautious, guarded, anxious, and that his play was not developmentally appropriate. He also startled easily. During the course of treatment, which lasted approximately eight months, Wade saw significant improvements in J.N., as he displayed more confidence and less aggression. Wade opined that he did not believe terminating Appellant's parental rights would cause significant trauma for the child.

Near the conclusion of the hearing, Jennifer Graham, the DHS caseworker for Appellant and her family, testified. According to Graham, since the children had been taken into protective custody, A.S. had been in seven different placements, S.S. had been in four different placements, and J.N. and M.N. had each been in four different placements. She stated that the services provided by DHS included transportation services, counseling referrals, family visitation, medical, dental and vision care, and educational services. Graham explained that prior to the children coming into DHS's custody, the Department had opened a protective services case for the family on May 29, 2001, based on a lack of supervision. According to Graham, the Department had not attempted any trial placement with the parents in this case. She noted that Appellant had failed to maintain suitable housing throughout the case and, thus, a trial placement was not appropriate. She admitted that Appellant had been in her current residence since August 5, 2002, and that Graham had visited her there three times. On the first visit, there were two men at the residence, and Appellant told her that her male cousin was living with her. The last time Graham visited, Appellant's husband was living with her.

With regard to Appellant's contact with her children, Graham testified that she attended most weekly visitation sessions but

was often late in arriving. On those visits that she missed, Appellant would claim a work interference or lack of transportation. Graham was unaware of Appellant ever requesting transportation to any of the visits, except to visit A.S. in Little Rock on one occasion. Graham also testified that Appellant was fairly consistent in bringing the children small gifts when she visited them but that she was not aware of Appellant paying any child support.

Graham opined that based on Appellant's past history, her recent employment and housing were not sufficient proof of stability. She noted that the children had been out of the home for sixteen months and during that time had never been returned to Appellant. Graham did not believe that there were any services that DHS could provide that would facilitate reunification in a short period of time. Graham did state, however, that she believed Appellant would continue to cooperate if the goal of reunification was continued based on her efforts of the last month. According to Graham, Appellant had completed the case plan in all categories except stability. Graham stated that in her opinion adoption was the best option for the children, not reunification. She stated that someone had expressed an interest in adopting all four children. She concluded by stating that the Department's recommendation was for termination of Appellant's parental rights, with the goal of the case plan being changed to adoption.

Following Graham's testimony, counsel for Nava, father of J.N. and M.N., moved for a directed verdict and requested that the court turn over custody of the two youngest children to him. The Department objected on the basis that the children had been out of the home in excess of twelve months and that Nava had failed to make any support payments. DHS took the position that it would not be in the best interest of the children to be placed in the custody of their father. The trial court noted that DHS failed to properly serve Nava for the dependency-neglect hearing and, thus, there had been no determination as to him in that regard. Thus, according to the trial court, without a prior determination of dependency-neglect, it would be inappropriate for it to terminate Nava's parental rights to J.N. and M.N. The trial court noted, however, that Nava was not an appropriate custodian for the two children and ordered that they remain in DHS's custody until a hearing could be held to determine Nava's rights to the children.

The trial court then announced from the bench that it was terminating Appellant's parental rights to all four children. The trial court noted that it believed Appellant loved her children, but

that she had been in and out of their lives for years. The court further pointed out that she lacked stability and permanence. A written order was entered on February 7, 2003. In that order, the trial court terminated Appellant's parental rights, as well as any rights of the fathers of A.S. and S.S. The trial court opined that DHS had proved by clear and convincing evidence that termination was in the best interest of the children. This conclusion was based on several factors, including: (1) the children had been out of the home for at least twelve months and that despite meaningful efforts by DHS to rehabilitate the home and correct the conditions caused by removal, those conditions had not been remedied; (2) Appellant failed to provide meaningful contact or support with the children; and (3) Appellant manifested an incapacity or indifference to remedy the conditions that led to the removal of her children.

Appellant appealed the order of the trial court to the court of appeals in *Camarillo-Cox v. Arkansas Dep't of Human Servs.*, 87 Ark. App. 35, 185 S.W.3d. 133 (2004). The court of appeals reversed the order of termination on the basis that none of the grounds warranting termination were supported by clear and convincing evidence. In so holding, the court of appeals relied primarily on the fact that while Appellant previously failed to comply with the case plan, during the five-month period from the permanency planning hearing of August 13, 2002, until the termination hearing of December 30, 2002, Appellant "showed significant improvement and met nearly all of the case plan requirements." *Id.*, at 46, 185 S.W.3d at 141. DHS petitioned this court for review. 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. *Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004).

On appeal, Appellant argues that the trial court's order terminating her parental rights was not supported by clear and convincing evidence and thus should be reversed. She avers that she remedied the conditions that caused her children to be removed from her home. Moreover, she argues that she did not wilfully fail to provide meaningful support or to maintain meaningful contact with her children. DHS counters that there was clear and convincing evidence supporting termination. We agree.

In cases where the issue is one of termination of parental rights, there is a heavy burden placed upon the party

seeking to terminate the relationship. *Trout v. Arkansas Dep't of Human Servs.*, 359 Ark. 283, 197 S.W.3d 486 (2004); *Ullom v. Arkansas Dep't of Human Servs.*, 340 Ark. 615, 12 S.W.3d 204 (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 v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001); *Davis v. Office of Child Supp. Enforcem't*, 341 Ark. 349, 20 S.W.3d 273 (2000).

Pursuant to Ark. Code Ann. § 9-27-341(b)(3) (Repl. 2002), an order terminating parental rights must be based upon clear and convincing evidence. *See also Larscheid v. Arkansas Dep't of Human Servs.*, 343 Ark. 580, 36 S.W.3d 308 (2001). Clear and convincing evidence is that degree of proof that will produce in the factfinder a firm conviction as to the allegation sought to be established. *Baker v. Arkansas Dep't of Human Servs.*, 340 Ark. 42, 8 S.W.3d 499 (2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Dinkins*, 344 Ark. 207, 40 S.W.3d 286. In resolving the clearly erroneous question, we give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Baker*, 340 Ark. 42, 8 S.W.3d 499.

The question now before us is whether the trial court clearly erred in finding that there was clear and convincing evidence of facts warranting termination of parental rights. In the present case, the trial court terminated Appellant's parental rights pursuant to section 9-27-341 based on three different factors: (1) the children had been out of the home for at least twelve months and that despite meaningful efforts by DHS to rehabilitate the home and correct the conditions caused by removal, those conditions had not been remedied; (2) Appellant failed to provide meaningful contact

or support with the children; and (3) Appellant manifested an incapacity or indifference to remedy the conditions that led to the removal of her children.

With regard to the first factor, it was undisputed that the children had been in the custody of DHS for sixteen months. Each child had been in multiple placements, most notably A.S. who had been in seven different placements in that time period. DHS continued to offer services to Appellant; yet, it was not until the end of this case, with the termination hearing looming near, that Appellant began to take active steps to comply with the case plan. The testimony acknowledged that Appellant had recently maintained housing and employment. This same testimony revealed, however, that the recent improvements did not negate Appellant's history of instability. Notably, during her testimony, Graham, the DHS caseworker, admitted that Appellant had complied with most of the components of the case plan but had done so only recently. She stated that Appellant had not applied consistent efforts in completing requirements set forth by the court or the Department. She also testified that while Appellant had recently been employed, she was currently laid off until the first of the year. She further explained that Appellant's employment was obtained through a temporary agency.

In *Dinkins*, 344 Ark. 207, 40 S.W.3d 286, 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. In so concluding, this court gave due deference to the trial court, which had "heard and observed [the] witnesses first-hand." *Id.* at 215, 40 S.W.3d at 293. Likewise, we must afford the trial court in this case with the same deference. In short, there was ample evidence to support the trial court's conclusion that Appellant failed to remedy the situation that led to the removal of her children.

As to the trial court's finding that Appellant failed to provide significant material support and to maintain meaningful contact, it was also supported by clear and convincing evidence. There was testimony that Appellant sometimes gave the Garcias money to help with the support of her children. The trial court, however, at the November 20, 2001, review hearing, admonished Appellant to provide documented evidence of such support. Nothing in the record indicates that such evidence was ever

provided. Moreover, there is nothing in the record indicating that Appellant ever made any type of support payments after the children left the Garcias and were placed into foster care. With regard to the issue of meaningful contact, DHS testified that Appellant did attend most of her weekly visitations with the children, but there was also testimony that she missed several visitations.

Finally, the third basis found by the trial court to support termination was an incapacity or indifference to remedy subsequent issues. Again, there was clear and convincing evidence to support this conclusion. First, after her children had been taken from her, Appellant married a convicted sex offender. She defended her husband on the basis that his crime was merely having intercourse with a fourteen-year-old girl when he was seventeen. Regardless of how his offense is characterized, the fact remains that he was a convicted sex offender who, as a condition for his parole, could not have unsupervised contact with minors. Appellant first testified that she would supervise the children and that they would not be alone with Cox. Later, though, Appellant testified that she would force Cox to move out of her home in order to regain custody of her children. The trial court was in the best position to weigh the credibility of this conflicting testimony.

Moreover, while there was evidence that Appellant was striving to maintain more stable employment, the fact remains that at the time of the termination hearing she was laid off work, and when she did work, she obtained the jobs through a temporary agency. Finally, while Appellant had been on her medication for several months, Graham testified that Appellant had a history of taking the medicine for a while until she started feeling better and then would stop taking it.

The bottom line is that the evidence was clear that these children needed a permanent and stable environment. The attorney *ad litem* representing them stated that it was her position that it was in the best interest of the children for Appellant's rights to be terminated. She noted that the children had been in foster care for a long period of time and needed permanency in their lives. While there was evidence that Appellant was complying with her case plan, we cannot ignore that her compliance did not begin until the eleventh hour. In considering this, we are mindful of the purpose of the termination-of-parental-rights statute, found at section 9-27-341(a)(3). It provides:

> 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.

Thus, these children should not be forced to remain in foster care for an indefinite period of time while their mother repeatedly fails to heed the orders of the trial court regarding compliance with her case plan. The overwhelming testimony in this case supports a conclusion that these children need permanency and stability in their life, and their mother was either unwilling or unable to provide those things.

In *Jefferson v. Arkansas Dep't of Human Servs.*, 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. In light of 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." *Id.* at 664, 158 S.W.3d at 140.

Moreover, in the recent case of *Trout*, 359 Ark. 283, 197 S.W.3d 486, this court rejected the mother's contention that it was error for the trial court not to consider the progress that she had been making immediately before the termination hearing. In so doing, this court pointed to evidence that the children had been out of the home for two years, and for much of that time, the appellant failed to comply with the requirements of her case plan. This court held that "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." *Id.* at 295, 197 S.W.3d at 494.

As this court discussed in *Jefferson* and *Trout*, evidence that a parent begins to make improvement as termination becomes more imminent will not outweigh other evidence demonstrating a failure to comply and to remedy the situation that caused the children to be removed in the first place. Here, Appellant's argument that there was no clear and convincing evidence to support the termination of her parental rights is without merit. Accordingly, the order of the trial court is affirmed; the court of appeals is reversed.

David Earl HENDERSON *v.* STATE of Arkansas

CR 04-630 201 S.W.3d 401

Supreme Court of Arkansas
Opinion delivered January 20, 2005

[redacted]

[redacted]

[redacted]

Cristi Beaumont, for appellant.

Mike Beebe, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant David Earl Henderson appeals from his judgment of conviction for attempted murder in the first degree, aggravated robbery, and residential burglary. He was sentenced to life imprisonment. He asserts two points on appeal: (1) that the circuit court erred in preventing his counsel from responding to the prosecutor's statement during *voir dire* regarding convictions and circumstantial evidence; and (2) that the circuit court erred in allowing evidence of a prior theft by Henderson against the same victim. We affirm the judgment of conviction.

On the evening of July 10, 2003, Kathleen Price was lying in her bed in her apartment in the Sunset Motel in Springdale. At the time, Ms. Price resided at the motel and served as its manager. She collected rent from the occupants and showed empty units to potential renters. While lying in her bed on that particular night, Ms. Price heard a loud noise and got out of her bed. She found a man climbing through her window, after having pushed her air-conditioning unit inside the window onto her floor. The man yelled at her not to scream, but she did, and he began to choke her. After hitting the man with a club that a friend had loaned her for protection, the man grabbed the club and continued choking her with his hands and the club. She passed out. The next thing she recalls is coming to and calling for help. Police officers from the Springdale Police Department arrived at the scene, and after searching her apartment, they discovered that a bag of money containing $250 was missing. In addition, $40 was missing from Ms. Price's purse.

Henderson was charged with attempted first-degree murder, aggravated robbery, and residential burglary. At his ensuing trial, Ms. Price identified Henderson as the man who climbed through her window and attacked her that evening. She also testified that Henderson and his roommate had moved into the motel six months earlier. She added that seven days earlier, she and Henderson had had an incident. She stated that Henderson had come over to her room and complained about another person living at the motel. When Ms. Price and he began to leave her apartment, she had her back to him. She testified that when she looked back, Henderson appeared to be pushing something down into his pants. After returning from trying to talk to the other resident, she discovered that her money bag for that week was missing, and she called the police department. The police officers searched Henderson's room and found the money bag, receipt, and the cards in the bag for that week. After she went to Henderson's apartment to inquire about the missing bag, Ms. Price said that while he did not admit taking the bag, he told her that he would pay her for the missing money.

At the conclusion of the trial, the jury found Henderson guilty of attempted murder in the first degree, aggravated robbery, and residential burglary and sentenced him to life imprisonment.

Henderson first argues that the circuit court erred in limiting his counsel's *voir dire*. He contends that the prosecutor made a statement regarding circumstantial evidence that was misleading to

the *venire* and that it was within his right to respond to the statement. He further asserts that by sustaining the prosecutor's objection to his counsel's response, the circuit court gave credibility to the prosecutor's statement that a majority of cases are proved by circumstantial evidence. He maintains that the circuit court unfairly discounted his counsel's own statement in response, which resulted in prejudice to him.

The relevant colloquy at *voir dire* is this:

> PROSECUTOR: That's circumstantial evidence, facts you know, facts that are introduced, you infer and determine what happened. Does anyone have a problem using circumstantial evidence to convict someone? The large vast majority of cases are proved with circumstantial evidence. Why? Because you limit witnesses, you do, you commit crimes you generally want to limit the witnesses and the evidence. You don't go out and shoot somebody at center court of a Razorback basketball game because more than likely other people are going to see you. The law recognizes that [in] most cases, the vast majority are proven by circumstantial evidence. . . .
>
> . . . .
>
> DEFENSE COUNSEL: Well now, another thing, he stated earlier that the vast majority of cases get convicted with just circumstantial evidence, he said that. Well, you also understand that a vast majority of cases where there's acquittals, the vast majority of those have just circumstantial evidence. Would you be —
>
> PROSECUTOR: Your Honor, I'm going to object.
>
> THE COURT: Yes, that's not a correct statement, counsel, and you need to limit your inquiry to the three legitimate areas in the statute and so let's move this process along.
>
> CONTINUING VOIR DIRE
>
> DEFENSE COUNSEL: Do you understand that a case can have circumstantial evidence and it can still have direct

> evidence but that still does not, that still cannot be enough to find someone guilty beyond a reasonable doubt, would everyone agree with that? . . .

Before addressing the merits, we turn to a preservation point raised by the State. The State claims that while Henderson now asserts that the prosecutor's statement at *voir dire* was misleading, he failed to object to that statement in circuit court. Furthermore, the State argues that defense counsel did not state any grounds in opposition to the circuit court's restriction of his *voir dire*; nor did he object to the impanelment of the jury. For these reasons, the State urges that Henderson waived his right to raise the prejudice point on appeal. In addition, the State contends that any prejudice caused by the prosecutor's statement could have been cured by an admonition, and because Henderson failed to request one, any failure by the circuit court to give an admonition to the jury is not an abuse of discretion.

[redacted] We agree with the State. Henderson first argues in his brief on appeal that the prosecutor's statement that the "vast majority of cases are proved with circumstantial evidence" was "misleading." Yet, he voiced no objection to that statement to the circuit court. In *Christopher v. State*, 340 Ark. 404, 10 S.W.3d 852 (2000), this court held that where an appellant had not objected to any restriction of his *voir dire* and never objected on the record to the impanelment of his jury, his assertion that the circuit court improperly restricted his *voir dire* was not preserved for appeal. The same holds true in the instant case. By not objecting, Henderson failed to alert the circuit court that he contested that statement. Thus, the circuit court had no opportunity to rule on the matter, and it is not preserved for our review. *See London v. State*, 354 Ark. 313, 125 S.W.3d 813 (2003).

[redacted] Henderson, secondly, contends that the circuit court abused its discretion in sustaining the prosecutor's objection to his statement to the *venire* that when there are acquittals, "the vast majority of those have just circumstantial evidence." He urges that the circuit court's ruling gave credibility to the prosecutor's statement and, thus, prejudiced him. We first note that questioning on *voir dire* is a matter of discretion vested in the circuit court. *See* Ark. R. Crim. P. 32.2(a) (2004). *See also Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004). But, in addition, Henderson never argued his "credibility" or "prejudice" point to the circuit court.

Had he done so, the court might well have understood the basis for Henderson's statement and admonished the *venire* not to view its ruling as a credibility matter. In short, under these facts, we do not view Henderson's silence after the court's ruling as sufficient to preserve the "credibility" and "prejudice" arguments he now mounts in this appeal. Because, again, the circuit court did not have the chance to rule first on the point now raised in this appeal, we refuse to entertain it. *See London v. State, supra. See also Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004) (defendant's issue on appeal following a sustained objection by the State was not preserved because argument was made for first time on appeal).

Henderson next argues that the circuit court erred in denying his motion in *limine* to prevent the introduction of an alleged prior theft perpetrated by Henderson against the same victim one week earlier. He contends that the alleged prior theft did not provide additional evidence to show that he had independent knowledge of when and where Ms. Price had money. He further asserts that the alleged prior theft does not provide a motive for the instant charges and that the evidence is not relevant to prove a material point. Instead, he urges, the prior event was simply used to show his bad character and that he acted in conformity with the alleged prior theft, all in contravention of Arkansas Rule of Evidence 404(b) (2004). He also claims that the circuit court failed to engage in the proper balancing test regarding the probative versus prejudicial value of the evidence under Arkansas Rule of Evidence 403.

Arkansas Rule of Evidence 404(b) (2004) provides that "[e]vidence 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[,]" although it may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This court has held that evidence offered under this rule must be independently relevant, thereby having a tendency to make the existence of any fact that is of consequence to the determination of guilt more or less probable than it would be without the evidence. *See Barnes v. State*, 346 Ark. 91, 55 S.W.3d 271 (2001). Another crime is "independently relevant" if it tends to prove a material point and is not introduced merely to demonstrate that the defendant is a criminal. *See Eliott v. State*, 342 Ark. 237, 27 S.W.3d 432 (2000). This court has further held that the list of exceptions in Rule 404(b) to inadmissibility is not an exclusive

list but, instead, is representative of the types of circumstances under which evidence of other crimes or wrongs or acts would be relevant and admissible. *See Cook v. State*, 345 Ark. 264, 45 S.W.3d 820 (2001). The admission or rejection of evidence under Arkansas Rule of Evidence 404(b) is left to the sound discretion of the circuit court and will not be disturbed on appeal absent a manifest abuse of discretion. *See Burley v. State*, 348 Ark. 422, 73 S.W.3d 600 (2002).

In the instant case, it is clear that the alleged prior theft by Henderson of Ms. Price's money was not only relevant but constituted proof of Henderson's motive, opportunity, and knowledge. As set forth above, Ms. Price testified that seven days before the instant robbery, Henderson had come to her apartment on the pretense of complaining about another resident. After looking back at Henderson, Ms. Price observed him shoving something down into his pants. She called the police, and the missing money bag was found in Henderson's room. She confronted him about the missing money bag, and he told her that he would repay the money.

[redacted] This evidence reveals that not only did Henderson know Ms. Price routinely kept money in a money bag in her apartment but also that Henderson was aware of the layout of the apartment. In addition, the testimony reveals that Henderson had a potential motive for attacking and strangling Ms. Price in retaliation for her actions in calling the police to report the previous theft. Without question, the evidence is independently relevant. Despite his claims that others in the complex also had this same information, the prior alleged theft demonstrates irrefutably that Henderson had such knowledge.

As to Henderson's allegation that the circuit court also failed to conduct the proper balancing test under Rule 403 regarding the alleged prior theft, his assertion is procedurally barred. Under Rule 403, evidence of prior crimes, wrongs, or acts, even if admissible under Rule 404(b), will not be admitted if the admission of such evidence is substantially outweighed by the danger of unfair prejudice. *See* Ark. R. Evid. 403 (2004). *See also Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000).

[redacted] In the instant case, the circuit court made the following ruling with respect to Henderson's motion in *limine* to exclude the prior incident:

> THE COURT: Well, I think it's admissible. It's not admissible to prove identity but I think it is admissible for those other purposes and if the Defendant wants to — the Court to give a limiting instruction if and when this comes in you call that to my attention and I will but I think clearly it's admissible to prove knowledge, motive, opportunity, so that's my ruling.

Though Henderson's motion in *limine* raised both Rule 404(b) and Rule 403 arguments, the circuit court did not make a specific Rule 403 ruling. It was incumbent upon Henderson to obtain such a ruling. *See Morgan v. State*, 308 Ark. 627, 826 S.W.2d 271 (1992). Accordingly, this issue is not preserved for our review.

A review of the record for reversible error has been done pursuant to Sup. Ct. R. 4-3(h), and none has been found.

Affirmed.

Sharon McGHEE, Sidney McGhee, Clarice Davis, Roberto Salas, Charles Stewart, Henry Evans, and Ladonna Payte, Individually and on Behalf of a Class of Similarly Situated Persons *v.* ARKANSAS STATE BOARD of COLLECTION AGENCIES and Rusty Guinn, Jerry Markham, Randy Bynum, Opal Lang and James Mitchell, in Their Official Capacities as Board Members of the Arkansas State Board of Collection Agencies

04-199 201 S.W.3d 375

Supreme Court of Arkansas
Opinion delivered January 20, 2005

Todd Turner and *Dan Turner*, for appellants.

Mike Beebe, Att'y Gen., by: *Arnold M. Jochums*, Ass't Att'y Gen., for appellee.

Richard C. Downing, Amicus Curiae.

ANNABELLE CLINTON IMBER, Justice. This is an action pursuant to Article 16, Section 13, of the Arkansas Constitution to protect the taxpayers of the State of Arkansas from alleged misuse of public funds by the Arkansas State Board of Collection Agencies ("the Board") in licensing and regulating check-cashing businesses that charge usurious interest rates under the Check-Casher's Act, Ark. Code Ann. § 23-52-101, *et seq.* (Repl. 2000 and Supp. 2003). Our common law makes an illegal-exaction suit under Article 16, Section 13, of the Arkansas Constitution a class action as a matter of law. *Worth v. City of Rogers*, 351 Ark. 183, 89 S.W.3d 875 (2002). An illegal-exaction claim is by its nature in the form of a class action. *Id.* An illegal-exaction suit is a constitutionally created class of taxpayers, and suit is brought for the benefit of all taxpayers. *Id.*

The Board has established a Division of Check-Cashing to administer the licensing and regulation of payday lenders. Under the statute, licensed persons are authorized to sell currency or a check to another person in exchange for a check. *See* Ark. Code Ann. §§ 23-52-102(4)—109. Often check-cashers will offer a "deferred-presentment option" whereby the check-casher, in exchange for a fee, allows the customer the option to repurchase the customer's personal check before an agreed upon time. Ark. Code Ann. § 23-52-102(5). Prior to the filing of the current case, one of the appellants, Sharon McGhee, on behalf of a class of persons with causes of action against AAA Check Cashing, Inc. ("AAA"), had received a class-action monetary judgment against AAA as a result of deferred presentment transactions. In her capacity as class representative, McGhee had filed a claim with the Board to recover the damages awarded in the judgment from Old Republic Insurance Co., Inc., AAA's surety. At the time the present complaint was filed, the Board had not issued a ruling in that administrative proceeding.

In the complaint filed in the instant case, the appellants maintain that all transactions under the Check-Casher's Act involve interest rates that violate the usury provisions of the Arkansas Constitution. Ark. Const. Art. 16, § 13. Appellants further allege

that the Board's Division of Check-Cashing has used public funds to finance its operations, and that such use constitutes an illegal exaction under Ark. Const. Art. 16, § 13. Appellants filed this case on April 23, 2003, seeking injunctive relief to prohibit the Board from the continued licensing of check cashers and a declaratory judgment that the Check Casher's Act is unconstitutional. Appellees responded to the suit by filing a motion to dismiss, asserting five grounds for dismissal: (1) that the claim for declaratory relief was barred while the administrative process was ongoing; (2) that the appellants lacked standing; (3) that the appellees were immune from suit; (4) that the appellants had failed to join all interested parties; (5) that the plaintiffs had failed to state facts upon which relief can be granted. Appellants responded and moved for partial summary judgment on their claim for declaratory relief. At the August 22, 2003 hearing, the circuit court stated, "It's not my place to declare something unconstitutional." Subsequently, the circuit court granted the appellees' motion to dismiss on all five grounds and ruled that the appellants' motion for partial summary judgment on the constitutionality of the statute was thus rendered moot. On appeal, the appellants argue the circuit court not only erred in dismissing the case, but also in determining that it could not rule on the constitutional issue, and in failing to grant the appellants' partial summary-judgment motion.

With regard to the constitutionality of the Check-Casher's Act, Ark. Code Ann. § 23-52-101, *et seq.*, this court has jurisdiction to hear issues concerning the validity of an act of the General Assembly pursuant to Ark. Sup. Ct. R. 1-2(b)(6). In deciding whether a motion to dismiss a complaint was properly granted, we treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Hodges v. Lamora,* 337 Ark. 470, 989 S.W.2d 530 (1999). Furthermore, we look only to the allegations in the complaint and not to matters outside the complaint. *Id.*

The first rationale given by the circuit court for granting the appellees' motion to dismiss was "that the claim for declaratory relief is barred while the administrative process is ongoing." Appellees, in support of this ruling, note the existence of a previous action that was commenced before the Board. However, the parties in both actions are not the same. Here, all Arkansas taxpayers are the appellants; whereas, Sharon McGhee filed the administrative complaint before the Board only on behalf of persons with causes of action against AAA, i.e., certain custom-

ers of AAA. Furthermore, the issues in both cases are not similar. In the case before the Board, the issue was whether Old Republic Insurance Co., Inc., as a surety, was liable on a judgment against the insured, AAA Check Cashing, Inc. Here, the issue is the alleged misuse of public funds to support the Board's Division of Check-Cashing and the constitutionality of Ark. Code Ann. § 23-52-101, *et seq*. While Appellant Sharon McGhee does have to wait for the Board's judgment before appealing the surety question, the pendency of that administrative process does not prevent the appellants from filing a new and separate cause of action for illegal exaction. Accordingly, we conclude that the circuit court erred when it found that the claim was barred by this unrelated administrative claim.

The dissent argues that the appellants must exhaust all administrative remedies before an illegal-exaction suit may be brought against the Board in the circuit court. As posited by the dissent, the doctrine of exhaustion of administrative remedies not only requires parties to follow through on matters already before the agency, but also requires them to bring an illegal-exaction claim before the agency prior to filing suit. Yet, neither the appellants nor the appellees have cited a case in which an illegal-exaction suit was initiated before a board, agency or commission, and our research discloses none. This court has, however, decided at least four cases involving the actions of a board in which an illegal-exaction suit was initiated either in circuit court or chancery court. *Carwell Elevator Co., Inc. v. Leathers,* 352 Ark. 381, 101 S.W.3d 211 (2003); *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 994 S.W.2d 481 (1999); *State Bd. of Workforce Educ. v. King,* 336 Ark. 409, 985 S.W.2d 731 (1999); *Chandler v. Board of Trustees of the Teacher Retirement System,* 236 Ark. 256, 365 S.W.2d 447 (1963). All of those suits were initiated in circuit or chancery court, decided, and appealed. This court decided the appeals without imposing an exhaustion-of-administrative-remedies requirement.

At least two other reasons militate against imposing such a requirement upon suits filed by citizens to enjoin "the enforcement of any illegal exaction whatever" under Article 16, Section 13 of the Arkansas Constitution. First, it is well established that Ark. Const. Art. 16, § 13 is self-executing and imposes no terms or conditions upon the right of the citizen to file suit to prevent an illegal exaction. *Saunders v. Neuse,* 320 Ark. 547, 898 S.W.2d 43

(1995); *Martin v. Couey Chrysler Plymouth, Inc.*, 308 Ark. 325, 824 S.W.2d 832 (1992); *Starnes v. Sadler*, 237 Ark. 325, 372 S.W.2d 585 (1963).

Second, the dissent's proposed application of the exhaustion-of-administrative-remedies doctrine, if adopted by this court, would preclude a taxpayer from bringing an illegal-exaction suit if any proceeding involving another taxpayer is pending before an agency, board or commission that is the subject of the challenge. Here, a group of plaintiffs — certain customers of AAA — filed a claim with the Board seeking to hold AAA's surety liable on a judgment against its insured. The dissent urges that the existence of that claim precludes any other taxpayer from bringing an illegal-exaction suit for the benefit of all taxpayers under Ark. Const. Art. 16, § 13. As noted earlier, an illegal-exaction suit is a constitutionally created class of taxpayers, and suit is brought for the benefit of all taxpayers. *Worth v. City of Rogers, supra.* The end result of that approach would be that any taxpayer involved in a proceeding before an agency must raise an illegal-exaction claim under Ark. Const. Art. 16, § 13, thereby effectively foreclosing any other taxpayer from bringing such a suit in circuit court. Furthermore, even if there is no proceeding pending before the agency, taxpayers would be required to institute illegal-exaction claims at the board level before they could file suit in circuit court. Such a result is not supported by the Arkansas Constitution or our case law.

■ In its second finding on the motion to dismiss, the circuit court determined that the appellants lacked standing. Appellants' standing to pursue an illegal-exaction claim is governed by Ark. Const. Art. 16, § 13, which states,

> Any citizen of any county, city, or town may institute suit, in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.

Ark. Const. Art. 16, § 13. Two types of illegal-exaction cases can arise under this constitutional provision: "public funds" cases, where the plaintiff contends that public funds generated from tax dollars are being misapplied or illegally spent, and "illegal-tax" cases, where the plaintiff asserts that the tax itself is illegal. *Pledger v. Featherlite Precast Corp.* 308 Ark. 124, 823 S.W.2d 852 (1992). In this case, the appellants are challenging the use of public funds by the State of Arkansas to fund the Arkansas Board of Collection Agencies, Division

of Check-Cashing, which division licenses and regulates check cashing companies, pursuant to Act 1216 of 1999. The only standing requirements we have imposed in public-funds cases are that the plaintiff be a citizen and that he or she have contributed tax money to the general treasury. *Ghegan v. Ghegan, Inc.* 338 Ark. 9, 991 S.W.2d 536 (1999). Here, the appellants' complaint clearly alleges that all plaintiffs were Arkansas residents and taxpayers. Because these allegations are sufficient to withstand a motion to dismiss for lack of standing, we conclude that the circuit court erred in dismissing the case on this ground.

The appellees, nonetheless, assert that the Board's Division of Check-Cashing is financed by fees paid by the licensed collection agencies and check-cashers and does not receive any general revenue from the Arkansas State Treasury. Based on that assertion, they contend that the appellants do not have standing to challenge the expenditure of money. Our decision in *Chapman v. Bevilacqua*, 349 Ark. 262, 42 S.W.3d 378 (2001), is cited as support for the proposition that a taxpayer does not have standing to challenge the disbursement of fees paid by a third party. The appellees also state, "Appellants do not state facts to show that the Appellee receives tax dollars or that the Appellants' tax dollars pay for the operation of the Appellee's Division of Check-Cashing." This statement, however, mischaracterizes the appellants' burden to overcome a motion to dismiss. As stated above, in deciding whether a motion to dismiss a complaint was properly granted, we treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Hodges v. Lamora, supra.* Here, the complaint clearly alleges the use of public funds, stating, "Since its inception, the Board's Division of Check-Cashing has used public funds to finance its operation." Because we must assume all factual allegations in the complaint are true, this statement in the complaint is sufficient to overcome a motion to dismiss. If the Board had presented affidavits or other evidence establishing that the Division of Check-Cashing did not use public funds to finance its operation, we could have treated the motion to dismiss as one for summary judgment. *Dupwe v. Wallace*, 355 Ark. 521, 140 S.W.3d 464 (2004). However, no additional evidence on this point was presented. Thus, our review is limited to the allegations in the complaint.

We also conclude that the circuit court erred in dismissing the complaint for failure to state facts upon which relief can be granted under Ark. R. Civ. P. 12(b)(6)(2004). The complaint sufficiently states a cause of action for illegal exaction. As we pointed out earlier in this opinion, the misapplication of public funds is one avenue for establishing a claim for illegal exaction. *Pledger v. Featherlite Precast Corp., supra.* Here, the complaint contains the following factual allegations:

- All transactions under the Check-Casher's Act involve interest rates that violate the usury provisions of the Arkansas Constitution.

- Since its inception, the Board's Division of Check-Cashing has used public funds to finance its operations. The Board has employees and equipment and has a budget for its routine expenses.

- At various times since its inception, the Division has presented payday lenders with a table to allow the lenders to calculate the interest amount to charge to consumers. This information is posted on the Defendants' website. According to the posted chart, transactions involve interest rates of at least 168.203% and up to 1,738.443%.

- The Board continues to provide "licenses" to payday lenders.

According to these allegations, the Board was aware that the check-cashers were charging unconstitutionally usurious fees and nevertheless continued to provide licenses to them. Based on these facts alleged in the complaint, the expenditure of public funds to support the Board's Division of Check-Cashing would be a misapplication of public funds; that is, as alleged in the complaint, public funds are being misapplied or illegally spent. We therefore hold that the complaint sufficiently states a cause of action for illegal exaction.

The circuit court additionally found that the appellees were immune from suit pursuant to the Arkansas Constitution and state law. According to Ark. Const. Art. 5, § 20, "The State of Arkansas shall never be made a Defendant in any of her Courts." *Id.* While this provision generally prohibits suits against the State or a State agency, we have held that the illegal-exaction clause, as the more specific provision, controls the more general prohibition

against suit provided in art. 5, § 20, and grants taxpayers the right to sue. *Carson v. Weiss*, 333 Ark. 561, 972 S.W.2d 933 (1998). Thus, in view of our holding that the appellants have successfully pled an illegal exaction claim, the doctrine of sovereign immunity is not applicable here.

In a fourth rationale for dismissing the complaint, the circuit court found that the appellants had failed to join all interested parties. Rule 19 of the Arkansas Rules of Civil Procedure states,

> A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter, impair or impede his ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest.

Ark. R. Civ. P. 19(a) (2004). Appellees argue the trial court properly dismissed the complaint because the appellants failed to name the licensed check-cashers that would be affected by the relief requested in their complaint. However, joinder is only an appropriate remedy when the individuals in question are not parties to the litigation. In an illegal exaction claim, the Arkansas Constitution makes each taxpayer a party to the lawsuit as a matter of law. *Worth v. City of Rogers*, 351 Ark. 183, 89 S.W.3d 875 (2002). A check-casher, as defined in Ark. Code. Ann. § 23-52-102(3), is "a person who for compensation engages, in whole or in part, in the check-cashing business." The status of check-cashers as taxpayers has not been rebutted. Consequently, all licensed check-cashers in Arkansas would be members of the class and parties to the illegal exaction suit.[1] We therefore conclude that the circuit court erred in dismissing the case for failure to join all interested parties.

Finally, the appellants argue that the circuit court erred in determining that it could not rule on the appellants' constitu-

[1] We need not address whether the check-cashers have a right to intervene in this lawsuit under Ark. R. Civ. P. 24 (2004) because that issue is not before us in this appeal. *Worth v. City of Rogers, supra* (Imber, J., concurring).

tional claim and in failing to grant the appellants' motion for partial summary judgment. In fact, the circuit court simply refused to rule on the motion, deeming it "moot" because it had dismissed the case on other grounds. As the trial court did not issue a ruling on the constitutional claim or the motion for partial summary judgment, we will not address these issues on appeal.

Reversed and Remanded.

CORBIN, J., dissents.

GUNTER, J., not participating.

DONALD L. CORBIN, Justice, dissenting. I dissent because I would affirm the trial court's order dismissing Appellants' class-action lawsuit, on the grounds that (1) they failed to exhaust their administrative remedies under the Arkansas Administrative Procedure Act (AAPA), Ark. Code Ann. §§ 25-15-201 to -218 (Repl. 2002 & Supp. 2003), and (2) they failed to state facts demonstrating their standing as taxpayers to bring this suit.

At the heart of this case is Appellants' claim that the Arkansas Check-Cashers Act, Ark. Code Ann. §§ 23-52-101 to -117 (Repl. 2000 & Supp. 2003), is unconstitutional. They seek both a declaratory judgment and a refund of monies that they claim have been illegally exacted under the Act. I believe that their suit is premature, because Appellants failed to pursue the constitutional issue before Appellee State Board of Collection Agencies.

As the majority states, some of the named Appellants in this case had previously brought a claim before the Board, seeking the release of surety bonds to fulfill a judgment they had won in the Craighead County Circuit Court against payday lender AAA Check Cashing, Inc. The named class representative in that case is Appellant Sharon McGhee. Appellants Roberto Salas and Henry Evans were also members of that class. According to the complaint filed in this case, Appellants at some point had "implored the Board to cease licensing and assisting payday lenders" in this state. Undeniably, the reason for their request was Appellants' belief that the Act under which the Board functioned was unconstitutional. For whatever reason, however, they did not seek a ruling from the Board regarding the constitutionality of the Act. I believe they were required to do so before seeking relief from our state courts.

This court has repeatedly held that a litigant must exhaust his or her administrative remedies before instituting litigation to challenge the action of an administrative agency, except where it

would be futile or where there was no genuine opportunity to do so. *See, e.g., Ford v. Arkansas Game & Fish Comm'n*, 335 Ark. 245, 979 S.W.2d 897 (1998); *Cummings v. Big Mac Mobile Homes, Inc.*, 335 Ark. 216, 980 S.W.2d 550 (1998); *Regional Care Facilities, Inc. v. Rose Care, Inc.*, 322 Ark. 780, 912 S.W.2d 406 (1995). The doctrine of exhaustion of administrative remedies provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed statutory administrative remedy has been exhausted. *Arkansas Prof'l Bail Bondsman Lic. Bd. v. Frawley*, 350 Ark. 444, 88 S.W.3d 418 (2002); *Cummings*, 335 Ark. 216, 980 S.W.2d 550. A basic rule of administrative procedure requires that an agency be given the opportunity to address a question before a complainant resorts to the courts. *Id.* The failure to exhaust administrative remedies is grounds for dismissal. *Douglas v. City of Cabot*, 347 Ark. 1, 59 S.W.3d 430 (2001); *Romine v. Arkansas Dep't of Envtl. Quality*, 342 Ark. 380, 40 S.W.3d 731 (2000). This is true even for constitutional issues. *See id.* (affirming the dismissal of the appellants' suit based on their repeated failure to respond to and raise their constitutional arguments at the administrative level).

This court has applied the doctrine of exhaustion of administrative remedies to declaratory-judgment actions filed under section 25-15-207 of the AAPA. For example, in *Ford*, 335 Ark. 245, 979 S.W.2d 897, this court affirmed the trial court's dismissal of the appellant's declaratory-judgment suit on the ground that he had not exhausted his administrative remedies. This court stated: "Instead of filing a declaratory-judgment action, Ford should have raised his constitutional arguments before the Commission, and then appealed the Commission's final ruling to the circuit court pursuant to Ark. Code Ann. § 25-15-212 (Repl. 1996)." *Id.* at 251-52, 979 S.W.2d at 900.

Similarly, in *Rehab Hosp. Servs. Corp. v. Delta-Hills Health Sys. Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985), this court held:

> Declaratory judgment actions are intended to supplement rather than replace ordinary causes of action. *Mid-State Const. Co. v. Means*, 245 Ark. 691, 434 S.W.2d 292 (1968). As such, the parties are required to exhaust administrative remedies prior to seeking a declaratory judgment.
>
> > It seems to be now a recognized doctrine that requires administrative relief to be sought before resorting to declaratory procedure, wherever administrative relief is afforded and this requirement is not one merely requiring the initiation of

> administrative procedure, *but the administrative procedure must be pursued to its final conclusion before resort may be had to the court for declaratory relief.*
>
> W. Anderson, *Actions for Declaratory Judgments*, 204, at 433 (1951). This court likewise requires exhaustion of administrative remedies before resorting to an action for declaratory judgment. *See Ragon v. Great American Indemnity Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954).

Id. at 399, 687 S.W.2d at 841-42. *See also Regional Care Facilities*, 322 Ark. 780, 912 S.W.2d 406.

More recently, in *AT&T Communications of the Southwest, Inc. v. Arkansas Pub. Serv. Comm'n*, 344 Ark. 188, 40 S.W.3d 273 (2001), this court held that even though a state agency lacks authority to declare unconstitutional a state statute that it is charged with enforcing, the constitutional challenge should nonetheless be brought before that agency prior to resorting to the courts. This court explained:

> Our court has addressed the question of whether an administrative agency has the authority to *declare* a statute unconstitutional. In *Lincoln v. Arkansas Public Service Commission*, 313 Ark. 295, 854 S.W.2d 330 (1993), we held that to allow the Public Service Commission to declare unconstitutional a statute that it was required to enforce would violate the separation of powers doctrine. However, this does not mean that a constitutional issue should not be *raised and developed* at the administrative level.

Id. at 196, 40 S.W.3d at 279. This court reasoned: "Raising such constitutional issues before the Commission is significant even when a statute is challenged as unconstitutional on its face, *especially since the interpretation given by the agency charged with its execution is highly persuasive.*" *Id.* at 198, 40 S.W.3d at 280 (citing *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 69 Ark. App. 323, 13 S.W.3d 197 (2000) (emphasis added)).

The foregoing cases are illustrative of this court's consistent practice of giving an agency first crack at interpreting the statutes and rules that it is charged with executing and enforcing. In doing so, this court has recognized that the agency is often in a better position of making a ruling, through its specialized knowledge and experience. Thus, even though the agency's ruling on the consti-

tutionality of a state statute is not binding on the courts of this state, it is undeniably valuable. It is because of this value that a litigant is required to exhaust any and every available remedy from the agency itself before resorting to the courts.

In the present case, it is undisputed that some of the named Appellants in this case were already involved in a pending action before the Board at the time that this action was filed in circuit court and that the Board had not yet rendered its decision before Appellants brought this suit. The majority holds that Appellants' suit is not barred by their failure to exhaust administrative remedies, because neither the issues nor the parties involved in the present suit are identical to those in the action before the Board. In my opinion, this holding ignores the fact that even if a similar proceeding were not already pending before the Board, Appellants were required to bring their constitutional challenge to the Board before resorting to the courts. The foregoing cases demonstrate that the doctrine of exhaustion of administrative remedies not only requires parties to *follow through* on matters already before the agency, it also requires them to *institute* such proceedings in the first place. Thus, regardless of whether the issues and the parties in the pending action before the Board were the same as those in the present suit, Appellants were required to seek a ruling on their statutory challenge from the Board before they filed suit in the circuit court.

Moreover, it matters not that the Board lacks the authority to actually strike down the Check-Cashers Act as unconstitutional. Under this court's holding in *AT&T*, 344 Ark. 188, 40 S.W.3d 273, Appellants were nonetheless required to raise and develop their constitutional challenge before the Board. Likewise, it is irrelevant that the Board has no jurisdiction to hear and determine an illegal-exaction claim. The heart of this claim is the constitutionality of the Act. Thus, even though the Board could not order a refund of any monies illegally exacted, it clearly has the authority to rule on the constitutional issue. I therefore disagree with Appellants that requiring them to exhaust their remedies before the Board would have been a futile act.

The majority posits that I would require every taxpayer who files an illegal-exaction suit involving a state agency to first bring that claim to the agency before filing suit in circuit court. My position is not so broad. However, based on the particular circumstances of this case, where the Appellants are seeking a declaratory judgment along with a refund of public monies, and where some of

these Appellants, including the named representative, were already before the Board on a related issue, and where the crux of both the illegal-exaction and the declaratory-judgment claims is the constitutionality of the Board's actions, the Appellants were required to exhaust their administrative remedies before resorting to the courts.

Moreover, I find it significant that this illegal-exaction claim was not pursued until the Board's AHO denied Appellants' request to release the surety bonds for one of the payday lenders. Appellants had sought those surety bonds to satisfy part of the judgment granted to them against the payday lender. Thus, in my mind, the illegal-exaction claim appears to be an afterthought aimed at getting the state and the taxpayers to satisfy their judgment against the true wrongdoer. Under these unique circumstances, I would require the Appellants to first bring their claim of the unconstitutionality of the Board's actions before the Board.

The majority also notes that this court has not heretofore applied the doctrine of exhaustion of administrative remedies to illegal-exaction claims involving a state agency. I do not disagree with this observation. However, I submit that the reason that this doctrine has not been so applied is because the issue has never been squarely before us, as it is in this case. I do not view the omission of this issue in the four cases cited by the majority as indicative of this court's prior rejection of this doctrine in illegal-exaction cases. Because I believe it is applicable in this case, I would affirm the trial court's order of dismissal.

I would also affirm the trial court's dismissal on the ground that Appellants failed to demonstrate that they have standing to pursue this matter as an illegal exaction. Particularly, they have failed to demonstrate that public funds are at issue.

This court has previously identified two types of illegal-exaction cases. *See, e.g., Chapman v. Bevilacqua*, 344 Ark. 262, 42 S.W.3d 378 (2001); *Ghegan & Ghegan, Inc. v. Weiss*, 338 Ark. 9, 991 S.W.2d 536 (1999). The type at issue in this case is the "public funds" type, where the plaintiff contends that public funds generated from tax dollars are being misapplied or illegally spent. *Id.* This court has explained that citizens have standing to bring a "public funds" case because they have a vested interest in ensuring that the tax money they have contributed to the state treasury is lawfully spent. *Id.* This court has stated that "a misapplication by a public official of funds arising from taxation constitutes an exac-

tion from the tax payers and empowers any citizen to maintain a suit to prevent such misapplication of funds." *Farrell v. Oliver*, 146 Ark. 599, 602, 226 S.W. 529, 530 (1921). *See also Arkansas Assoc. of County Judges v. Green*, 232 Ark. 438, 338 S.W.2d 672 (1960); *Ward v. Farrell*, 221 Ark. 363, 253 S.W.2d 353 (1952); *Samples v. Grady*, 207 Ark. 724, 182 S.W.2d 875(1944).

In the present case, Appellants assert that the Board is misusing public funds. They state in their complaint that "as victims of payday loan transactions and as Arkansas taxpayers," they are "entitled to a judgment against the [Board and its members] for the amount of public funds that have been diverted for the improper purpose of 'licensing' and 'regulating' payday lenders." The problem with this assertion is that Appellants have not pled any facts to show that the funds used for the allegedly improper purpose of licensing and regulating the payday lenders were the result of taxpayer monies. Rather, their complaint merely contains the conclusory statements that the Board "is a public entity," which "has used public funds to finance its operations," and which has "employees and equipment and has a budget for its routine expenses." They also state that the legislature has "continued to appropriate public funds to finance the Board's Division of Check Cashing."

The State, on the other hand, asserts that the Board, although a state agency, does not expend public tax monies; rather, the Board is funded by the fees paid by the licensees — the payday lenders. The State asserts further that the fees paid to the Board are not placed in the state's treasury and are not part of the state's general revenue. Thus, the State argues that the taxpayers are not the source of the funds and that, accordingly, Appellants' status as taxpayers is irrelevant because public monies are not at stake. I believe that the State's point is well taken.

It is axiomatic that before a public-funds type of illegal exaction will be allowed to proceed, there must be facts showing that monies generated from tax dollars or arising from taxation are at stake. The statements contained in this complaint, *i.e.*, that the Board is a public entity that has used public funds and that the legislature has continued to appropriate funds for the Board, are bare-bones allegations. Arkansas is a fact-pleading state. *Scamardo v. Jaggers*, 356 Ark. 236, 149 S.W.3d 311 (2004); *Travelers Cas. & Sur. Co. v. Arkansas State Highway Comm'n*, 353 Ark. 721, 120 S.W.3d 50 (2003). Thus, a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.*

Moreover, even if this court were to view these allegations as facts, they are still insufficient. It is not enough for Appellants to state that the Board receives or uses public funds or that the legislature has authorized it to spend public funds. Rather, to prove their unique illegal-exaction claim, they must show that the particular funds used to license and regulate the payday lenders are public funds. There are simply no facts in their complaint to support this claim or to counter the State's assertion that the funds used to license and regulate these lenders are gained solely from the fees charged to lenders themselves.

The bottom line is that as the plaintiffs in this case, it was incumbent upon Appellants to demonstrate their standing to bring this illegal-exaction claim. Under this court's long line of cases, this requires a showing that the alleged misused funds are generated from tax dollars or otherwise arise from taxation. Because Appellants failed to make such a showing, the trial court was correct to grant the State's motion to dismiss the illegal-exaction claim on the ground that Appellants lacked standing to pursue such a claim. Accordingly, I dissent.

Keela McGAHEY *v.* STATE of Arkansas

CR 04-1041 201 S.W.3d 416

Supreme Court of Arkansas
Opinion delivered January 20, 2005

Jimmy Doyle, for appellant.

No response.

PER CURIAM. Appellant Keela McGahey filed a motion for rule on the clerk, which we granted in *McGahey v. State*, 359 Ark. 252, 195 S.W.3d 922 (2004). In *McGahey*, we stated that "the motion and accompanying record fail[ed] to reveal plainly whether there was an attorney's error," on the part of appellant's former counsel, Mr. Jimmy Doyle. We remanded the matter of attorney error to the circuit court to make findings of fact. *Id.*

On November 19, 2004, an order from the Desha County Circuit Court containing those findings was filed with our court. At the hearing, evidence was presented that is consistent with *McGahey*, *supra*, where we stated:

> 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.
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> 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.

Id. The trial court further ruled that there was no motion or order in the file that indicates that Mr. Doyle requested or was relieved as attorney of record for appellant.

Mr. Doyle was ordered to appear at 9:00 a.m., on Thursday, January 13, 2005; however, at that time, service had not yet been perfected. We order Mr. Doyle to appear before this court at 9:00 a.m., on Thursday, January 27, 2005, to show cause as to why he should not be held in contempt for his conduct in representing appellant in failing to secure the record for appellant's appeal. Mr. Doyle's failure to appear will result in a bench warrant for his arrest.

It is so ordered.

Daniel MORALES *v.* Hector MARTINEZ

04-1353 201 S.W.3d 415

Supreme Court of Arkansas
Opinion delivered January 20, 2005

Tolley & Brooks, P.A., by: *Jay N. Tolley*, for appellant.

No response.

PER CURIAM. Appellant Daniel Morales, by and through his attorney, Jay N. Tolley, moves this court for permission to file a belated petition for review. In his motion, filed December 20, 2004, Morales states that he now wishes to file his petition for review which was originally due on November 28, 2004. Morales asserts that his counsel is currently experiencing health problems and is undergoing extensive and ongoing treatment. Morales tendered his petition for review to this court's clerk along with the instant motion.

In *Porter v. State*, 315 Ark. 160, 865 S.W.2d 300 (1993), we held that counsel's admitted error in tendering a late petition for review was good cause to grant permission to file a belated petition for review. Likewise, we find that the appellant in the instant case has demonstrated good cause, and, accordingly, we grant him permission to file a belated petition for review.

Motion to file belated petition for review granted.

Gary Lee STEWART *v.* STATE of Arkansas

CR 04-1199 201 S.W.3d 415

Supreme Court of Arkansas
Opinion delivered January 20, 2005

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

No response.

PER CURIAM. On November 5, 2004, Appellant Gary Lee Stewart filed a motion for belated appeal from judgments entered on September 7, 2004, in the Pulaski County Circuit Court. In his motion, Appellant contended that he had informed his trial counsel, Deputy Public Defender Lance Sullenberger, of his desire to appeal. We initially remanded the matter to the trial court to determine if Appellant had in fact informed his attorney of his desire to appeal. *See Stewart v. State*, 359 Ark. 528, 199 S.W.3d 78 (2004) (*per curiam*).

Pursuant to our order, the trial court held a hearing on December 15, 2004, during which both Appellant and Mr. Sullenberger gave testimony. Appellant testified that he had told

counsel that he wanted to appeal. Mr. Sullenberger, however, testified that Appellant had not done so. The trial court found Mr. Sullenberger's testimony more credible. The trial court pointed to the fact that Mr. Sullenberger had kept records of his telephone log, including voice mail and messages taken by his receptionist, and that there was no record of any message from Appellant. Indeed, the records showed that some sixty-two days after Appellant's sentencing, Appellant's brother left a message for Mr. Sullenberger in regard to doing an appeal on this case. The trial court found that the call from Appellant's brother would not have been necessary had Appellant believed that he had already informed Mr. Sullenberger of his desire to appeal.

We accept the trial court's findings of fact, and we conclude that the failure to file a notice of appeal on Appellant's behalf was not due to any error on Mr. Sullenberger's part. Rather, it was the direct result of Appellant's failure to timely inform his attorney of his desire to appeal. We thus deny the motion for belated appeal.

Co Q. MAC and Hoa T. Mac *v.* Richard A. WEISS,
in his official capacity as Director of the Arkansas Department
of Finance and Administration

04-461 201 S.W.3d 890

Supreme Court of Arkansas
Opinion delivered January 27, 2005

Jack, Lyon & Jones, by: *Eugene G. Sayre*, for appellant.

David B. Alexander and *Ronna Layne Absure*, of Ark. Dep't of Fin. and Admin., for appellee.

TOM GLAZE, Justice. This is the companion case to *Baker Refrigeration Systems, Inc. v. Weiss*, No. 04-598, which is also handed down today. Although the facts of these two cases are somewhat different, the legal issues raised and argued in both cases are identical, and we affirm for the same reasons set out in *Baker Refrigeration.*

The appellants in the instant appeal are Co Mac and Hoa Mac, Vietnamese immigrants who own Chinese restaurants in Batesville, Jonesboro, and Trumann. All of their restaurants had received a Sales and Use Tax Permit from the Arkansas Department of Finance & Administration, and because the restaurants were making taxable sales of food, the Macs were responsible for collecting tax from their customers and remitting that tax to DF&A. In 1996 and 1997, DF&A audited the Macs' three restaurants for sales tax compliance for the time period that ran from February 1, 1991, through January 31, 1997; in addition, DF&A audited the Macs' individual income tax returns for tax years 1991 through 1995. DF&A determined that additional sales taxes and individual income taxes were due for each of the audited tax years, and issued assessments reflecting those determinations.

The Macs formally protested both the sales tax assessment and the individual income tax assessment. The two protests were consolidated, and an administrative law judge of DF&A's Board of Hearings and Appeals held a hearing on April 21, 1998, pursuant to Ark. Code Ann. § 26-18-405 (Repl. 1997). On July 20, 1998, the administrative law judge issued two separate decisions: one affirming the sales tax audits of the three restaurants, and one sustaining the individual income tax audits. On August 7, 1998, the Macs requested that the administrative law judge's determinations be

revised. On April 19, 1999, DF&A Deputy Director Timothy Leathers issued a letter ruling on the Macs' "requests for revision," upholding the sales tax assessment and reducing the individual income tax assessment. By letter dated May 27, 1999, DF&A issued final assessments to the Macs, informing them of the additional income taxes owed for tax years 1991, 1992, 1993, 1994, and 1995; on October 21, 1999, DF&A issued final assessments for the additional sales taxes owed for the three restaurants for the tax periods February 1, 1991, through January 31, 1997.

On January 10, 2001, the Macs fully paid the amount of the additional sales taxes assessed for the month of July 1994 for their three restaurants; in addition, they paid the additional individual income taxes assessed for tax year 1993. On June 28, 2002, the Macs filed a "Verified Claim for Refund and Claims for Abatement of Gross Receipts (Sales) Taxes" with regard to their three restaurants; on the same day, they also filed a "Verified Claim for Refund and Claims for Abatement of Arkansas Individual Income Taxes" for the years 1991 through 1995, with respect to the disputed assessments.

On May 19, 2003, the Macs filed a complaint in the Independence County Circuit Court, alleging that DF&A illegally and improperly assessed the additional sales tax and individual income tax assessments. The Macs further alleged that the actions of the auditors were arbitrary and capricious, and were in violation of the Macs' civil rights. DF&A filed a motion to dismiss the Macs' complaint on July 8, 2003, contending that the Macs had failed to file suit within the applicable statute of limitations. In addition, with respect to the Macs' "claims for refund," DF&A alleged that those were not "claims for refund of an overpayment of taxes lawfully due," and therefore, the court lacked subject matter jurisdiction over the claim due to sovereign immunity.

The circuit court held a hearing on DF&A's motion to dismiss on December 11, 2003. At the conclusion of the hearing, the trial court ruled that the Macs had failed to file suit within the applicable statute of limitations, and that their suit was therefore time-barred. In addition, the court found that the Macs' "claims for refund" were not claims for refund of an overpayment of taxes lawfully due, in accordance with the provisions of Ark. Code Ann. § 26-18-507, and as a result, the court lacked subject matter jurisdiction over the claims due to the doctrine of sovereign immunity. The court dismissed the Macs' complaint with prejudice.

On appeal, the Macs argue that the trial court erred in its interpretation of Act 1139 of 1997, codified at Ark. Code Ann. § 26-18-401 *et seq.* (Repl. 1997). Specifically, the Macs contend that Act 1139 created a third alternative claim-for-refund method by which taxpayers may contest a DF&A assessment of additional state taxes. The Macs assert that they utilized this third method, and the trial court erred in concluding that they improperly contested their tax assessment. In addition, the Macs argue that the trial court erred in allowing DF&A to introduce the testimony of Assistant Revenue Commissioner John Theis on the subject of the General Assembly's intent in enacting Act 1139.

For the same reasons set out in *Baker*, we affirm the trial court's dismissal of the Macs' complaint on the basis of the statute of limitations. In short, in *Baker*, we hold today that the language of the challenged statutes plainly and unambiguously demonstrate that a taxpayer who wishes to challenge a final assessment of tax deficiency following an audit must comply with the procedures and time constraints set out in § 26-18-406; further, we hold that § 26-18-507 applies only in situations involving a taxpayer who has erroneously overpaid his or her taxes and seeks a refund thereof, not in a case where a taxpayer deliberately pays taxes that had been assessed pursuant to an audit in order to subsequently challenge those additional taxes. Section 26-18-406 provides a taxpayer with one year after an assessment to pay all or a portion of the assessed taxes in order to challenge the assessment, and one year following the payment to file suit in circuit court.

In this case, the final assessments were issued on May 27, 1999 (for individual income taxes owed), and on October 21, 1999 (for sales taxes owed). The Macs' payments would therefore have been due by May 27, 2000, and October 21, 2000. However, the Macs did not submit their payment until January 10, 2001, when they paid the amount of the additional sales taxes assessed for the month of July 1994 for their three restaurants and the individual income taxes assessed for tax year 1993. In addition, they did not file their complaint in circuit court until May 19, 2003, which was well over one year after the date they paid the portion of their taxes. Clearly, on the face of the complaint, it was apparent that the statute of limitations had expired, and the trial court was entirely correct in dismissing the Macs' complaint.

Affirmed.

BAKER REFRIGERATION SYSTEMS, INC and Wayne Baker *v.* Richard A. WEISS, In His Official Capacity As Director of the Arkansas Department of Finance and Administration

04-598 201 S.W.3d 892

Supreme Court of Arkansas
Opinion delivered January 27, 2005

[redacted]

[redacted]

[redacted]

Jack, Lyon & Jones, P.A., by: *Eugene G. Sayre*, for appellants.

David B. Alexander, for appellee.

DONALD L. CORBIN, Justice. Appellants Baker Refrigeration Systems, Inc., and Wayne Baker (collectively referred to as "Baker") appeal the order of the Pope County Circuit Court dismissing their complaint against Richard A. Weiss, Director of the Arkansas Department of Finance and Administration ("DF&A"), on the ground that the suit was untimely filed. This appeal and its companion case, *Mac v. Weiss*, Docket No. 04-461, raise an issue of first impression regarding the interpretation of Act 1139 of 1997. Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We find no error and affirm.

The record reflects that during the spring and summer of 1994, DF&A conducted a sales-tax audit on Baker for the period of January 1991 through July 1994. On August 26, 1994, DF&A's auditor issued a proposed assessment of $1,120,788.42 in additional sales taxes. Baker protested the audit, pursuant to Ark. Code Ann. § 26-18-404 (1987). A hearing was held before an administrative law judge (ALJ), pursuant to Ark. Code Ann. § 26-18-405 (Supp. 1995). On July 25, 1995, the ALJ ruled in favor of DF&A.

Thereafter, in August 1995, Baker formally requested DF&A's Commissioner of Revenues to revise and abate the ALJ's decision, also pursuant to section 26-18-405. In a letter issued on December 24, 1995, the Commissioner granted Baker's request and ordered a re-audit. DF&A's auditors issued a revised audit report on February 27, 1997, this time finding unreported sales taxes in the amount of $3,596,875.06.

Baker again protested the proposed assessment and sought further revision from DF&A. In May 1997, Wayne Baker and his accounting representatives met with Assistant Revenue Commissioner John Theis and DF&A's legal counsel. As a result of the meeting, Theis personally reviewed Baker's case. Eventually, after a number of revisions, on January 15, 1999, DF&A issued its final assessment, which reduced Baker's sales-tax deficiency to $278,366.89.

Baker did not appeal the final assessment under Ark. Code Ann. § 26-18-406(a) (Supp. 1999). In fact, Baker took no action at all until July 17 and August 9, 2002, when it made payments to DF&A in the amounts of $3,868.81 and $20,000.00 and noted that these payments were to be applied to four particular taxable periods covered by the assessment. On August 30, 2002, Baker

filed with DF&A a verified claim for refund and claims for abatement of sales taxes, pursuant to Ark. Code Ann. § 26-18-507 (Supp. 2001), seeking to recover the foregoing amounts on the theory that they were overpayments. DF&A took no formal action on Baker's verified claim.

Baker filed the present suit in circuit court on July 9, 2003, challenging both DF&A's final assessment and its failure to take any action on the verified claim for refund. The complaint also alleged that two of DF&A's employees, Auditor Ralph Mulder and Audit Supervisor John Martin, violated Baker's civil rights by allegedly assessing additional taxes to the corporation based on personal animus.

DF&A filed a motion to dismiss Baker's complaint, arguing that Baker's suit was, in reality, a challenge to the January 15, 1999, final assessment. As such, it was required to comply with the time limitations in section 26-18-406(a)(1), which provided that a taxpayer could seek judicial relief by paying the tax due for any taxable period or periods within one year of the final assessment and then filing suit within one year of the date of the payment. Alternatively, Baker could have posted a bond for double the amount of the entire assessment within thirty days of the issuance and service of the notice and demand for payment, and then filed suit within thirty days of the posting of the bond, pursuant to section 26-18-406(a)(2)(A). Because Baker did not follow either procedure in a timely manner, DF&A asserted that its sovereign immunity as a state agency was not waived and that the trial court therefore lacked jurisdiction to hear its claim.

DF&A argued that Baker's suit was not a proper claim for refund under section 26-18-507, as it contended that the remedies available under that section were only applicable to situations where a taxpayer has overpaid the amount of taxes due. It contended further that because Baker had only paid a portion of the amounts due under the final assessment, and had not timely challenged the amount of the final assessment, it had not paid any amount in excess of what was lawfully due. DF&A also argued that Baker's civil-rights claims were time barred because they were not filed within three years of the time that the conduct by Mulder and Martin was alleged to have occurred.

A hearing was held on the motion to dismiss on January 2, 2004. Thereafter, the trial court issued a letter to counsel granting DF&A's motion to dismiss, based on the court's finding that Baker

failed to file suit within the applicable time limitations. A formal order was entered on March 18, and a timely notice of appeal was filed by Baker on April 9.

For reversal, Baker argues that the trial court erred in dismissing its suit, because Act 1139 of 1997 had amended sections 26-18-406 and 26-18-507 to allow a taxpayer a third alternative means to challenge a final assessment of additional state taxes. It argues that this amendment allowed them to pursue their suit under the claim-for-refund method provided in section 26-18-507. Baker also argues that the trial court erred in allowing Assistant Revenue Commissioner John Theis to testify as to the legislative intent of Act 1139. Baker does not, however, make any assignment of error regarding the trial court's dismissal of its civil-rights claims.

We note at the outset that we review a trial court's decision in a tax case *de novo*, but we will not disturb the trial court's findings of fact unless they are clearly erroneous. *Barclay v. First Paris Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (2001); *Pledger v. Troll Book Clubs, Inc.*, 316 Ark. 195, 871 S.W.2d 389 (1994). We also review issues of statutory construction *de novo*, as it is for this court to decide what a statute means. *Ghegan & Ghegan, Inc. v. Barclay*, 345 Ark. 514, 49 S.W.3d 652 (2001); *Barclay*, 344 Ark. 711, 42 S.W.3d 496. In this respect, we are not bound by the decision of the trial court; 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.*

The main thrust of Baker's argument is that the trial court erred in interpreting sections 26-18-406 and 26-18-507, as amended by Act 1139 of 1997. 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. *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003); *Mississippi River Transmission Corp v. Weiss*, 347 Ark. 543, 65 S.W.3d 867 (2002). When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Id.* When the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Id.* An additional rule of statutory construction in the area of taxation cases is that when we are reviewing matters

involving the levying of taxes, any and all doubts and ambiguities must be resolved in favor of the taxpayer. *Id.*; *Barclay*, 344 Ark. 711, 42 S.W.3d 496.

[redacted] At the time of Baker's suit, section 26-18-406, titled "Judicial relief," provided in pertinent part:

> (a) After the issuance and service on the taxpayer of the notice and demand for payment of a deficiency in tax established by an audit determination that is not protested by the taxpayer under § 26-18-403, or a final determination of the hearing officer or the director under § 26-18-405, a taxpayer may seek judicial relief from the final determination by either:
>
> (1) Within one (1) year of the date of the final assessment, paying the entire amount of state tax due, for any taxable period or periods covered by the final assessment and filing suit to recover that amount within one (1) year of the date of the payment. The director may proceed with collection activities, including the filing of a certificate of indebtedness as authorized under § 26-18-701, within thirty (30) days of the issuance of the final assessment for any assessed but unpaid state taxes, penalties, or interest owed by the taxpayer for other taxable periods covered by the final assessment, while the suit for refund is being pursued by the taxpayer for the other taxable periods covered by the final assessment; or
>
> (2)(A) Within thirty (30) days of the issuance and service on the taxpayer of the notice and demand for payment, filing with the director a bond in double the amount of the tax deficiency due and by filing suit within thirty (30) days thereafter to stay the effect of the director's determination.

Under this section, a taxpayer has three means of challenging a final assessment following an audit: (1) make payment of the entire amount assessed within one year from the date of assessment and then file suit challenging the assessment within one year of the date payment is made; (2) make payment on *any particular taxable period* covered by the assessment within one year of the date of the assessment and then file suit challenging the assessment of *that taxable period* within one year from the date payment is made; or (3) post a bond in double the amount of the entire assessment within thirty days of the date of the notice and demand for payment and then file suit challenging the assessment within thirty days of the posting of the bond.

Prior to the passage of Act 1139, section 26-18-406 did not allow a taxpayer to contest particular taxable periods, under a divisible tax theory, by paying only the taxes assessed on those periods and then filing suit to dispute those taxes, as was allowed under the federal tax law. *See Taber v. Pledger*, 302 Ark. 484, 791 S.W.2d 361, *cert. denied*, 498 U.S. 967 (1990). DF&A asserts that the Act's provision for a challenge to divisible tax periods was the only change made to the method for contesting an assessment of additional taxes following an audit.

Baker argues that Act 1139 went a step further in that it provided a fourth alternative to challenge an assessment of tax deficiency, by allowing a taxpayer to file a verified claim for refund under section 26-18-507. To support this contention, Baker points to the language of the Act's title, subtitle, and Section 10, which provided:

> AN ACT TO AMEND THE ARKANSAS TAX PROCEDURE ACT TO CONFORM THE METHODS OF CONTESTING STATE TAX ASSESSMENTS AND FILING CLAIMS FOR REFUND TO THE SIMILAR TAX PROCEDURAL METHODS OF THE FEDERAL LAW FOR CONTESTING FEDERAL TAX ASSESSMENTS AND FILING CLAIMS FOR REFUND; AND FOR OTHER PURPOSES.
>
> Subtitle
>
> TO ALLOW A TAXPAYER THE ALTERNATIVE RIGHT TO CONTEST STATE TAX DISPUTES BY THE POSTING OF BOND METHOD OR THE CLAIM FOR REFUND METHOD WHERE THE DISPUTED TAXES HAVE BEEN FULLY PAID FOR AT LEAST ONE TAXABLE PERIOD.
>
> . . . .
>
> Section 10. The General Assembly intends, by the passage of this amendment to the provisions of the Arkansas Tax Procedure Act, to clarify its intent that taxpayers involved in state tax disputes with the Arkansas Department of Finance and Administration shall have, as much as possible, the opportunity to secure an objective review of their dispute by a court at law through: (1) the posting of bond method; (2) the payment after assessment method; or (3) the claim for refund method, after the payment by the taxpayer of all state taxes claimed to be due from the taxpayer for at least one

> complete taxable period involved in the audit period. It is also intended by the General Assembly that the courts of this state are to recognize the "divisible tax theory" applicable to the review of federal tax dispute by federal courts, as also being applicable to the review of state tax disputes by the courts of this state.

Baker asserts that Act 1139 adopted the federal tax law in this area, and that federal law at the time allowed a taxpayer to challenge an assessment of additional tax by filing a claim for refund within three years from the time that the tax return is filed or within two years from the time that the tax was paid, whichever period expires later, or if no return was filed by the taxpayer, within two years of the time that the tax was paid.[1]

DF&A argues that the general language in Act 1139 concerning the conformation of state-law tax procedures to that of federal law cannot be used to contradict the plain language of section 26-18-507, which it asserts clearly provides for a claim for refund only where there is an erroneous overpayment of tax. It asserts that the legislature never intended to allow taxpayers to use the claim for refund method to challenge an assessment of a tax deficiency following an audit, which is how Baker is attempting to use it, and that section 26-18-507 was never meant to be a back-door means of challenging a final assessment once the time limitations in section 26-18-406(a) have expired. We agree.

At the time of Baker's claim, section 26-18-507 provided in pertinent part:

> (a) *Any taxpayer who has paid any state tax to the State of Arkansas, in excess of the taxes lawfully due,* subject to the requirements of this chapter, *shall be refunded the overpayment of the tax determined* by the Director of the Department of Finance and Administration *to be erroneously paid* upon the filing of an amended return or a verified claim for refund. This subsection does not include actions based on Arkansas Constitution, Article 16, § 13.
>
> (b) The claim shall specify:
>
> (1) The name of the taxpayer;

[1] To support its claim, Baker offered a letter from the Department of Treasury, Internal Revenue Service, stating that 26 U.S.C. § 6511(a) provided such a procedure.

(2) The time when and the period for which the tax was paid;

(3) The nature and kind of tax paid;

(4) The amount of the tax which the taxpayer claimed was *erroneously paid*;

(5) The grounds upon which a refund is claimed; and

(6) Any other information relative to the payment as may be prescribed by the director. [Emphasis added.]

Subsection (e)(3) provided that a taxpayer could seek judicial relief under the provisions of section 26-18-406 from either a notice of a denial by the director of the claim for refund or the director's failure to issue a written decision, after that claim has been filed for six months.

[redacted] The plain language of section 26-18-507 demonstrates that it applies to cases in which a taxpayer has erroneously overpaid taxes. Subsection (a) states that a taxpayer shall be refunded the overpayment of tax determined by DF&A's director "to be erroneously paid[.]" To get such a refund, the taxpayer must file a claim specifying, among other things, the amount of the tax that the taxpayer claims "was erroneously paid[.]" *See* section 26-18-507(b)(4). The payments made by Baker were not done so "erroneously." Rather, they were made deliberately so that Baker could challenge DF&A's final assessment.

[redacted] The facts of this case are similar to those in *Taber*, 302 Ark. 484, 791 S.W.2d 361. There, the taxpayer, Taber, challenged DF&A's assessment of tax deficiency under both sections 26-18-406 and 26-18-507. This court held that his claim under section 26-18-406 was barred because he had not complied with the procedure in effect at the time, which required the taxpayer to pay the entire amount assessed or post a bond in double the amount before the taxpayer could file suit. This court held that section 26-18-507 was not applicable because Taber's claim was not one for erroneous overpayment of tax. This court explained:

Taber filed for a refund, following the procedure outlined in subsequent subsections of this statute, and it was denied. He reasserts his divisible tax argument with respect to this section, contend-

> ing that each of the payments he made was an overpayment because no tax was due. We do not consider this section to apply in this case. It deals with a taxpayer's overpayment through "error of fact, computation, or mistake of law." Taber paid under protest rather than through error. We have no doubt that his remedies fell under § 26-18-406, not § 26-18-507.

Id. at 488, 791 S.W.2d at 363. Although Baker is correct in stating that since our decision in *Taber*, the legislature has removed the language "error of fact, computation, or mistake of law," from section 26-18-507(a), our holding is still controlling, as the language pertaining to taxes that are "erroneously paid" remains in both subsections (a) and (b) of that statute. Thus, we conclude that the plain language demonstrates that section 26-18-507 applies only to those cases where a taxpayer has erroneously or mistakenly overpaid taxes, and not where a taxpayer pays the amount assessed deliberately in order to challenge a final assessment of additional taxes following an audit. The latter situation must be brought under the procedures set out in section 26-18-406(a).

[redacted] Because the language of these statutes plainly and unambiguously demonstrate that a taxpayer who wishes to challenge a final assessment of tax deficiency must comply with the procedures and time constraints set out in section 26-18-406(a), we must reject Baker's argument that Act 1139, through its title, subtitle, and Section 10, adopted all federal tax procedures regarding challenges to assessed tax deficiencies. In the first place, the title merely states in general language that the act is to amend state tax procedures for contesting assessments to conform to the similar federal procedural methods. This is not a situation like that in *Barclay*, 344 Ark. 711, 42 S.W.3d 496, where this court affirmed the trial court's application of the definition of "affiliated group" found in federal tax law to determine whether appellee-corporations comprised such an affiliated group. The state statute at issue in that case specifically instructed that the federal definition found in 26 U.S.C. § 1504(a) and (b) that was in effect at the time the statute was enacted was the definition to be used. In the present case, however, there is no specific adoption of or reference to a particular federal tax provision in Act 1139. Thus, Baker's reliance on *Barclay* is misplaced.

[redacted] In the second place, this court has long held that the title of an act is not controlling in its construction, although it

is considered in determining its meaning when such meaning is otherwise in doubt. *See, e.g., Henderson v. Russell*, 267 Ark. 140, 589 S.W.2d 565 (1979); *Cook v. Southeast Ark. Transp. Co.*, 211 Ark. 831, 202 S.W.2d 772 (1947); *Matthews v. Byrd*, 187 Ark. 458, 60 S.W.2d 909 (1933). The title may only be examined for the purpose of shedding light on the intent of the legislature. *Henderson*, 267 Ark. 140, 589 S.W.2d 565. Where, however, the statute is unambiguous, we will not resort to the title to determine legislative intent. *Id.*; *McDonald v. Bowen*, 250 Ark. 1049, 468 S.W.2d 765 (1971). Because we have already concluded that the language of sections 26-18-406 and 26-18-507 is plain and unambiguous, there is no need to search for the legislature's intent through the title of the act.

Likewise, we will not look to the legislature's statement of intent, found in Section 10 of Act 1139, in such a way as to contradict the plain language of the substance of that act, which is what Baker is asking us to do. The only specific reference in Section 10 to federal tax procedure is the divisible tax theory, which, as set out above, was specifically adopted by the legislature in its amendment to section 26-18-406(a).

Based on the above and foregoing, we conclude that section 26-18-507 was not designed for use by a taxpayer like Baker who wishes to challenge a final assessment of a tax deficiency following an audit. Rather, it was designed to provide an avenue of relief to those taxpayers who erroneously or mistakenly overpaid the amount of taxes due. The avenue for challenging a final assessment following an audit is by the procedures set out in section 26-18-406(a). If this were not clear enough from the plain language of those statutes, it was made abundantly clear with the passage of Act 1718 of 2003, which amended section 26-18-507 to specifically provide:

> (f)(1) This section shall not apply to taxes paid as a result of an audit or proposed assessment.
>
> (2) Taxes paid as a result of an audit or proposed assessment may not be recovered unless § 26-18-406 applies.

See Ark. Code Ann. § 26-18-507 (Supp. 2003). The stated purpose in passing Act 1718 was to clarify the procedure for appealing a tax assessment after payment. Thus, even though this amendment was not

in effect at the time that Baker filed its claim, we may consider it because the legislature specifically intended Act 1718 to be a clarification of existing law, not a change in the law. *See Pledger v. Baldor Int'l, Inc.*, 309 Ark. 30, 827 S.W.2d 646 (1992).

Finally, we reject Baker's suggestion that by passing Act 1139, the legislature intended to allow a taxpayer to pursue both the administrative remedies provided in sections 26-18-406 and 26-18-507. In response to questions from this court during oral argument, Baker's counsel stated that Act 1139 allowed a taxpayer to challenge the initial assessment following an audit; go through all the administrative review procedures offered in sections 26-18-404, -405, and -406; and then, following the issuance of a final assessment, seek a second administrative review by filing a claim for refund under section 26-18-507, thus beginning the process all over again. Counsel averred that such was the procedure under federal tax law.

We agree with DF&A that the procedures set out in section 26-18-406 and 26-18-507 are parallel administrative processes, one which allows a taxpayer to contest an assessment, and one which allows a taxpayer to obtain a refund of an erroneous overpayment of taxes. Here, there is no doubt that Baker was afforded the full panoply of administrative relief for contesting an assessment. Specifically, Baker protested the initial audit results, pursuant to section 26-18-404, and was given a hearing before an ALJ, pursuant to section 26-18-405. Following the ALJ's ruling in favor of DF&A, Baker formally requested the Commissioner of Revenues to revise and abate the ALJ's decision, also pursuant to section 26-18-405. The Commissioner then ordered a re-audit, which ultimately resulted in a greater tax deficiency. Again, Baker protested the proposed assessment and sought further revision. Again, the department obliged Baker by having its Assistant Revenue Commissioner personally review Baker's case. This review resulted in a final assessment which lowered considerably the amount of tax deficiency previously reported. The only part of this procedure that Baker did not avail itself of was the judicial review of the final assessment under section 26-18-406(a).

From our review of the foregoing tax statutes, it is abundantly clear that the procedures established in sections 26-18-404, -405, and -406 are specifically for the purpose of providing a taxpayer with the means of challenging DF&A's assessment of additional taxes due, while the procedures set out in section 26-18-507 are for the purpose of providing a taxpayer with the

means to seek a refund for taxes erroneously overpaid to DF&A. These procedures are distinct and parallel, such that a taxpayer may only take advantage of one or the other, depending on the nature of the claim. We find no support, either in the statutes themselves or in Act 1139, for Baker's assertion that the legislature intended to give the same taxpayer two opportunities for administrative review of the same claim.

In sum, we affirm the trial court's dismissal of Baker's suit because it was a challenge to a final assessment following an audit and it was not timely filed under section 26-18-406. The state's sovereign immunity, found in Article 5, § 20, of the Arkansas Constitution, may be waived only in limited circumstances. *State v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996). A trial court acquires no jurisdiction where the suit is one against the state and there is no waiver of sovereign immunity. *Id.* By enacting section 26-18-406, the legislature has permitted suits against the state's DF&A. However, there must be full compliance with this type of statute before sovereign immunity is waived. *Id.* (citing *Hercules, Inc. v. Pledger*, 319 Ark. 702, 894 S.W.2d 576 (1995)). The facts of this case show that DF&A issued its final assessment of tax deficiency on January 15, 1999. Baker had until one year later to make payment on any taxable periods covered by the assessment, and then one year from the date of payment to file suit in circuit court. Baker did not make any payments until July 2002, over three years after the final assessment. Accordingly, Baker did not comply with the provisions of section 26-18-406, and, consequently, the trial court acquired no jurisdiction over this suit.

For his final point for reversal, Baker argues that the trial court erred in allowing DF&A's Assistant Commissioner John Theis to testify about the legislative intent in passing Act 1139 of 1997. Baker does not state how, if at all, it was prejudiced by the admission of this testimony. We will not reverse a trial court's evidentiary ruling without a demonstration of prejudice. *See Union Pac. R.R. Co. v. Barber*, 356 Ark. 268, 149 S.W.3d 325 (2004) (citing Ark. R. Evid. 103(a) for the proposition that evidentiary error may not be predicated upon a ruling that admits evidence unless it affects a substantial right of the party). Here, there can be no prejudice, because we conclude that the meaning of the statutes

as amended by Act 1139 is apparent from their plain language. Any additional information that Theis may have offered on the issue would have been superfluous.

Affirmed.

Roger SCHUBERT *v.* TARGET STORES, INC.

04-882 201 S.W.3d 909

Supreme Court of Arkansas
Opinion delivered January 27, 2005

Bassett Law Firm, by: *J. David Wall*, for appellant.

Wright, Lindsey & Jennings, by: *Kyle R. Wilson* and *Justin T. Allen*, for appellee.

ROBERT L. BROWN, Justice. Appellant Roger Schubert appeals from the circuit court's order granting summary judgment in favor of appellee Target Stores, Inc. (Target). Schubert argues the following points on appeal: (1) the circuit court erred in concluding that Arkansas' conflicts-of-law rules require application of the substantive law of the state of Louisiana to this case; and (2) the circuit court erred in its application of Louisiana law. We reverse and remand on the first point.

Schubert is a resident of Enid, Oklahoma, and was employed by J.B. Hunt Transport, Inc. (Hunt), as a tractor-trailer driver. Hunt is a business corporation with its principal offices in Lowell, Arkansas. Target is a foreign corporation with its principal place of business outside of Arkansas, but it is authorized to do business in Arkansas. Target owns and operates a distribution center in Maumelle.

On April 1, 1998, Target entered into a transportation contract with Hunt wherein Hunt agreed to transport material for Target. Under the contract, Hunt was required to provide workers' compensation coverage for the benefit of both Target and Hunt in the event of an injury to one of Hunt's employees.

On February 19, 1999, Schubert was dispatched to hook up a sealed trailer that was loaded with bales of cardboard boxes by Target's employees at its distribution center in Maumelle. Schubert then transported the load to an International Paper facility in Mansfield, Louisiana, for recycling. Once there, Schubert opened the trailer doors, and a 1000 pound bale of cardboard fell from the trailer and hit Schubert, thereby injuring him.

Schubert subsequently filed a workers' compensation claim against Hunt in Oklahoma and was awarded $46,476.30 in benefits minus attorney's fees and minus a credit in favor of Hunt. Thereafter, Schubert filed a complaint in Arkansas in Pulaski County Circuit Court against Target and alleged that Target's employees were negligent in loading the bales of cardboard into the trailer and inspecting the same. Schubert sought damages in excess of $50,000. Target next filed a motion for summary judgment and argued that Louisiana law should apply as the place of the accident and that Schubert's receipt of workers' compensation benefits was his exclusive remedy against Target under Louisiana law. According to Target, it was the statutory employer of Schubert under Louisiana's workers' compensation law, and as such, Schubert's claim was barred by Louisiana's exclusive-remedy doctrine.

Target attached an affidavit to its summary-judgment motion from Rodney Schluterman, the facility operations group leader at the Target distribution center in Maumelle, who averred that the distribution center in its course of business receives cardboard boxes from various manufacturers containing products that are then removed and placed in separate packaging. Schluterman further averred that the empty cardboard boxes have to be discarded. Accordingly, Target compacts the boxes into bales bound with wire that are then loaded by forklift into trailers that take the bales to various locations where the cardboard is recycled. Schluterman further asserted that the receiving, compacting, handling, loading, and shipping of cardboard boxes is an integral part of Target's business and is essential to the ability of Target to generate its products and service.

The circuit court held a hearing on the summary-judgment motion and then entered its order. In that order, the circuit court concluded that Louisiana law should apply after "consideration of a mixture of the five choice-influencing factors set forth in *Wallis v. Mrs. Smith's Pie Company*, 261 Ark. 622, 550 S.W.2d 453 (1977)[,] as well as other Arkansas precedent considering the *lex loci delicti* approach." The order further stated:

> 7. Under Louisiana Law, a principal which is a statutory employer of the plaintiff is immune from tort liability. A principal becomes a statutory employer when "there is a written contract between the principal and a contractor which is the employee's immediate employer or his statutory employer, which recognizes the principal as a statutory employer." *See* La. R. S. 23:1061[(A)](3). Whether a principal is a statutory employer for workers' compensation purposes is a question of law for the court to decide. *See Maddox v. Superior Steel*, 814 So.2d 569, 572 (La. Ct. App. 1st Cir., 2001).
>
> 8. The Court finds that the contract between Target and J.B. Hunt recognizes Target as plaintiff's statutory employer for purposes of worker's compensation law. Specifically, the contract requires that J.B. Hunt retain worker's compensation insurance with Target as an insured under that policy. Since Target and J.B. Hunt contracted that Target was to be insured by workers' compensation insurance, then the parties intended that Target be protected by the exclusive remedy doctrine. That protection is the essence of being a "statutory employer."
>
> 9. This statutory employer status can be overcome only if the plaintiff can establish "that the work is not an integral part of or

> essential to the ability of the principal to generate that individual principal's goods, products or services." *Id.* at 23:1061[(A)](3).
>
> 10. The Court finds that Target's acquiring, storing and shipping of cardboard bales is an integral part or essential to the ability of Target to generate its goods, products or services.

The circuit court found that Target was a statutory employer and that Schubert's claim was barred by the exclusive-remedy doctrine.

Schubert first argues that the circuit court erred in applying Louisiana law to this case, because while stating in its order that it considered the choice-influencing factors set out in *Wallis v. Mrs. Smith's Pie Co., supra*, the circuit court's ruling at the hearing showed that the court only considered the *lex loci delicti* choice-of-law rule to apply Louisiana law. This strict application was error, Schubert contends, because this court held in *Wallis v. Mrs. Smith's Pie Co., supra*, that the five choice-influencing factors are to be used in conjunction with *lex loci delicti*, when deciding whether to apply the forum state's substantive law or another state's substantive law. Schubert next analyzes each of the five choice-of-law factors and concludes that this case had significant contacts with the state of Arkansas and that the better rule of law was found in Arkansas, not Louisiana.

Target responds that the circuit court correctly applied Louisiana substantive law under the doctrine of *lex loci delicti*, because this doctrine controls in tort cases and is not overcome unless application of choice-influencing factors demonstrates a compelling reason to decide a case otherwise. Target concludes that in this case, the choice-influencing factors do not override *lex loci delicti*. Target also examines the five *Wallis* factors and notes that Schubert forum-shopped by filing suit in Arkansas, because Arkansas has a three-year statute of limitations on tort claims, whereas Louisiana only has a one-year statute of limitations and Oklahoma has a two-year statute of limitations. Target urges that *lex loci delicti*, the five *Wallis* factors, and the suggestion of forum shopping militate in favor of an affirmance in this case. We disagree.

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.

> . . . 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. 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. We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties.

Dodson v. Taylor, 346 Ark. 443, 447, 57 S.W.3d 710, 713 (2001) (internal citations omitted).

Three Arkansas cases appear particularly pertinent in deciding which state's substantive law should be applied in this case. *See Gomez v. ITT Educ. Servs., Inc.*, 348 Ark. 69, 71 S.W.3d 542 (2002); *Wallis v. Mrs. Smith's Pie Co., supra*; *McGinty v. Ballentine*, 241 Ark. 533, 408 S.W.2d 891 (1966). In *McGinty v. Ballentine, supra*, this court followed the *lex loci delicti* choice-of-law rule and held that a victim's family could not file a wrongful-death claim in Arkansas (1) when the accident occurred in Missouri, (2) the victim did not reside in Arkansas, (3) the administratrix of the victim's estate was not appointed by an Arkansas court, and (4) the appellee-defendant only had a place of business in Arkansas. In *McGinty*, this court intimated that while Arkansas' wrongful-death statute of limitations is more favorable to the administratrix, she should not be permitted to forum shop for a state where the law was most favorable to her cause, especially when the case's connection with Arkansas was so minimal.

In *Wallis v. Mrs. Smith's Pie Co., supra*, we observed that the doctrine of *lex loci delicti* had fallen under much criticism and looked to five new factors in our analysis. In that case, Jeff Wallis and his mother, both residents of Arkansas, were returning to Arkansas from a trip to Ohio, when their vehicle was struck by a tractor-trailer truck in Missouri driven by Howard Long, a resident of Pennsylvania. Long was an agent of Mrs. Smith's Pie Co., which is a Pennsylvania company authorized to do business in Arkansas. Wallis and his mother each brought an action against Mrs. Smith's Pie Co. in Arkansas. At trial, the circuit court applied Missouri's law of contributory negligence as the law of the place of the accident, and the jury returned verdicts in favor of the defendant and against both Wallis and his mother.

On appeal, this court considered Dr. Robert A. Leflar's five choice-influencing factors, which include (1) predictability of

results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests, and (5) application of the better rule of law.[1] Focusing on the governmental-interest factor, this court found that the circuit court should have applied Arkansas' comparative-fault statutes in lieu of Missouri's contributory-negligence law, irrespective of the fact that the accident occurred in Missouri. The clear implication was that this was the better rule of law.

In *Gomez v. ITT Educ. Servs., Inc.*, *supra*, this court affirmed the circuit court's application of Texas' two-year wrongful-death statute of limitations rather than Arkansas' three-year wrongful-death statute of limitations. In *Gomez*, a woman had been murdered in Texas by a recruiter employed by the appellee-defendant. The victim's family sued for wrongful death in Texas but failed to serve the correct defendant company within the two-year statute of limitations. Thereafter, the victim's family filed a wrongful-death action in Arkansas within Arkansas' three-year statute of limitations. The circuit court granted summary judgment to the defendant company after applying Texas' statute of limitations. On appeal, this court looked to both the five choice-influencing factors set out in *Wallis v. Mrs. Smith's Pie Co.*, *supra*, and the doctrine of *lex loci delicti* and found that Arkansas did not have a significant relationship to the parties or to the injury, because every relevant action took place in Texas and every party was a resident of Texas. We analyzed the case, using the five factors, however, and said:

> In *Schlemmer v. Fireman's Fund Ins. Co.*, 292 Ark. 344, 730 S.W.2d 217 (1987), this court noted that it had adopted the Leflar choice-influencing approach in *Wallis* and had continued to use the approach. However, neither *Schlemmer* nor *Wallis* explicitly overruled *McGinty* and the other earlier cases applying the more mechanical *lex loci delicti* rule. Nor do we find it necessary to overrule *McGinty* and its progeny here. Instead, the adoption of the Leflar factors in *Wallis* and subsequent cases appears to be merely a softening of what previously had been a rigid formulaic application of the former rule of law.

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[1] The distinguished law professor Dr. Robert A. Leflar, set out the five factors in his treatise, Robert A. Leflar et al., *American Conflicts Law* (4th ed. 1986) (previous editions released in 1959, 1968, and 1977), and in several law review articles. *See, e.g.*, Robert A. Leflar, *Conflict of Laws: Arkansas the Choice Influencing Considerations*, 28 ARK. L. REV. 199 (1974).

> This conclusion is consistent with Leflar's commentary on the issue.

Gomez, 348 Ark. at 76, 71 S.W.3d at 546 (internal citation omitted).

In the case at bar, after hearing arguments of counsel regarding summary judgment and after reviewing the briefs submitted, the circuit court granted Target summary judgment. The court reasoned that *lex loci delicti* was the prevalent choice-of-law rule, and it applied Louisiana's workers' compensation law, which barred Schubert's complaint. The ensuing circuit court's order states that the circuit court made its finding in favor of applying Louisiana law after considering *lex loci delicti* and the choice-influencing factors from *Wallis v. Mrs. Smith's Pie Co., supra.*

[redacted] In *McGinty*, *Wallis*, and *Gomez*, this court began its analysis with a consideration of whether the case had any significant contacts with Arkansas. In the case at bar, Schubert is a resident of Oklahoma, and Target is not an Arkansas corporation but owns and operates a distribution center in Arkansas. However, Hunt is an Arkansas corporation, and the transportation of the cardboard bales began in Arkansas. Moreover, the cardboard bales were allegedly loaded in a negligent manner in Arkansas. Even though the accident occurred in Louisiana, we conclude that Arkansas has significant contacts with this case in light of the fact that the potential site of the negligence was where the bales were loaded, which was Arkansas, and Hunt's primary place of business is in this state.

It is clear to this court that we have evolved from a mechanical application of the law of the state where an accident occurred, as witnessed by our opinions in both the *Wallis* and *Gomez* cases. As we said in *Gomez*, this court adopted the choice-influencing factors in *Wallis* to soften the formulaic application of *lex loci delicti*. We turn then to an analysis of the five factors endorsed in both those cases.

The first factor is the predictability of results. The consideration here is the ideal that a decision following litigation on a given set of facts should be the same regardless of where the litigation occurs in order to prevent forum shopping. In the case at bar, Louisiana's workers' compensation law under La. R. S. 23:1061(A) could bar Schubert's recovery under the statutory-employer theory and the exclusive-remedy doctrine. Arkansas' workers' compensation law, on the other hand, provides in Ark.

Code Ann. § 11-9-105(b)(1) (Repl. 2002), that an injured employee who does not receive the necessary benefits may file a workers' compensation claim *or* file a complaint in circuit court. Thus, it appears that resolution of this case depends on which state's law applies.

The second consideration, maintenance of interstate and international order, is not a great concern for purposes of this case. Residents of Louisiana will not likely engage in negligent conduct in Arkansas to avail themselves of our workers' compensation statutes, and residents of Arkansas will not likely engage in negligent conduct in Louisiana to avail themselves of Louisiana's workers' compensation statutes.

The third consideration, simplification of the judicial task, also is not a paramount consideration, because the law at issue does not exist for the convenience of the court that administers it, but for society and its members. In *Gomez*, this court followed Dr. Leflar's reasoning that where the out-of-state law is outcome-determinative and easy to apply, there is no good reason not to consider importing it as the law governing the case. In the case at hand, the Louisiana workers' compensation law is easy to apply and is outcome-determinative, because it appears to bar the case. The Arkansas workers' compensation law is also easy to apply and appears to allow a court suit. This factor does not appear to favor either party.

Looking to the fourth consideration, advancement of the forum's governmental interests, this court examines the Arkansas contacts to decide this state's interest. Here, Arkansas' contacts to the accident are at the site in Maumelle where the negligence allegedly occurred and the fact that Hunt's principal place of business is Arkansas. Louisiana's sole contact is the place where the accident occurred. Arkansas has a significant governmental interest in this case, because Arkansas has a real interest in protecting its people from negligent behavior and in protecting Arkansas employees.

Under the fifth consideration, application of the better rule of law, we hold that the circuit court erred in applying Louisiana law, because that law prevents a suit in tort for negligence against a non-employer like Target. Louisiana law, according to the circuit court, would transform Target into a statutory employer and hold Target immune from tort liability. As a result, Schubert is foreclosed from his day in court. This is akin to the situation in

Wallis v. Mrs. Smith's Pie Co., supra, where we viewed the Arkansas comparative-fault law as superior to the Missouri contributory-negligence law, which would have denied the plaintiff-victim any damages.

We conclude that Arkansas has significant contacts with this case and that any assertion of forum shopping is unfounded. Moreover, Target's citation to a 1960 federal district court case, *McAvoy v. Texas E. Transmission Corp.*, 187 F. Supp. 46 (W.D. Ark. 1960), is not determinative. *McAvoy* was decided before this court's opinions in *Wallis v. Mrs. Smith's Pie Co.*, *supra*, and *Gomez v. ITT Educ. Servs., Inc.*, *supra*. The fact that our court of appeals cited *McAvoy* in a 1986 decision, *Orintas v. Meadows*, 17 Ark. App. 214, 706 S.W.2d 199 (1986), is clearly not binding on this court. We note, in addition, that the principles of *lex loci delicti* and the five choice-of-law factors were reiterated by this court as recently as 2002 in the *Gomez* case. In light of this history, the *McAvoy* decision is simply not controlling authority for this case.

[redacted] In short, we hold that, based on the significant contacts Arkansas has with this case and its better rule of law, the substantive law of Arkansas applies. We reverse the summary judgment in favor of Target on the choice-of-law point and remand for further proceedings. Because we reverse on the first point, there is no need for this court to address Schubert's second point related to Louisiana's substantive law.

Reversed and remanded.

Timothy EDWARDS *v.* STATE of Arkansas

CR 04-0382 201 S.W.3d 902

Supreme Court of Arkansas
Opinion delivered January 27, 2005

Dana Reece, for appellant.

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

ANNABELLE CLINTON IMBER, Justice. Appellant Timothy Edwards was convicted of aggravated robbery and theft of property and sentenced to life imprisonment. Thus, our jurisdiction is proper pursuant to Ark. Sup. Ct. R. 1-2(a)(2) (2004). On appeal, he raises three points of error: (1) there was insufficient evidence to support his convictions; (2) the circuit court erred in failing to suppress evidence seized incident to his arrest; and (3) the circuit court erred in refusing to suppress the photo lineup. Finding no merit in any point raised, we affirm the circuit court.

Beginning in early March 2003, four separate robberies occurred within a ten-day period in southwest Little Rock. On March 9, 2003, the Phillips 66 Station at Scott Hamilton and Baseline Road was robbed. Tabatha Cannon was working at the station when the robbery occurred. She told a detective with the Little Rock Police Department that the robber was a bald, black man wearing a black jacket and black pants. Cannon also described the robber as being about six feet tall and 28 or 29 years old. A video surveillance camera captured this robbery on tape.

The next robbery occurred around 11 p.m. on March 17, 2003, at the Total Station on Geyer Springs Road. Law enforcement officers investigating this robbery learned from Velvet Cowan, a gas station employee, that the robber wore a black leather jacket, a blue skull cap or toboggan, and dirty boots. Shortly thereafter, at approximately 2 a.m. on March 18, 2003, an employee at the Shell Station on Baseline Road reported another robbery. Amar Kassees told law enforcement officers that the robber wore a black leather trench jacket and a midnight blue skull cap or toboggan.

Four hours later, at 6:30 a.m. on March 18, 2003, the fourth robbery occurred at the Super 8 Motel on Frenchman's Lane. Detective Bill Yeager, as well as other law enforcement officers, arrived at the motel around 7:00 a.m. At that time, he already knew about the other robberies in the same area. One of the motel employees, Terry Yelder, described the clothing worn by the robber as a black trench coat with a blue hooded jacket underneath the coat. Yelder also said that his cell phone had been stolen during the robbery. Another motel employee just happened to dial Yelder's cell phone number when some of the officers standing outside the motel saw Greg Dockery, who was walking along Frenchman's Lane, take a cell phone out of his pocket and answer it. They immediately picked Dockery up and escorted him to his apartment. Dockery told officers that Edwards had been to his

apartment earlier that morning and had left the cell phone and a windbreaker there. The officers seized the windbreaker from the apartment. Yelder identified the windbreaker as belonging to the person who robbed him. Based on this information, Edwards became a suspect in the robbery at the Super 8 Motel. Law enforcement officers then began to search for Edwards. Dockery disclosed that he had received a call from Edwards, and the caller ID on his phone indicated the call came from a Super 7 Motel.

Detective Yeager and the other officers proceeded to the Super 7 Motel. The owner, Anil Patel, advised them that Edwards had checked into the motel on March 17, 2003, and had made several phone calls from his room. When officers searched the room, they saw cigar wrappers in a trash can, but did not seize anything at that time. They also learned that Edwards had used the phone at the Super 7 to call his girlfriend, Deborah McCullough. Upon further investigation, the officers learned that Edwards had also called McCullough from a Motel 6 in North Little Rock.

Later that same day, five detectives went to the Motel 6 in North Little Rock. When they knocked on the door to his motel room, Edwards opened the door. He was arrested after being identified as the suspect in the Super 8 Motel robbery. At the time of the arrest, several officers indicated that they observed a black coat, a pair of leather shoes, and a toboggan cap in plain view in the room. Those items were seized immediately. Officers then returned to the Super 7 motel and seized the trash bag containing the cigar wrappers that Edwards had left in the room. Subsequently, Detective Yeager created a photo lineup containing Edwards's picture. All of the robbery victims identified Edwards in the photo spread as the person who robbed them.

One suppression hearing was held in connection with all four robberies. At the hearing, Detective Yeager testified that Dockery consented to a search of his apartment and Patel allowed officers to search the room that Edwards used at the Super 7 Motel. Patel testified that to his knowledge Edwards had checked out of the room prior to the police arriving. Furthermore, he did not observe any of Edwards's personal belongings remaining in the room. The circuit court denied all motions to suppress filed by Edwards.

The case arising out of the robbery at the Phillips 66 station was tried on January 7, 2004. The victim, Tabatha Cannon, and several law enforcement officers testified to the events as summa-

rized above. More significantly, the video surveillance tape and a still photograph were introduced into evidence. Also, over the defendant's objection, the leather jacket was admitted into evidence. Cannon testified that she was able to select Edwards from the photo lineup created by the police and she identified Edwards at trial as the person who robbed her. The sole witness called on behalf of the defense was the defendant's aunt, Lorraine Edwards. She testified that her nephew was at her home at the time of the March 9 robbery. At the conclusion of the trial, Edwards was found guilty of aggravated robbery and theft of property.

In his first point on appeal, Edwards challenges the sufficiency of the evidence supporting his convictions of aggravated robbery and theft of property.[1] In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Garner v. State,* 355 Ark. 82, 131 S.W.3d 734 (2003) (citing *Polk v. State,* 348 Ark. 446, 73 S.W.3d 609 (2002)). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* We view the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *Id.* Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Id.*

The elements that the State must prove in order to convict a person of aggravated robbery are set forth in Ark. Code Ann. §§ 5-12-102 — 103 (2004). Section 5-12-102 states:

> (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.
>
> (b) Robbery is a Class B felony.

Ark. Code Ann. § 5-12-102. Section 5-12-103 further states:

> (a) A person commits aggravated robbery if he commits robbery as defined in § 5-12-102, and he:

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[1] We must first consider Edwards's argument that there was insufficient evidence to convict him because double jeopardy considerations require this court to consider a challenge to the sufficiency of the evidence prior to the other issues on appeal. *Atkinson v. State,* 347 Ark. 336, 64 S.W.3d 259 (citing *Haynes v. State,* 346 Ark. 388, 58 S.W.3d 336 (2001)).

> (1) Is armed with a deadly weapon or represents by word or conduct that he is so armed; or
>
> (2) Inflicts or attempts to inflict death or serious physical injury upon another person.
>
> (b) Aggravated robbery is a Class Y felony.

Ark. Code Ann. § 5-12-103. As to the proof required on the theft-of-property charge, Ark. Code Ann. § 5-36-103 provides in relevant part as follows:

> (a) A person commits theft of property if he or she:
>
> (1) Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner thereof; or
>
> (2) Knowingly obtains the property of another person, by deception or by threat, with the purpose of depriving the owner thereof.

Ark. Code Ann. § 5-36-103 (2004).

In addition to the facts summarized earlier, Cannon testified at trial that she was alone when Edwards came into the Phillips 66 store. She noticed him at the freezer section while Cannon was with another customer. Edwards hollered out to ask if the store had any juice. Cannon responded that she would come help him look for juice when she finished with the other customer. Later, when she asked him if he had found the juice, Edwards did not reply. Cannon began to feel nervous. She testified that Edwards came up to the counter and said something like "give me the money." Cannon said, "What?", whereupon Edwards said, "Open it. Open it now." Because Cannon had already rung the purchase up, she struggled to open the register. Eventually she got the register open and started handing him the money. He asked for the rest of the money, so she handed him the next shift's cash too. Edwards told her to get down on the floor. She complied, hit the panic button, and then waited a few minutes before calling 911.

[redacted] Cannon testified she was able to observe Edwards for a total of five minutes. He was wearing a black jacket and black pants. He was not wearing anything over his eyes. She could see

part of his nose, his eyes, his eyebrows and his whole head. He approached her and pointed his jacket at her insinuating that he had a gun. His hand was in his pocket. At one point, he was approximately 18 inches away from her. In sum, Cannon identified Edwards as the person who robbed her. Additionally, from a review of the surveillance tape and a still photograph, Cannon and Detective Yeager were both able to identify Edwards as the person on the video. Based on these facts, we have no hesitancy in holding that the evidence was sufficient to sustain both convictions.

Edwards also cites *Fairchild v. State*, 269 Ark. 273, 600 S.W.2d 16 (1980), in support of his argument that there is insufficient evidence to support the aggravated-robbery conviction when there was no evidence that Edwards had a weapon. The *Fairchild* case is, however, inapposite. In that case, we stated that

> [w]e are not persuaded that appellant's hand under his shirt, even with the admitted intention of conveying to the victim that he was armed, is sufficient representation to satisfy the requirements of aggravated robbery *in the absence of the victim's appreciation that he was armed.* It is clear from Mrs. Calva's testimony that she did not attach any special significance to this conduct and certainly did not perceive it to be in any way threatening.

Fairchild v. State, 269 Ark. at 275, 600 S.W.2d at 17 (emphasis added). Clearly, a representation through words or conduct indicating a person is armed is sufficient to satisfy the weapon requirement under our aggravated-robbery statute. Ark. Code Ann. § 5-12-103. Furthermore, unlike the victim in *Fairchild v. State*, Cannon testified that she was fearful and believed Edwards was armed based on his conduct. We therefore conclude that the argument on this point is without merit.

For his second point on appeal, Edwards argues that the circuit court erred in failing to suppress evidence seized incident to his arrest. Specifically, he challenges the searches at the apartment, the Super 7 Motel, and the Super 6 Motel on grounds that the police did not have a search warrant. The only item introduced into evidence at trial was a leather jacket that had been seized at the Super 6 motel. Nonetheless, Edwards contends that the other searches are important because the evidence collected at the those locations were used to develop Edwards as a suspect. Absent the first two illegal searches, Edwards suggests there would have been

less evidence tying him to the robberies. Our standard of review for a circuit court's action granting or denying motions to suppress evidence obtained by a warrantless search requires that we make an independent determination based upon the totality of the circumstances, giving respectful consideration to the findings of the circuit judge. *Davis v. State,* 351 Ark. 406, 94 S.W.3d 892 (2003) (citing *State v. Osborn*, 263 Ark. 554, 566 S.W.2d 139 (1978)).

First, Edwards does not have standing to assert his Fourth Amendment rights in connection with the search at the apartment. As the State properly indicates in its brief, Fourth Amendment rights are personal rights which may not be vicariously asserted. *Burkhart v. State*, 301 Ark. 543, 785 S.W.2d 460 (1990). Whether an appellant has standing depends on whether he manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993).

In this case, the property manager for the apartment complex testified that the apartment was leased to Mohamed Bangura. Edwards was not a leaseholder on the apartment, and no additional evidence was presented to show that Edwards had any type of interest in the apartment. Accordingly, it is reasonable to conclude that he had no expectation of privacy in a third party's apartment. Thus, the circuit court did not err when it denied the motion to suppress as to the items seized in the apartment.

Similarly, Edwards does not have standing to assert his Fourth Amendment rights in connection with the search of the Super 7 Motel. He had clearly abandoned the motel room when police officers entered the premises. In *Rockett v. State*, we addressed a similar issue where the appellant's name was on the motel registration card. *Rockett v. State*, 318 Ark. 831, 890 S.W.2d 235 (1994), *overruled on other grounds by MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998). In that case, we said that while it is well settled that one registered at a motel or hotel as a guest is protected against unreasonable searches and seizures by the Fourth Amendment to the United States Constitution, the appellant no longer had a reasonable expectation of privacy in the motel room as he abandoned the room at the time he fled from the police. *Id.* Likewise, in this case, the motel manager testified at the suppression hearing that he believed Edwards had checked out of the room by the time police arrived. He also testified that Edwards had already previously returned the room key. Moreover, there was

additional evidence presented that Edwards had in fact abandoned the room because none of his personal items were in the room when the police arrived at the motel. Based on the totality of the circumstances, it was reasonable for the circuit court to conclude that Edwards had in fact abandoned his expectation of privacy in the room.

Lastly, the police seized certain items at the Motel 6 when they arrested Edwards. Rule 4.1 of the Arkansas Rules of Criminal Procedure gives police the power to arrest persons without a warrant. It states in part:

> (a) A law enforcement officer may arrest a person without a warrant if:
>
> (I) the officer has reasonable cause to believe that such person has committed a felony.

Ark. R. Crim. P. 4.1(a)(i) (2004). In addition, Rules 12.1 and 12.2 provide officers who are making a lawful arrest with the authority to conduct a limited search. Rule 12.1 specifically states:

> An officer who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused for the following purposes only:
>
> (a) to protect the officer, the accused, or others;
>
> (b) to prevent the escape of the accused;
>
> (c) to furnish appropriate custodial care if the accused is jailed; or
>
> (d) to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense.

Ark. R. Crim. P. 12.1 (2004)(emphasis added). Rule 12.2 further provides that

> [a]n officer making an arrest and the authorized officials at the police station or other place of detention to which the accused is brought

> may conduct a search of the accused's garments and personal effects ready to hand, the surface of his body, and the area within his immediate control.

Ark. R. Crim. P. 12.2 (2004).[2] In applying these rules, we have consistently held that searches within this lawful scope do not violate an individual's Fourth Amendment rights. *Hazelwood v. State*, 328 Ark. 602, 945 S.W.2d 365 (1997).

[redacted] Here, the police had identified Edwards as a suspect in the robbery that occurred at the Super 8 Motel on March 18, 2003, in which Yelder was the victim. They had recovered Yelder's cell phone and Yelder identified the windbreaker that the robber was wearing. These items were connected to Edwards through Dockery. Finally, information obtained from Edwards's girlfriend led officers to Motel 6 where he was arrested. Based on these facts, we conclude that the officers had reasonable cause to believe that Edwards had committed a felony. Therefore, pursuant to Ark. R. Crim. P. 4.1(a), they had authority to arrest him without a warrant. Furthermore, after the arrest and pursuant to Rules 12.1(d) and 12.2, it was legal for the officers to seize the leather jacket, which was in "plain view" and was evidence that Edwards had committed a robbery. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998) (police officers legitimately at a location and acting without a search warrant may seize an object in plain view if they have probable cause to believe that the object is either evidence of a crime, fruit of the crime, or an instrumentality of a crime, citing *Arizona v. Hicks*, 480 U.S. 321 (1987)); *Hazelwood v. State, supra.* We affirm the circuit court's denial of the motion to suppress evidence seized incident to the defendant's arrest.

For his final point on appeal, Edwards argues that the circuit court erred in refusing to suppress the photo lineup. This argument is procedurally barred. In *Lewis v. State*, 354 Ark. 359, 123 S.W.3d 891 (2003), as in this case, the appellant filed a motion prior to trial requesting that the out-of-court photo identifications made by the witnesses be suppressed. The trial court denied the motion. At trial, however, the appellant did not object to the in-court iden-

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[2] These rules reflect the U.S. Supreme Court's decisions in *Chimel v. California*, 395 U.S. 752 (1969) and *U.S. v. Robinson*, 414 U.S. 218 (1973).

tifications made by the witnesses. The appellant's failure to object to the in-court identification barred our review because an out-of-court identification based on a photo array is not preserved for review where, despite challenging the photo identification prior to trial, the appellant failed to object to the witness's in-court identification. *See Fields v. State*, 349 Ark. 122, 76 S.W.3d 868 (2002); *Goins v. State*, 318 Ark. 689, 890 S.W.2d 602 (1995). To preserve a challenge to a pretrial photographic identification, we require a contemporaneous objection to an in-court identification at trial. *Fields v. State, supra.*

In the instant case, Edwards did not object at trial to Cannon's in-court identification of him as the person who robbed her. Thus, even though Edwards objected at trial to the introduction of the victim's pretrial photographic identification, because there was no objection to her in-court identification, the argument that the court erred in failing to suppress the out-of-court photo identification is not preserved for our review. *Lewis v. State, supra.*

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 Edwards, and no prejudicial error has been found. *Doss v. State*, 351 Ark. 667, 97 S.W.3d 413 (2003).

Affirmed.

Robbin E. RIDLING *v.* STATE of Arkansas

CR 04-48 203 S.W.3d 63

Supreme Court of Arkansas
Opinion delivered January 27, 2005

[redacted]

[redacted]

Patrick J. Benca and *John Wesley Hall, Jr.*, for appellant.

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

BETTY C. DICKEY, Justice. Appellant Robbin R. Ridling was convicted of capital felony murder by a Miller County jury and was sentenced to life imprisonment without parole. Ridling brings seven (7) points on appeal, none of which has merit. We affirm.

Background

Ridling and his wife, Lisa Graf, lived in Texarkana, Arkansas, in a duplex adjoining that of Betty Tullis, the girlfriend of Roy Baskett, the victim. Baskett became friends with Ridling and Lisa, and continued that friendship after Betty and Baskett had stopped dating, and she had moved from the duplex into a home in May 2002.

Tensions first began between Baskett and the Ridlings in July of 2002, when Baskett's wallet, containing his dog tags, was missing. Baskett suspected that either Lisa or her good friend, Lisa Hickey, had stolen the wallet. On July 27, 2002, while Ridling was working in Little Rock, Baskett stopped by their duplex to visit with Lisa. While there, Baskett discovered that the Ridlings had captured a raccoon using a trap provided by the city. Baskett became upset and left, but returned shortly thereafter, smashed the cage, and freed the raccoon. Lisa called Ridling, who told her not to call the police, but said he would talk to Baskett the next day. However, Lisa and Ridling called law enforcement instead, then called Baskett to tell him how upset the incident had made her and that she was not going to pay for the cage.

About the third week of July 2002, Don Mitchell overheard an answering machine message recorded on Baskett's telephone from a "Robbin" who angrily told Baskett he had gone too far by destroying the animal trap and that he intended to either "whip" or "kick Baskett's ass" in retaliation.

In August of 2002, Betty and Baskett started seeing each other again, and on Saturday, August 3, 2002, he stopped by Betty's house about 8:30 p.m., but Betty was going to dinner with a friend. Before she left, Baskett asked her for his captain's bars, telling her that he "was going on a mission." Baskett did not give Betty any other details. Baskett drove to the duplex and told Ridling that "he was nothing but a piece of shit, he never served his country, had never been in the armed forces," and that Lisa was a slut. Baskett told Ridling and Lisa that he heard that Lisa had cheated on her first husband and that she was not the person he thought she was. Baskett then accused Lisa of being in cahoots with Lisa Hickey to steal his wallet.

Baskett challenged Ridling to fight, to which Ridling responded, "I don't want to fight an old man, and besides that, you're packing heat." Baskett demanded that Lisa return a gun that he had given her, which she did. While Lisa and Ridling were getting the firearm, Ridling told Lisa that Baskett had a gun with him and that they better empty the bullets out of this gun. After Baskett left, Lisa told Ridling that she did not want Baskett over at their house anymore and that she wanted Ridling to take care of the situation. Lisa asked Ridling to let her call the police but he refused.

On his way home, Baskett stopped by Willie Chiles's home and told him about the confrontation. Chiles, Baskett's neighbor, testified that Baskett was upset, and after showing Chiles two guns, said that he would be needing one of his guns that evening. Betty returned to her home about 9:45 p.m., and Baskett returned there around 10:00 p.m., with the firearm, where they spent the night together.

The next morning, Sunday, August 4, 2002, Baskett and Betty left her home and went to Baskett's. Betty left there between 10:00 a.m. and 11:00 a.m. to do her weekly shopping.

Lisa testified that Ridling awoke about noon on Sunday, August 4, 2002. She told Ridling that she was still upset and that he needed to "handle this situation. Take care of it, Robbin. I don't want him back over here acting that way. I don't want to have to deal with it. I don't want him bringing guns back to my house." Ridling then picked up a baseball bat and keys to his 1992 blue Dodge Dakota extended cab truck, and said that he had to go take care of some things. He told Lisa he was going jogging and was taking the bat back to Wal-Mart. He left wearing black shorts, a

red muscle shirt, and tennis shoes. Sometime thereafter, Lisa went by Wal-Mart and the place where he normally jogged, but did not see him or his truck. Lisa tried calling Ridling, but he did not answer.

At approximately 12:30 p.m. that day, Florence Seale, Baskett's across-the-street neighbor, was looking out her window when she saw Ridling's truck pull up to the Baskett home. Baskett got into Ridling's truck and the two drove away. Seale saw nothing out of the ordinary in either man's behavior.

Ridling returned home around 3:00 p.m. carrying his tennis shoes and socks, which were wet and grassy. He started the washer, took his shoestrings out of his shoes, and threw his shoes in the washing machine. Ridling then began scrubbing the shoestrings in the sink; actions Lisa testified that were highly unusual. He then took off the red muscle shirt and took a shower. Lisa never saw that shirt nor the socks again after that afternoon. Ridling told Lisa that he had gone jogging and then had to change a flat tire. Ridling eventually dressed and left for work at UPS some time around 6:00 p.m. Later, Lisa drove by UPS and noticed that Ridling had his truck pulled up to the building with both doors open and was holding a water hose. She thought it odd that he was spraying water on the inside of his truck. Lisa did not stop at that time, but she did return before Ridling left in his UPS truck. At 7:04 p.m., Lisa called Ridling to make sure that he was on the road. She went back out to UPS, and using her spare key, opened the truck door. She noticed that the interior, particularly the passenger side, was wet, and she saw the baseball bat in the back. Later that night Lisa called Ridling seven times on his cell phone, asking him several times about his activities that day, but he would never give her a direct answer.

On August 5, Lisa began calling Ridling at 5:43 a.m., with seven more calls between the two by 10:00 a.m. Phone records place Ridling's cell phone within two to fourteen miles of the Hope Upland Wildlife Management Area. When Lisa returned home, around noon, Ridling was back at home. Around 5:00 p.m., while appellant was asleep, Lisa, again, looked in Ridling's truck to see if his tire was really flat. She did see a tire and two white trash bags. She testified that the bags did not feel as though they contained ordinary trash, but rather something that was both hard and soft. She also testified her husband never hauled trash in his truck.

On August 6, 2002, when no one had heard from Baskett, a missing person's report was made. Texarkana Police Detective Bobby Jordan began an investigation, interviewing Betty, Willie Chiles, and Florence Seale. Detective Jordan and Detective Ed Chattaway interviewed Lisa, who said that she had not seen Baskett for at least two weeks. After the officers left, Lisa spoke with Ridling who denied having done anything to Baskett, but cautioned Lisa to stick to the story she had told the police.

Detectives Jordan and Chattaway interviewed Ridling and Lisa, who both said that they had not seen Baskett in a couple of weeks. Appellant also stated that he was home all day on Sunday, August 4, 2002, until he left for work around 6:00 p.m., and that his vehicle had not been over at Baskett's house. Ridling told the officers about the raccoon incident and about Baskett accusing Lisa Graf or Lisa Hickey of stealing his wallet. Jordan noticed that Ridling had a red mark or cut about halfway up his shin. The Detectives also noticed that appellant was guarded during the interview and that he used past tense when referring to Baskett.

Jordan attempted to schedule a second interview with Lisa for August 8, but Ridling called him and cancelled. When the officers finally did interview Lisa on August 14, 2002, Ridling accompanied her and refused to let her speak freely. When Lisa did speak, he would cut her off and interject his own comments. Ridling denied having any contact with Baskett during the week before his disappearance, claimed he stayed home all day on Sunday, August 4, 2002, until he left for work at 6:15 p.m., and when told about witness reports that he and Baskett had a confrontation on August 3, 2002, he denied the encounter.

Warrants to search Ridling's residence and for seizure of his truck were executed on August 21, 2002. While searching the shed, Detective Marc Sullivan noticed a double-bit axe that had a spattering of green paint on it. While searching the truck, Sullivan found the interior carpet wet, and when it was removed, a reddish-tinted substance was on the bottom of the truck. The preliminary test of the reddish water tested positive for blood. In addition, blood was also found on the passenger seatbelt, on the passenger's seat headrest, and on a plastic pane on the passenger side. The blood samples were sent to the State Crime Lab and some were found to be a match with that of Baskett.

On August 30, 2002, Arkansas Game and Fish Commission Officer Terry "Mickey" Rogers was working in the Hope Upland Wildlife Area, Hempstead County, when Ridling drove up in his

truck dressed in his UPS uniform. Despite that fact that it was quite still dark, between 5:45 and 6:15 a.m., Ridling was driving with only his parking lights on.

On September 27, 2002, another search of the Hope Upland Wildlife Area was conducted, and a white trash bag smelling of a decaying organism was located that afternoon. A stacked pile of branches was found that was inconsistent with the other vegetation in the area, and that had a strong odor of decay surrounding it. Because what appeared to be a bone fragment was seen, the area was thoroughly searched that same day and again on October 1, 2002. During these searches, officers found: bones and fragments of bone, which were identified as Baskett's; two sets of keys, which were later found to be to Baskett's car and house; a baseball cap, which was identified as one given to Baskett; a Chap Ice chapstick container that matched similar containers found at Baskett's home; sunglasses identified by Baskett's daughter as belonging to her father; and, a double-bit axe with a spattering of green paint on the handle.

A second search warrant for Ridling's residence was executed on October 1, 2002, after the axe was found in the woods, but the axe previously photographed at Ridling's home could not again be located.

At some point prior to the discovery of the bones, Ridling was arrested. During the time he was incarcerated in the fall of 2002, he made several admissions to another inmate, William Gainey, Jr. When Ridling learned that the officers were searching in the Hope Wildlife Area, he said that "[t]hey wouldn't find anything, but they were looking in the correct area." Ridling also told Gainey that he and Baskett "were going to the bank on that Sunday."

On October 8, 2002, an information was filed in Miller County, charging Ridling with capital felony murder and premeditated and deliberated murder. During the trial, Ridling's counsel moved for directed verdict regarding what he felt were several deficiencies in the State's case as to proof. The motion was renewed at the end of the trial and was denied.

Territorial Jurisdiction

Ridling argues that there was positive evidence presented that Miller County did not have territorial jurisdiction, but charges should have been filed in Hempstead County. The trial court did

not err by denying Ridling's directed-verdict motion on the basis that the crime did not occur in Miller County, Arkansas.

Territorial jurisdiction over a criminal defendant is controlled by statute. *Kirwan v. State,* 351 Ark. 603, 96 S.W.3d 724 (2003). We have stated that "when reviewing the evidence on a jurisdictional question, [we] need only determine whether there is substantial evidence to support the finding of jurisdiction." *Id.; Dunham v. State*, 315 Ark. 580, 581, 868 S.W.2d 496, 497 (1994).

Our cases have consistently recognized that when a crime begins in one county and proceeds to culmination in another county, both counties have jurisdiction to prosecute the crime. *Cloird v. State,* 352 Ark. 190, 99 S.W.3d 419 (2003); *Cozzaglio v. State,* 289 Ark. 33, 709 S.W.2d 70 (1986); See also *Wilson v. State*, 298 Ark. 608, 770 S.W.2d 123 (1989) (reiterating the law that separate crimes committed in one continuous episode in more than one county may be tried in either county and require joinder in one county if the defendant requests it). In *Patterson v. State*, 306 Ark. 385, 815 S.W.2d 377 (1991), this court held that although the murder occurred in Greene County, Craighead County had jurisdiction to try the appellant because some of the acts requisite to the murder occurred in Craighead County. *See also Pilcher v. State*, 303 Ark. 335, 796 S.W.2d 845 (1990) (holding that both Saline County and Grant County had jurisdiction to try the appellant for murder, where the actual killing occurred in one county, but the acts requisite to the consummation of the murder and the subsequent disposal of the body occurred in the other county).

Ark. Code Ann. § 5-1-111(b) creates a presumption in favor of jurisdiction where the charge is actually filed by the State. *Higgins v. State,* 317 Ark. 555, 879 S.W.2d 424 (1994). Ark. Code Ann. § 5-1-111(b) states:

> (b) The state is not required to prove jurisdiction or venue unless evidence is admitted that affirmatively shows that the court lacks jurisdiction or venue.

Findley v. State, 307 Ark. 53, 59, 818 S.W.2d 242, 246 (1991). This presumption can be overcome if positive evidence is admitted that affirmatively shows jurisdiction to be lacking. *Nicholson v. State,* 319 Ark. 566, 892 S.W.2d 507 (1995). If such positive evidence of lack of

jurisdiction is presented, then the State must then offer evidence that jurisdiction is proper in the county where the case is being tried. *Dix v. State,* 290 Ark. 28, 715 S.W.2d 879 (1986).

Ridling contends that no evidence, direct or circumstantial, was presented that any laws were ever violated in Miller County. He asserts that based on the evidence found in Hempstead County, the burden shifted to the State to establish that territorial jurisdiction of Miller County was proper. *Dix, supra.*

[redacted] The State presented substantial evidence that an element of the offense for which Ridling was convicted occurred in Miller County, Arkansas. Lisa testified that in response to her demand that Ridling "handle the situation" concerning Baskett, he left with a baseball bat. Seale testified that she saw Ridling's truck pull up to Baskett's house, and that Ridling and Baskett left together in that same truck. All these activities occurred in Miller County. From this evidence, the jury could logically conclude that one or more of the acts charged occurred in Miller County. Therefore, the trial court did not err in denying Ridling's directed-verdict motion on the basis of jurisdiction.

Capital Felony Murder

Ridling challenges the sufficiency of the evidence to support a conviction of capital felony murder. According to the jury's verdict, Ridling was found guilty "of committing or attempting to commit the crime of kidnapping, and that in the course of and in furtherance of that crime or attempt or in immediate flight therefrom he caused the death of Roy Baskett, Jr. under circumstances manifesting extreme indifference to the value of human life."

[redacted] 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). 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. *Id.* 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. *Id.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Hodge v. State,* 303 Ark. 375, 797 S.W.2d 432 (1990). 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. *Smith, supra.*

In this case, the State was required to prove that Ridling committed or attempted to commit the underlying charge of kidnapping. In the information, the State alleged only the underlying offense of kidnapping or the attempted kidnapping to support the charge of capital felony murder. Ark. Code Ann. § 5-11-102(a)(4) states:

> (a) A person commits the offense of kidnapping if, without consent, he restrains another person so as to interfere substantially with his liberty with the purpose of:
>
> (4) Inflicting physical injury upon him, or of engaging in sexual intercourse, deviate sexual activity, or sexual contact with him

Ridling contends that the State must prove beyond a reasonable doubt (1) that he restrained Baskett without his consent, and (2) that the purpose of such restraint was to inflict physical injury upon him. Ridling cites to *Parker v. State,* 292 Ark. 421, 731 S.W.2d 756 (1987), where this court held that the State did not advance a convincing argument as to how the murder committed after a burglary could be done in the course of and in furtherance of the burglary, both of which were required elements. Therefore, Ridling avers that even if evidence of kidnapping is found, there is no such proof to establish that the death of Baskett was in the course and in furtherance of kidnapping.

However, *Parker* can be distinguished from the case at hand. Unlike burglary, a specified object of kidnapping is that it occurs with the purpose of causing physical injury. Compare Ark. Code Ann. § 5-11-102(a)(4) with Ark. Code Ann. § 5-39-201(a)(1) (Repl. 1997). Proof of kidnapping necessarily requires proof of intent to cause physical injury. In this case, the evidence showed that Ridling restrained Baskett with the purpose of injuring him and that Baskett's death occurred during the course thereof.

In *Hogan v. State,* 281 Ark. 250, 663 S.W.2d 726 (1984), Hogan was the last person seen with the victim before her car was later found abandoned. The victim's blood and clothing were found inside the car, along with Hogan's semen and fingerprints. The victim's body was later found in the Mississippi River. This

court held that there was substantial evidence that the murder occurred in the course of kidnapping and affirmed Hogan's capital murder conviction. .

[redacted] From the evidence presented at trial, the jury could reasonably conclude that Ridling had formed the plan to lure Baskett into his vehicle, where he would be under Ridling's control and his liberty thus restrained, with the purpose of injuring or killing him, and that Baskett died under circumstances manifesting extreme indifference to the value of human life. First, Lisa testified that her husband left their home at noon with a baseball bat, saying that he was going to take care of some things. Next, Ms. Seale saw Ridling arrive at Baskett's home and saw the two leave together soon afterwards. Baskett was last seen at that time. While in jail, Ridling told Gainey that on August 4, 2002, he and Baskett were going to the bank, despite the fact that day was a Sunday. Samples of Baskett's blood were discovered in the passenger seat of Ridling's truck. Bone fragments and several personal items belonging to Baskett were discovered near Hope, an area where appellant was seen twice following Baskett's disappearance.

Corpus Delicti

[redacted] Ridling contends that the State failed to prove *corpus delicti*, that Baskett's death occurred as a result of a criminal act. The *corpus delicti* may be proved by circumstantial evidence, i.e., there was in fact a death and that the deceased came to his death by the criminal agency of another. *Derring v. State,* 273 Ark. 347, 619 S.W.2d 644 (1981); *Edmonds v. State*, 34 Ark. 720 (1879); and 1 Underhill's Criminal Evidence 37 (5th Ed. 1956). In 1879, this court laid out three points to be proved before *corpus delicti* could be found: (1) the fact of death; (2) that the decedent be identified as the person for which defendant had been charged with killing; and (3) criminal agency is the cause of that person's death. *Edmond, supra.* There, two medical witnesses examined the skull and rendered the opinion that the victim had received a blow to the head.

Here, Dr. Charles Kokes testified that due to the lack of remains recovered, that he was unable to determine a cause or manner of death. Dr. Kokes stated that "as a medical doctor reviewing all of the evidence, I could not conclusively say that this was a homicide."

However, circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Howard v. State,* 348 Ark. 471, 79 S.W.3d 273 (2002); *Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999). Such a determination is a question of fact for the fact-finder to determine. *Id.; Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993). The credibility of witnesses is an issue for the jury and not the court. *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001). The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Phillips, supra.* We will disturb the jury's determination only if the evidence did not meet the required standards, thereby leaving the jury to speculation and conjecture in reaching its verdict. *Philips, supra.* Additionally, the longstanding rule in the use of circumstantial evidence is that the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused to be substantial, and whether it does is a question for the jury. *Howard, supra; Gregory v. State*, 341 Ark. 243, 15 S.W.3d 690 (2000).

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. *Howard, supra; Chapman v. State*, 343 Ark. 643, 38 S.W.3d 305 (2001). We have also held that a defendant's improbable explanation of suspicious circumstances may be admissible as proof of guilt. *Id.; Chapman, supra*; *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997).

Here, the jury could reasonably infer that Baskett died by criminal means: the angry confrontation between Ridling and Baskett the night before he disappeared; Ridling's leaving his residence with a baseball bat and telling Lisa he was going to take care of some things; Baskett leaving his home with Ridling; Baskett's blood in Ridling's truck; the discovery of Baskett's bones in an area where Ridling was known to have been in the hours following Baskett's disappearance; and, Ridling's admission to Gainey that the police would not find anything even though they were looking in the right place. Because these facts lead to the conclusion that Ridling kidnapped and murdered Baskett, the trial court did not err in denying his motion for directed verdict.

Marital Infidelity

[redacted] Ridling argues that the introduction of marital infidelity lacked a legitimate connection to the crime charged, amounted to an attack upon his character, and resulted in prejudicial error. In evidentiary determinations, a trial court has wide discretion, and we do not reverse a ruling on the admission of evidence absent an abuse of discretion. *Bullock v. State,* 353 Ark. 577, 111 S.W.3d 380 (2003); *Davis v. State*, 350 Ark. 22, 86 S.W.3d 872 (2002). The trial court did not abuse its discretion and should be affirmed.

During cross-examination of Ridling, the State brought up the topic of marital infidelity. Ridling's counsel objected, but the trial court overruled. Ridling argues that the evidence introduced at trial had no relevance for the offense he was charged. Ridling admitted an affair, "but the State inquired into specific aspects of the affair, and how his former wife found out about it." According to Ridling, this line of questioning had nothing to do with his credibility, but amounted to "smearing" his character. *Barnett v. Commonwealth,* 763 S.W.2d 119 (Ky. 1988). Ridling asks this court to adopt the rulings from *Barnett*, a Kentucky case, and find this type of evidence, with limited exceptions, to be prejudicial.

[redacted] Ridling opened the door to the topic by discussing the matter on direct examination, and he cannot later object to being cross-examined on the subject. *Newman v. State,* 353 Ark. 258, 106 S.W.3d 438. During direct examination, Ridling testified that "[o]n the afternoon of the 4th, Lisa was asking me where I'd been in a jealous way. Like a jealous wife thinking her husband was having an affair or something. . . Lisa was the other woman at one point. I felt like Lisa was suspicious of me all the time." Because Ridling brought up the issue of martial infidelity during direct examination, he cannot now complain about being cross-examined on it.

Daubert

Ridling argues that the trial court erred in ruling that *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), has not been adopted in Arkansas, and as a result, he was prejudiced by evidence that was introduced without a proper foundation.

Bobby Humphries, latent fingerprint examiner for the Arkansas State Crime Laboratory, was declared an expert at Ridling's trial. Ridling's counsel was allowed to question Humphries under

Ark. R. Evid. 702 regarding his qualifications. Outside the presence of the jury, Humphries testified that he had previously been permitted to give similar expert testimony in courts in Arkansas and in Texas. According to Humphries, the method of photographic comparison was accepted in the scientific community, that he had personally performed the technique for six years, and that he was taught that process at the Crime Laboratory. Humphries commented that in the course of his employment he would compare actual, recovered items of evidence to items depicted in photographs. The State moved to have Humphries declared an expert, Ridling's attorney objected, and the trial court overruled the objection.

Bobby Humphries testified that pictures of an axe handle taken while conducting a search warrant at Ridling's home prior to his arrest, matched the handle of the axe that was later found at the area where Baskett's bones were found. Humphries obtained a photograph depicting the axe handle in Ridling's shed and converted it to a 1:1 scale, black and white photograph. He then took his own photograph of the axe handle found near Baskett's remains and converted it to a 1:1 scale, black and white photograph. Humphries examined each to see whether wear patterns, paint spatters, size, grain, and the like matched.

[redacted] In overruling Ridling's objection, the trial court opined that although mentioned in several opinions by this court, the *Daubert* rule had not been adopted in Arkansas. 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.

The rule expressly recognizes that an expert's testimony may be based on experience in addition to knowledge and training. In *Daubert v. Merrell Dow Pharmaceuticals,* the Supreme Court established an inquiry to be conducted by the trial court when faced with the admissibility of certain expert testimony. In *Farm Bureau Mutual Insurance Co. v. Foote,* 341 Ark. 105, 14 S.W.3d 512 (2000), this court adopted *Daubert* and held that a trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the

trier of fact to understand or determine a fact in issue. *Farm Bureau Mut. Ins. Co. v. Foote, supra.* This inquiry entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Id.* A primary factor for a trial court to consider in determining the admissibility of scientific evidence is whether the scientific theory can be or has been tested. Other factors include whether the theory has been subjected to peer review and publication, the potential error rate, and the existence and maintenance of standards controlling the technique's operation. It is also significant whether the scientific community has generally accepted the theory.

Ridling argues that the trial court never went into the *Daubert* analysis, because it was under the mistaken belief that analysis had not been adopted in Arkansas. According to Ridling, there was no scientific foundation laid, therefore his recognition as an expert put a considerable amount of weight on his opinion.

However, the technique, as the State argued, involved "the hardly novel act of examining two photographs for similarity." Moreover, the predicate for testimony concerning Humphries's examination was laid outside the jury's presence by his testimony that his technique was accepted by the scientific community, had been used by him personally for six years, had been used in this State for nearly two decades, and had been accepted as reliable by courts in this State and Texas.

[redacted] The trial court did err in commenting that *Daubert* had not been adopted by Arkansas courts, however it was harmless error, and the decision overruling the objection to Humphries's testimony is affirmed.

"Crime Scene"

For his sixth point on appeal, Ridling argues that the use of "crime scene," improperly negates the presumption of innocence during a trial when the defense is that no crime has been proven. Ridling cites to several cases from other states where courts have dealt with the use of the word "victim," and ruled that such use is inconsistent with the presumption of innocence. *Jackson v. State,* 600 A.2d 21 (Del. 1991); *Allen v. State,* 644 A.2d 982 (Del. 1994); *Veteto v. State,* 8 S.W.3d 805 (Tex. App. 2000); *State v. Wright,* 02CA008179, 2003 WL 21509033 (Ohio App. 2003). Finally,

Ridling contends that the continual reference to the word "crime scene" was prejudicial when the jury was considering whether there was even a crime to begin with.

Ridling did not preserve this point for appeal because he did not make a timely objection. To preserve a point for appeal, an objection must be made at the first opportunity. *Cummings v. State,* 353 Ark. 618, 110 S.W.3d 272; *Gamble v. State*, 351 Ark. 541, 95 S.W.3d 755 (2003); *Berger v. State*, 343 Ark. 413, 36 S.W.3d 286 (2000). We have stated that if a contemporaneous objection is not made during a jury trial, the proverbial bell will have been rung and the jury prejudiced. *Id.; Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998).

Here, the first opportunity to make an objection at trial was when the State was examining Marc Sullivan, who testified that he made a videotape from Interstate 30 at Hope to the crime scene at the Wildlife Management Area. He commented that the total mileage from Interstate 30 to the "crime scene" was 7.1 miles. Sullivan went on to give a more detailed instruction of the roads he took and the mileage on each of those roads. Sullivan then stated that "If you followed those directions you should end up right here. There are vehicles parked up here at the top where you enter the crime scene." Ridling's counsel then requested a bench conference where he objected to the State referring to the area as a crime scene. The trial court overruled the objection. Ridling's claim is barred because he did not object to the first use of "crime scene," but waited until after Sullivan said it again. Regardless, the admission of such a statement constitutes harmless error.

Husband/Wife Privilege

For his final point on appeal, Ridling challenges five statements made by his wife, Lisa Graf, that were introduced over his objection. These statements are:

1. Lisa Graf questioned Ridling about whether he did anything to Baskett. Lisa told Ridling that she had told investigators some lies, specifically that they had not seen Baskett. Ridling responded by saying "that's fine. We haven't." Lisa further recalled Ridling saying, "once you tell the police something, never change your story."

2. On or about August 4, 2002, Lisa asked why Ridling's shoes were wet. Ridling responded that he went jogging, but Lisa asked several other follow-up questions.
3. When Lisa indicated that she was going to give a statement to Bobby Jordan, Ridling stated, "No, you're not. You didn't do anything wrong and they just need to leave you alone."
4. Ridling wrote a letter to Lisa, saying, "I can do better with you on my side, especially about Sunday, August 4th. You made it sound like I was gone four hours and come home guilty of something."
5. In another letter, dated November 26, 2002, Ridling wrote, "I let you influence me too much. August 3rd you went crazy, but it won't happen again."

According to Ridling, all of the communications were protected under Ark. R. Evid. 504 and do not fall under any exception. Ark. R. Evid. 504 provides in part:

> (a) *Definition.* A communication is confidential if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person.
>
> (b) *General Rule of Privilege.* An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse.

Statements made by one spouse to the other that are for the purpose of establishing an alibi are intended for publication to investigators and are not confidential. *Findley v. State,* 307 Ark. 53, 818 S.W.2d 242 (1991). A spouse's direction to another spouse to communicate a fabricated story to the police is intended for disclosure to a third-party and, hence, is not a privileged communication. *David v. State,* 286 Ark. 205, 691 S.W.2d 133 (1985).

In this case, the trial court did not abuse its discretion by overruling Ridling's objection to the above statements and the comments contained in the letters. The statements were intended for Lisa to fabricate a story, to continue the fabrication, or to establish an alibi. The statements were not privileged.

Rule 4-3(h)

In compliance with Ark .Sup. Ct. R. 4-3(h), the record has been examined for adverse rulings objected to by Ridling but not argued on appeal and no prejudicial error is found.

In view of the physical and substantial circumstantial evidence presented to the jury, who determined his guilt and recommended his sentence, we cannot say that the trial court committed error in this case. Accordingly, we find no reversible error in the trial court's rulings.

Affirmed.

CORBIN, J., not participating.

Carl J. FREEMAN *v.* Bruce RUSHTON
and Beth Rushton

04-138 201 S.W.3d 923

Supreme Court of Arkansas
Opinion delivered January 27, 2005

David P. Price, for appellant.

David W. Talley, Jr., for appellee.

JIM GUNTER, Justice. Appellant, Carl J. Freeman, appeals the order of the Columbia County Circuit Court appointing appellees, Bruce and Beth Rushton, as guardians of the person and estate of their grandson, Alec.[1] Appellant argues only one point for reversal: the circuit court erred as a matter of law by granting custody to the child's maternal grandparents instead of to him, the fit biological father. We affirm.

Alec was born on July 20, 1999. His mother, Jill Rushton, was never married to appellant. Jill and Alec lived with Jill's

[1] This appeal was certified to us from the court of appeals pursuant to Ark. R. Sup. Ct. 1-2(b)(5) and (6), as it involves significant issues needing clarification or development of the law.

parents, the appellees, after Alec's birth. As a result of Jill's request for Medicaid benefits, the State filed a paternity action against appellant in 2000. A judgment of paternity declaring appellant to be the child's father was entered on February 8, 2001. Appellant was ordered to pay child support and was also awarded visitation. Although he did not take advantage of extended summer visits granted to him by the court's visitation schedule, appellant otherwise has continued to pay support for and spend time with Alec as set forth in that order.

On February 23, 2003, Jill Rushton died from injuries she received in a car accident. The present guardianship case arose from that event. While Alec was visiting with appellant when the accident occurred, his home was still with the appellees. Appellant has never had custody of Alec. Four days after Jill's death, appellees filed a petition for appointment of guardianship over Alec following the guidelines set forth in Ark. Code Ann. § 28-65-205 (Repl. 2004). Appellant filed an answer and later a motion to dismiss, requesting the court to dismiss the petition and reunite him with his child. While appellant did not file a "petition for guardianship" as such, it appears clear from the record that he sought to obtain Alec by virtue of the natural-parent preference found both in Ark. Code Ann. § 28-65-204(a) and in our long-established caselaw. The circuit court recognized this in its opinion, stating that despite appellant's failure to file such a petition, it was nevertheless considering him to fill that role.

The circuit court granted appellees' petition establishing a guardianship over Alec, setting forth the following findings of fact: (1) Alec has lived with appellees since his birth; (2) appellees have been responsible for seeing to and providing for Alec's educational needs; (3) appellees have been responsible for Alec's medical needs; (4) appellees have been responsible for seeing that Alec receives religious instruction and attends church on a regular basis; (5) appellant is a fit person to have custody; however, he has never had any extended time with Alec; (6) at the time of the hearing, it had been only three months since Alec's mother's death; and (7) Alec is a minor, a guardianship is desirable to protect his needs, and appellees are qualified and suitable to act as his guardians. The court concluded that the key factor in determining guardianship is the best interest of the child and found that it was in Alec's best interest to continue to live and be raised in the home of his grandparents.

While the circuit court noted that Ark. Code Ann. § 28-65-204(a) grants preferential status to the parents of a child, it stated that this preference is only one factor the court must consider in determining who will be the most suitable guardian for the child. Relying on our decision in *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000), the opinion stated further that any inclination to appoint a parent or relative must be *subservient* to the principle that the child's best interest is of paramount consideration. We agree.

We review probate proceedings *de novo*, but we will not reverse the decision of the court unless it is clearly erroneous. *Blunt, supra; Amant v. Callahan*, 341 Ark. 857, 20 S.W.3d 896 (2000). When reviewing probate proceedings, we give due regard to the opportunity and superior position of the circuit judge to determine the credibility of the witnesses. *Id.*

Appellant argues that the circuit court's decision should be reversed, not because its findings of fact were clearly erroneous, but because the court erred as a matter of law in not following the natural-parent preference after finding that appellant was a fit parent. He argues that once a determination has been made in a guardianship proceeding that a parent is "fit," as a matter of law, the circuit court must appoint that fit parent as guardian over his or her child. While we will not set aside a trial court's findings of fact unless they are clearly erroneous, we do not afford the same deference to a trial court's conclusions of law. *Hartford Fire Ins. Co. v. Sauer*, 358 Ark. 89, 186 S.W.3d 229 (2004).

Before appointing a guardian, the circuit court must be satisfied that (1) the person from whom guardianship is sought is a minor or otherwise incapacitated; (2) a guardianship is desirable to protect the needs of that person; and (3) the person to be appointed guardian is qualified and suitable to act as such. Ark. Code Ann. § 28-65-210 (Repl. 2004). The natural-parent preference referred to by appellant derives both from our long-established caselaw in custody matters and from Ark. Code Ann. § 28-65-204(a). While the two preferences are similar, the preference at issue here is the statutory preference, Ark. Code Ann. § 28-65-204(a).

This case began when appellees filed a petition for guardianship. While appellant did not request guardianship in

either his answer or his motion to dismiss, but requested merely to be "reunited" with his child, the circuit court indicated that it was nevertheless considering him to fill the role of guardian. As this is not an initial-custody or modification-of-custody case, but a guardianship case, the parties are governed by the preference set forth in Ark. Code Ann. § 28-65-204(a). Subsection (a) states that "[t]he parents of an unmarried minor, or either of them, if qualified and, in the opinion of the court, suitable, shall be preferred over all others for appointment as guardian of the person." *Id.* Interpretation of a statute is a conclusion of law which we review *de novo. Hartford Fire Ins. Co., supra.*

While this statute, or its predecessor, has been the law since 1949, we have had very few opportunities to interpret it in the context of a parent versus a third party. The most recent case was *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000), relied upon by the circuit court in this case. The question in *Blunt* was whether guardianship of a child whose mother was killed in an amusement-park accident should lie with the maternal grandparents or the alleged biological father. While the parents were not married, and no paternity action had ever been filed, both the probate court and this court treated the appellant as the natural father for purposes of the case. The probate court appointed the maternal grandparents as permanent guardians, finding that appellant was "not suitable" to be the child's guardian. In affirming, we said that

> [p]referential status may be given to the natural parents of the child under Ark. Code Ann. § 28-65-204 (Supp. 1999). This preference, however, is but one factor that the probate court must consider in determining who will be the most suitable guardian for the child. *See Marsh,* 15 Ark. App. 272, 692 S.W.2d 270. Indeed, any inclination to appoint a parent or relative must be subservient to the principle that the child's best interest is of paramount consideration. *See Bennett*, 281 Ark. 414, 664 S.W.2d 476.

Blunt, supra.

Since we upheld the probate court's finding that the natural father in *Blunt* was not suitable, we did not go further in interpreting the statutory language. In this case, appellant argues that

because the circuit court found he was "fit," it must, consequently, appoint him as his son's guardian.[2] We disagree.

It is in the trial court's discretion to make a determination whether a parent is "qualified" and "suitable." *See* Ark. Code Ann. § 28-65-204(a). Assuming such a determination is made, however, the analysis does not end there. This statute does not mandate appointment. It merely states that such a parent "shall be preferred over all others for appointment as guardian." *Id.* We must assume that had the General Assembly intended to require appointment, it would have stated that a parent who is qualified and suitable shall be appointed as guardian. This statute does not do that. This statute merely grants a preference and does not negate the trial judge's discretion to weigh all of the facts before him and to determine the credibility of the witnesses in making his determination of guardianship.

While this statute grants a preference to a parent, "qualified," "suitable," and "preferred" also incorporate our long-stated principle that the child's best interest is of paramount consideration, both in custody and in guardianship situations.[3] *Blunt, supra*; *Crosser v. Henson*, 357 Ark. 635, 187 S.W.3d 848 (2004) (Holding that while there is a natural-parent preference in custody cases, the preference is not absolute. The controlling factor is the best interests of the child. "Determining whether the child is to be better off with one party versus another is precisely what the court should decide. The natural-parent preference and the fitness of that parent are not the absolute determinants in custody-modification matters, as our case law makes clear."); *Henry v. Janes*, 222 Ark. 89, 257 S.W.2d 285 (1953) (court determined in considering the best interest of the child, the natural-parent preference was overcome and changed custody from the natural father to the great-aunt and great-uncle).

Appellant cites *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988), for his argument that the natural-parent

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[2] While the circuit court made a specific finding that the appellees were qualified and suitable, it made no such finding about appellant.

[3] We note also that in *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002), we recognized that a parent's rights do not spring from a "bare biological connection" to the child, but must be born of a relationship to a child demonstrated over time. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

preference must prevail unless it is established that the natural parent is unfit. First, that case is a modification-of-custody case, not a guardianship case, governed by the case-law preference, found in not the statutory preference found in Ark. Code Ann. § 28-65-204(a). Furthermore, in *Stamps*, custody of the child had already been awarded to the natural mother, and the stepfather was attempting to have the custody changed to him. The trial court found that the mother was a fit and proper person for custody, but nevertheless changed custody of the child to the stepfather. We reversed. There had been no finding of a change in circumstances warranting a change in custody. Finally, in *Stamps,* granting custody would deprive the natural parent of custody, something she already had. In this case, appellant has never had custody. We also reiterated in *Stamps* that the preference is based on the child's best interests.

In this case, the circuit court carefully considered the evidence and found that in spite of the statutory preference, it was in Alec's best interest to remain with his maternal grandparents. After a *de novo* review of the record, we cannot say that the circuit court's decision was clearly erroneous. We affirm.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING DELIVERED MARCH 10, 2005

PER CURIAM. Rehearing is denied.

TOM GLAZE, Justice, dissenting. Carl J. Freeman files a petition for rehearing, and argues our court has made a mistake of law. At the very least, I believe this court should clarify its opinion to explain why, under *Troxell v. Granville*, 530 U.S. 57 (2000), and *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002), Freeman, being the only living fit parent, was not given the legal presumption to which he was entitled that he was acting in his son's best interest. As we said in *Linder*, to overcome the presumption in the parent's favor, there must be some other factor, such as harm to the child or custodial unfitness, that justifies state interference. So long as Freeman is fit to care for his son on a day-to-day basis, the Fourteenth Amendment right attaches. The State cannot interfere with a compelling interest, and, in making such analysis, the State must accord

special weight to Freeman's decision as long as he is a fit parent. Instead, this court, in its opinion, largely relied on *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000), which predates *Linder* and makes no refrence to *Troxell*.[1] Although the trial court and parties agreed that Freeman is a fit parent, this court's opinion places the burden on Freeman to show he is "suitable" even though, under relevant case law, he is indisputably found to be a fit parent who is presumed to be acting in his son's best interest. Again, our opinion in this case ignores the legal principle set out in *Troxell* and *Linder* by saying any inclination to appoint a parent or relative must be subservient to the child's best interest. Of course, as previously stated above, the proper analysis must commence with the presumption that Freeman was acting in his son's best interest; however, Freeman was not given the benefit of that presumption. Our court, therefore, cannot be assured that, if it had utilized the correct legal principles and analysis, the trial court would have ruled the way it did. Utilizing the proper analysis, that presumption may well be rebutted. It appears to me that Freeman's argument that the trial court erred as a matter of law is correct under the tenets established in *Troxell* and *Linder*. In my view, confusion exists in this case and we are the only ones who can alleviate that confusion — better now than later.

[1] The court's opinion only mentions the *Linder* case in a footnote, for the proposition that we recognize a parent's rights do not spring from a "bare biological connection" to the child, but must be born of a relationship to a child demonstrated over time. This proposition is found in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), but that rule hardly answers the issues now before our court.

Garry KYZAR *v.* CITY of WEST MEMPHIS, Billy Johnson, Mayor; the West Memphis Advertising and Promotion Commission, Frank Waggener, Chairman; Frank Martin, James Hold, Clarence Davis, Gheric Bruce, James Pulliaum, Ramona Taylor, Harold Thomas, Lorraine Robinson, Marco McClendon, Rev. Hermann Coleman, and Al Felton in their official capacity as members of the West Memphis City Counsel, and Phillip Para

04-338 201 S.W.3d 916

Supreme Court of Arkansas
Opinion delivered January 27, 2005

[redacted]

[redacted]

[redacted]

Mike Everett, and *Joe M. Rogers,* for appellant.

Erika Ross, and *David Peeples,* for appellee.

JIM GUNTER, Justice. Appellant, Garry Kyzar, appeals from an order from the Crittenden County Circuit Court granting a motion to dismiss filed by appellees, City of West Memphis *et al.* Appellant's complaint requested a writ of mandamus ordering appellees to call an election on a referendum petition concerning a tax increase. We affirm.

On June 26, 2003, the city council ("Council") of the City of West Memphis ("West Memphis") passed Ordinance 2072 ("ordinance"), which levied a one-percent tax upon the gross receipts or gross proceeds from the sale of prepared foods and beverages and from the rental of all hotel and motel facilities in West Memphis, as authorized by Ark. Code Ann. § 26-75-602 (Repl. 1997). This ordinance is known as the "hamburger tax." The collection of this tax increase was to begin on June 26, 2003.

Appellant, among others, signed a petition seeking a referendum election on the ordinance, and on July 24, 2003, the petition was timely filed with the city clerk, appellee Para. The

clerk verified that there were the requisite number of signatures on the petition, but the petition was not certified. On July 30, 2003, at a city council meeting, the mayor of West Memphis announced that the petition was certified by the clerk and that there would be a vote on the ordinance. However, the clerk subsequently rejected the petition as legally void because a copy of the referred ordinance was not attached to the petition as allegedly required by Ark. Code Ann. § 7-9-106(b) (Repl. 2000). The petition was never certified by the clerk, nor was it set for a referendum election.

On September 15, 2003, appellant filed a complaint in which this referendum issue was consolidated with another action alleging an illegal exaction. In his complaint, appellant requested *inter alia* that the trial court issue a writ of mandamus ordering the council to call an election on the petition for referendum, or in the alternative, that the clerk certify the petition for referendum. Appellees filed their answer on September 22, 2003.

On September 22, 2003, appellees filed a motion to dismiss the referendum portion of appellant's complaint. In their motion to dismiss, appellees averred that appellant failed to state a claim under Ark. R. Civ. P. 12(b)(6) with regard to the referendum portion of his complaint. Appellees argue that a writ of mandamus was inapplicable because the petition was void for its failure to satisfy the statutory requirements of Ark. Code Ann. § 7-9-106, which requires a petition to be certified. Appellees conclude that until the sufficiency of the petition is established, through the procedure mandated by Amendment 7 to the Arkansas Constitution, appellant has no legal right that may be enforced by mandamus.

A hearing was held before the Crittenden County Circuit Court. Counsel for appellant advised the court that the issue of the hearing was the legal sufficiency of the petition and that he was not asking the court to rule on the illegal-exaction issue. The trial court granted appellees' motion to dismiss, finding that Ark. Code Ann. § 7-9-106(b) imposes a jurisdictional requirement that a referendum petition on a local ordinance must have a complete copy of the ordinance attached to the petition. Because the petition did not strictly comply with Ark. Code Ann. § 7-9-106(b), it was fatally flawed and could not be set for a referendum election. In compliance with Ark. R. Civ. P. 54(b)(1), the trial court certified that the order was a final judgment with regard to the issue of a referendum vote.

In *Kyzar v. City of West Memphis*, 359 Ark. 366, 197 S.W.3d 502 (2004), we found appellant's addendum to be deficient, pursuant to Ark. Sup. Ct. R. 4-2(a)(8) (2004), and we gave appellant the opportunity to file a substituted addendum. Appellant has done so, and we now consider the merits of his appeal. From the trial court's order granting appellees' motion to dismiss under Ark. R. Civ. P. 12(b)(6), appellant brings his appeal.

When a trial court considers matters outside of the pleadings, the appellate courts will treat a motion to dismiss as one for summary judgment. Ark. R. Civ. P. 12(b); *Smothers v. Clouette,* 326 Ark. 1017, 934 S.W.2d 923 (1996). Summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Calcagno v. Shelter Mutual Insurance Co.,* 330 Ark. 802, 957 S.W.2d 700 (1997). The burden of sustaining a motion for summary judgment is the responsibility of the moving party. *Pugh v. Griggs,* 327 Ark. 577, 940 S.W.2d 445 (1997). Once the moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* 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.* Because the order states that the trial court considered "pleadings of the parties, the testimony and arguments from the September 19, 2003, hearing," we will treat the motion as one for summary judgment. *Smothers, supra.*

This appeal also requires us to determine the application of Ark. Code Ann. § 7-9-106(b). We articulated the rules of statutory construction in *Weiss v. American Honda Finance Corp.*, 360 Ark. 208, 195 S.W.3d 911 (2004), where we stated:

> The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Raley v. Wagner,* 346 Ark. 234, 57 S.W.3d 683 (2001); *Dunklin v. Ramsay,* 328 Ark. 263, 944 S.W.2d 76 (1997). When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Stephens v. Arkansas Sch. for the Blind,* 341 Ark. 939, 20 S.W.3d 397 (2000); *Burcham v. City of Van Buren,* 330 Ark. 451, 954 S.W.2d 266 (1997). Where the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legisla-

> tive history, and other appropriate means that shed light on the subject. *Stephens, supra* (citing *State v. McLeod,* 318 Ark. 781, 888 S.W.2d 639 (1994)). Finally, the ultimate rule of statutory construction is to give effect to the intent of the General Assembly. *Ford v. Keith,* 338 Ark. 487, 996 S.W.2d 20 (1999); *Kildow v. Baldwin Piano & Organ,* 333 Ark. 335, 969 S.W.2d 190 (1998).

Weiss, supra (citing *Faulkner v. Arkansas Children's Hospital,* 347 Ark. 941, 952, 69 S.W.3d 393, 400 (2002)). With these standards of review in mind, we turn to appellant's argument on appeal.

For his first point, appellant argues that the trial court erred in ruling that the requirements of Ark. Code Ann. § 7-9-106 apply to petitions for referendum on municipal ordinances. Specifically, appellant contends that Ark. Code Ann. § 7-9-106 does not apply to municipal ordinances, but only to "any act having general application throughout the state" or "any proposed amendment to the Arkansas Constitution." Ark. Code Ann. § 7-9-101(1) and (2) (Repl. 2000). In response, appellees argue that Ark. Code Ann. § 7-9-106 does apply to municipal referenda.

We are required to review Ark. Code Ann. § 7-9-106(b), which provides:

> (b) To every petition for the referendum shall be attached a full and correct copy of the measure on which the referendum is ordered.

Id.

"Measure" is defined in Ark. Code Ann. § 7-9-101, which provides in pertinent part:

> As used in this subchapter, unless the context otherwise requires:
>
> (1) "Act" means any act having general application throughout the state, whether originating in the General Assembly or proposed by the people, and referred acts;
>
> (2) "Amendment" means any proposed amendment to the Arkansas Constitution, whether proposed by the General Assembly or by the people;
>
> * * *

(6) "Measure" means either an amendment or an act[.]

Id.[1]

"Measure" is defined by Ark. Code Ann. § 7-9-101(1) and (2), which refer to an act and an amendment, respectively. Because the present case does not involve a proposed amendment to the Arkansas Constitution, subsection (2) does not apply. Thus, we must look to subsection (1), which defines an act, to determine whether it applies to a local ordinance.

In so doing, we note that Amendment 7 authorizes the right of referendum. Amendment 7 amended Art. 5, § 1 of the Arkansas Constitution and is commonly referred to as the Initiative and Referendum Amendment. It provides:

> The initiative and referendum powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special, and municipal legislation of every character in and for their respective municipalities and counties, but *no local legislation shall be enacted contrary to the Constitution or any general law of the State*, and any general law shall have the effect of repealing any local legislation which is in conflict therewith.

Ark. Const. art. 5, § 1 (emphasis added). Amendment 7 must be liberally construed in order to effectuate its purposes and only substantial compliance with the amendment is required. *Porter v. McCuen*, 310 Ark. 674, 839 S.W.2d 521 (1992).

Appellant admits in his brief that "[t]he City of West Memphis has, indeed, enacted ordinances governing the referendum, . . . [b]ut those ordinances do not address the attachment of a copy of an ordinance to a petition for referendum." Because there is no local legislation on the subject of attachment, we now address whether Ark. Code Ann. § 7-9-106(b) is applicable to the petition at issue.

This question was addressed in *Townsend v. McDonald*, 184 Ark. 273, 42 S.W.2d 410 (1931), where appellant Townsend sought by mandamus to compel the Secretary of State to file a petition for a referendum on a statewide act passed by the legisla-

[1] The statute at issue, Ark. Code Ann. § 7-9-106(b), was enacted by Act 2 of 1911. The definition section, found at Ark. Code Ann. § 7-9-101, was enacted by Act 195 of 1943.

ture. The Secretary of State refused to file the petition because a full and correct copy of the act was not attached to it. We held that the failure to attach a full and correct copy of the measure to be voted upon rendered the petition invalid. *Id.* We stated:

> The statute was not passed as a mere matter of convenience or direction to be observed either by those circulating the petitions or by the Secretary of State. The act was passed as a safeguard to the rights of the voters to whom the petition was offered for signature. The requirement was intended to secure the voters, whose interests were to be affected, an opportunity to know what they were signing, and to know that they were not signing something different from those whose signatures appeared on the petition. *This is a right of great benefit to the voters, and we do not think the requirement should be regarded as merely directory, but that it is a substantial right which is of a mandatory character, and must be complied with or the proceeding will be void.*

Id. (emphasis added). In *Townsend, supra*, we held that the attachment requirement is mandatory and jurisdictional.

Citing *State ex rel. v. Olcott*, 62 Or. 277, 125 P. 303 (1912), with approval, we further noted in *Townsend*:

> The [Oregon] court held that it was not necessary to have a full and correct copy of the title and text of the measure proposed attached to each sheet of the petition. This would make each sheet a separate petition and would be putting form above substance. No matter how many signers there are to a petition and how many sheets are used, they are pasted together and become a constituent part of the same petition. It is only necessary that a full and correct copy of the measure on which the referendum is asked be filed with the petition and attached thereto in order that the petitioners may have the opportunity to read it and inform themselves as to the act to be referred *before signing* the petition, if they wish to do so.

Townsend, supra (emphasis added).

This rationale comports with our holding in *Reeves v. Smith*, 190 Ark. 213, 78 S.W.2d 72 (1935), where we held that the filing of several parts of a petition constitute but one petition. *Id. See also Bradley v. Galloway*, 279 Ark. 231, 651 S.W.2d 445 (1983) (noting that it is not necessary that a full and correct copy of the referred measure be attached to "each sheet" of the petition); *Leigh v. Hall*, 232 Ark. 558, 339 S.W.2d 104 (1960).

With this well-established precedent in mind, as well as the statutory provisions of Ark. Code Ann. § 7-9-106(b), we turn to the case *sub judice*. First, we look to the plain meaning of Ark. Code Ann. § 7-9-106(b), which provides, "To every petition for the referendum shall be attached a full and correct copy of the measure on which the referendum is ordered." *Id.* The operative phrase is "*every* petition." Here, the plain meaning of Ark. Code Ann. § 7-9-106(b) requires a clerk to reject the petition for referendum if a "full and correct copy of the measure" is not attached. Thus, "every petition" makes no distinction between local, county, or state petitions, and a copy of the ordinance must be attached to the petition. Under *Townsend*, *supra*, this requirement is mandatory and jurisdictional. *Id.* Because West Memphis did not have a local ordinance already in place on the subject of attachment, the clerk must look to Ark. Code Ann. § 7-9-106(b) for guidance.

Second, we must examine the intent of the General Assembly in Act 2 of 1911, which is codified at Ark. Code Ann. § 7-9-106. The title of the act provides:

> An act to provide for carrying into effect the initiative and referendum powers reserved by the people in Amendment No. 10, to the Constitution of the State of Arkansas on *general county and municipal legislation*, to regulate elections thereunder and to punish violations of this Act.

Acts 1911, (Ex. Sess.), No. 2 (emphasis added). Thus, it appears from the language of Act 2 of 1911 that the General Assembly had the intent for this act to apply to "general county and municipal legislation," including local ordinances like the one in the present case.[2]

Appellant contends that the word, "measure," which is defined as an "act" in Ark. Code Ann. § 7-9-101(1), does not apply to the West Memphis ordinance. We disagree. Under Ark.

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[2] We have routinely held that when a municipality acts in a legislative capacity, it exercises a power conferred upon it by the General Assembly. *Summit Mall Company v. Lemond*, 355 Ark. 190, 132 S.W.3d 725 (2003). As a consequence, a legislative act of a municipality equates to an act by the General Assembly. *Id.* We have further stated that the test for determining whether a resolution or ordinance of a municipality is legislation is whether the proposition is one that makes new law or, rather, executes a law already in existence. *Id.* Here, the Council's action in enacting municipal legislation, such as this ordinance, was clearly legislative.

Code Ann. § 7-9-101(1), "measure" applies to "act[s] having *general application throughout the state*[.]" *Id.* (emphasis added). This definition does not conflict with the definition of measure found in Amend. 7, which includes "any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment *of any character.*" Ark. Const. art 5, § 1 (emphasis added). Thus, we do not perceive any conflict between Ark. Code Ann. § 7-9-101(1) and Ark. Code Ann. § 7-9-106(b). We reconcile statutory provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part. *Arkansas Tobacco Control Bd. v. Santa Fe Natural Tobacco Co., Inc.*, 360 Ark. 32, 199 S.W.3d 656 (2004). We also look to the legislative history, the language, and the subject matter involved. *Id.*

Lastly, as we noted in *Townsend, supra,* the purpose of attaching a copy of the measure to the petition is to inform the voter of what he or she is signing, regardless of whether the measure is a statewide act or a local ordinance. Those who sign must have the opportunity to know the contents of the local ordinance *before signing* the petition. *Townsend, supra.* Here, that opportunity was not available in West Memphis. As we said in *Townsend,* "this requirement was intended to secure the voters, whose interests were to be affected, an opportunity to know what they were signing, and to know that they were not signing something different from those whose signatures appeared on the petition." *Id.* Asking the voters to sign a petition without an attached copy of the ordinance would defeat the purpose of Ark. Code Ann. § 7-9-106(b).

For his second point on appeal, appellant argues that the trial court erred in finding that the city clerk did not certify appellant's petition for referendum. Specifically, appellant contends that, because the mayor inadvertently stated in the Council's meeting that the petition had been certified, "[s]uch evidence seems to mandate a factual conclusion that the clerk had determined the sufficiency of the signatures on the referendum."

[redacted] Appellant's argument is misplaced. Here, the trial court found that the clerk never certified the petition, but rejected it as legally void because a copy of the referred ordinance was not attached to the petition for referendum. In the parties' joint exhibit 1, counsel for appellant and appellees signed a stipulation of counsel stating that the clerk verified that the petition contained the requisite number of signatures, but that the clerk did not issue

a written certification that the petition was legally sufficient. Paragraph 5 of the stipulation of counsel states: "The West Memphis City Council has taken no action to call an election on the petition for referendum for the reason that the petition for referendum has not been certified by the city clerk." For these reasons, we conclude that the trial court was correct in its finding.

Based upon the foregoing conclusions, as well as our standard of review on summary-judgment motions and statutory construction, we hold that the trial court properly ruled as a matter of law that the petition was fatally flawed because it did not comply with Ark. Code Ann. § 7-9-106(b). Accordingly, we affirm.

Shane CALAWAY *v.* Barbara DICKSON

04-1091 201 S.W.3d 927

Supreme Court of Arkansas
Opinion delivered January 31, 2005

William C. Plouffe, Jr., for appellant.

Compton, Prewett, Thomas & Hickey, L.L.P., by: *F. Mattison Thomas, III*, for appellee.

PER CURIAM. Appellant Shane Calaway appeals the denial of sanctions under Ark. R. Civ. P. 11 (2004) against Appellee Barbara Dickson. This case was submitted for decision on January 27, 2005. Upon reviewing the materials included in Mr. Calaway's abstract and addendum, it is apparent that the hearing held on appellant's motion for sanctions is not abstracted in accordance with our rules. Instead, a copy of the transcript from the Rule 11 hearing is improperly included in the addendum. Our rules clearly state that the addendum shall contain "true and legible photocopies of the order, judgment, decree, ruling, letter opinion, or Workers' Compensation Commission opinion 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." Ark. Sup. Ct. R. 4-2(a)(8) (2004). The appellant's abstract of the transcript of testimony of witnesses and colloquies between the court and counsel should be included in the abstract. Ark. Sup. Ct. R. 4-2(a)(5).

Supreme Court Rule 4-2(b)(3) explains the procedure to be followed when an appellant has failed to supply this court with a sufficient brief. The rule provides:

> 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 unreasonably 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. R. Sup. Ct. 4-2(b)(3) (2004).

We hereby order the appellant to submit a substituted brief that contains an abstract of the hearing denying his motion for Rule 11 sanctions. Appellant is directed to file the substituted brief within fifteen days from the entry of this order. Mere modifications of the original brief will not be accepted. *See* Ark. Sup. Ct. R. 4-2(b)(3). According to Rule 4-2(b)(3), if appellant fails to file a complying abstract and addendum within the prescribed time, the judgment or decree may be affirmed for noncompliance with the Rule.

After service of the substituted brief on the appellee, the appellee shall have an opportunity to file a responsive brief in the time prescribed by the Supreme Court Clerk, or to rely on the appellee's brief previously filed in this appeal.

Rebriefing ordered.

FMC CORPORATION, INC., and Agro Distribution, LLC *v.* Roy HELTON, d/b/a Helton Farms; Joyce Clifton and Ricky Clifton, d/b/a Clifton Farms Joint Venture; Riddell Flying Service, Inc.; Gibbons Flying Service, Inc.

and

Roy Helton, d/b/a Helton Farms; Joyce Clifton and Ricky Clifton, d/b/a Clifton Farms Joint Venture *v.* Agro Distribution, LLC, and Land O'Lakes, Inc.

04-215 202 S.W.3d 490

Supreme Court of Arkansas
Opinion delivered February 3, 2005

Womack, Landis, Phelps, McNeill & McDaniel, by: *John V. Phelps*, *Jeffrey W. Puryear*, and *Mark Mayfield*; and *Butler, Snow, O'Mara, Stevens & Cannada, PLLC*, by: *Lee Davis Thames*, for appellant FMC Corporation.

Bridges, Young, Matthews & Drake, PLC, by: *Joseph A. Strode*, for appellant Agro Distribution, LLC.

Nix, Patterson & Roach, by: *Brady Paddock* and *Anthony Bruster*; and *Bond & Chamberlin*, by: *Will Bond* and *Neil Chamberlin*, for appellees Helton and the Cliftons.

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

Friday, Eldredge & Clark, LLP, by: *Donald H. Bacon*, for appellee Gibbons Flying Service, Inc.

DONALD L. CORBIN, Justice. This case arises from a jury verdict awarding damages resulting from the application of the insecticide Fury to the wheat crops of two farms located in Phillips County, Arkansas. Appellants raise numerous points on appeal. There are questions involving interpretation of our statutes; hence, our jurisdiction of this case is pursuant to Ark. Sup. Ct. R. 1-2(b)(6). We reverse and remand for a new trial.

Before setting forth the necessary facts, it is helpful to review the parties in this case, as well as their roles in the instant litigation. Appellants are FMC Corporation, Inc., and Agro Distribution,

LLC. FMC is the manufacturer of Fury. Agro is a distributor of chemical products, including Fury. Land O'Lakes, Inc., is a fifty percent owner of Agro and is the subject of the cross-appeal. Appellees in this case include Roy Helton, d/b/a Helton Farms and Joyce Clifton and Ricky Clifton, d/b/a Clifton Farms Joint Venture. It was these two farming operations that were growing the wheat on which Fury was sprayed. Also included as Appellees are two flying services who are licensed under Arkansas law to spray pesticides on crops, Riddell Flying Service, Inc., and Gibbons Flying Service, Inc. These two flying services were the ones who sprayed Fury on the wheat crops.[1]

In March 2001, Tyrus Teague, a salesman for FMC, made a routine sales call to Doug Davidson, manager of Agro's facility in Holly Grove, Arkansas. They discussed the FMC line of products. They also discussed the fact that FMC had applications pending before the Environmental Protection Agency to expand the legal uses of Fury to additional products, including wheat.

At the end of April 2001, J.R. Davidson, a salesman for Agro, detected a heavy concentration of armyworms in the Helton and Clifton wheat fields. Armyworms can be devastating to a wheat crop because they eat the leaves on wheat and ring the head causing it to fall off. J.R. contacted his manager at Agro's Holly Grove location, Doug Davidson, to determine what products Agro would sell for use on wheat. In turn, Doug contacted some manufacturers' sales representatives to get a product recommendation and the recommended rate of application. One such call was to Teague who recommended the use of Fury and provided an application rate. Doug reported this recommendation to J.R., and the Fury was loaded and delivered to Riddell Flying Service and Gibbons Flying Service. J.R. wrote the rate of application on the receipt tickets left with the flying services. The pesticide was applied to the wheat crops of the two farms and killed the armyworm infestations. A few days later, however, Doug received a phone call from a pilot, informing him that Fury had not yet been approved for use on wheat. Agro, in turn, notified Appellees, as well as other farmers who had recently purchased Fury.

It was soon discovered that similar incidents involving the use of Fury on wheat occurred in Mississippi and that the Missis-

[1] For purposes of clarity, when the opinion refers to Appellees, it is referring to Helton and the Cliftons.

sippi Department of Agriculture had begun an investigation. The Arkansas Plant Board subsequently launched its own investigation in May 2001, and a quarantine was instituted on all wheat that had been sprayed with Fury. As a result of the quarantine, Appellees were initially prevented from harvesting their wheat. They finally received approval to cut the wheat, but had to locate storage for the adulterated wheat until the quarantine was resolved.

Upon learning of the quarantine, Agro employees, along with Kevin Conrad, an employee of parent company, Land O'Lakes, held a conference call. They decided that Doug Davidson would be responsible for assisting affected customers in locating storage facilities for the quarantined wheat. At some point, Appellees were told that either FMC or Agro would be responsible for the transportation and storage costs of the adulterated wheat.

During this time, a meeting was held in Mississippi, at which several FMC employees and representatives of various state and federal agencies explained that a program was being created to allow FMC to purchase the adulterated wheat and reimburse the farmers for the additional transportation and storage charges. Doug Davidson attended this meeting and reported what he learned to Appellees.

Donald Wilkison and Keith Wilkison, who were customers of Agro, agreed to store the Appellees' wheat in their on-site storage facilities of their farms. As part of their agreement, the wheat was to be removed by August 1, so that they could store their own rice and corn crops once they were harvested.

During the pendency of the quarantine, the United States Department of Agriculture determined that farmers who had sprayed their crops with Fury would not be eligible for their loan deficiency payments (LDP), which amounted to approximately $.37 per bushel. At that time, Helton had 37,200 bushels of wheat, and the Cliftons had 28,600 bushels. In the meantime, FMC finalized its arrangement to purchase the quarantined wheat. An offer to purchase the wheat was made on or about June 21, 2001. As part of the agreement, the farmers had to sign a release of liability. Appellees refused to sign the release and sell their wheat to FMC. By August 1, Appellees had not sold their wheat and had also failed to remove it from the Wilkisons' storage facilities. At this time, the wheat was still quarantined. Appellees refusal to sell their wheat to FMC or to otherwise remove it from the Wilkisons' storage facilities led to a dispute between Appellees and Conrad.

Conrad eventually notified Appellees that their wheat was going to be removed from the Wilkisons' storage bins and dumped onto the ground at their farms. Appellees obtained an injunction, preventing Conrad from removing and dumping their wheat.

The wheat subsequently remained in the Wilkisons' storage bins until December 27, 2001, when it was sold. The proceeds from the sale of the wheat were deposited with the clerk of the court in Phillips County. The Wilkisons attempted to assert a lien against the proceeds to cover the costs of storage. The court, however, entered an order in October 2002, directing that the proceeds be paid to Appellees, after determining that there was no basis for the Wilkisons' lien.[2]

Appellees filed their original complaint on August 9, 2001, against numerous parties for damages they sustained as a result of Fury being used on their wheat. A second amended complaint was filed on October 9, 2002. As is pertinent to the current appeal, Appellees alleged: (1) fraud/misrepresentation on the part of FMC and Agro; (2) negligence on the part of FMC, Agro, Riddell Flying Service, and Gibbons Flying Service; (3) breach of express warranty by FMC and Agro; (4) breach of implied warranty of fitness for a particular purpose by FMC and Agro; (5) violation of the Arkansas Deceptive Trade Practices Act ("ADTPA") by FMC and Agro; and (6) outrage by FMC, Agro, and Land O'Lakes, Inc.

Prior to trial, FMC and Agro filed motions for summary judgment. Appellees dismissed their claims for breach of express and implied warranties against FMC and Agro. They also dismissed their claim for outrage against FMC. Appellees subsequently nonsuited their claims against Riddell Flying Service and Gibbons Flying Service. FMC and Agro had filed cross-claims against both flying services, but the flying services filed a pretrial motion to sever. The trial court granted the motion to sever.

The case was tried before a Phillips County jury on May 13-21, 2003. At the close of Appellees' case, both FMC and Agro moved for directed verdicts on all claims. The trial court granted Agro's and Land O'Lakes's directed-verdict motions on the claim of outrage, thus dismissing Land O'Lakes from the action. The

[2] Appellees initially included the Wilkisons as defendants in their complaint, arguing that any money owed for storage was owed by FMC and Agro. The Wilkisons subsequently filed a cross-claim against Agro for breach of contract. This claim was severed and is not at issue in the present appeal.

remainder of the motions were denied. The directed-verdict motions were renewed at the close of all evidence and again were denied by the trial court. The case was then submitted to the jury on interrogatories.

The jury returned verdicts in favor of Appellees, apportioning fault as 10% to each Appellee; 40% to Agro; and 50% to FMC. Clifton was awarded damages totaling $527,017.16. This award consisted of economic damages of $27,017.16; damages for mental anguish of $250,000.00; and punitive damages of $250,000.00. Helton was awarded total damages of $554,085.95, which included economic damages of $54,085.95; damages for mental anguish of $125,000.00; and punitive damages of $375,000.00.

Following the trial, Appellees filed a petition requesting attorneys' fees of $217,507.50, as well as costs and postjudgment interest. Appellees argued that they were entitled to fees as they prevailed on their claim under the ADTPA. The petition sought payment for 1,242.90 hours of work performed at an hourly rate of $175.00. A supplemental petition was filed on September 22, 2003, seeking additional fees for work performed after the filing of the initial petition. The trial court awarded Appellees attorneys' fees totaling $233,572.50, as well as taxable costs totaling $1,006.67. This appeal followed.

I. Severance

Although not raised as the first point on appeal, we will address the issue of severance first because it was reversible error for the trial court to grant Riddell's and Gibbons' motion to sever the cross-claims filed against them by FMC and Agro. In its brief to this court, FMC argues that the trial court erred in granting severance because they were prejudiced by it. According to FMC, the trial court's error was compounded by its refusal to include the flying services in the special interrogatories submitted to the jury. Likewise, Agro argues that there was no sound reason supporting severance and, thus, the trial court abused its discretion in this regard.

Appellees Helton and the Cliftons argue that the trial court did not abuse its discretion in severing the cross-claims and that it is speculative to argue that the jury would have apportioned any fault to Riddell or Gibbons.

Appellees Riddell and Gibbons, who have filed a joint brief, argue that the trial court correctly ordered severance because FMC and Agro suffered no prejudice, as they will still have the chance to

pursue their cross-claims in a subsequent trial. Moreover, Riddell and Gibbons argue that severing the cross-claims could have obviated the need for a trial on these claims if FMC and Agro had prevailed; thus, the trial court correctly determined that judicial economy warranted severance.

This court has recognized that a trial court's order pursuant to Ark. R. Civ. P. 42 is a matter within the trial court's discretion, and the court's decision will not be reversed absent a showing of abuse of that discretion. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). Thus, the question to be resolved by this court is whether the trial court abused its discretion in severing FMC's and Agro's cross-claims against Riddell and Gibbons.

Severance of claims is provided for in Rule 42(b), which provides:

> *Separate Trials.* The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues.

This court discussed the primary purpose underlying Rule 42(b) in *Alter*, and explained that its purpose is to further convenience, avoid delay and prejudice, and serve the needs of justice. *Id.* The court in *Alter* further explained that in evaluating a motion under Rule 42, the primary consideration is efficient judicial administration, as long as no party suffers prejudice as a result of severance. *Id.* (citing *Hunter v. McDaniel Bros. Const. Co.*, 274 Ark. 178, 623 S.W.2d 196 (1981)). In *Pennington v. Harvest Foods, Inc.*, 326 Ark. 704, 934 S.W.2d 485 (1996), this court further elaborated that the trial court's abuse of discretion could be demonstrated by a showing of prejudice to the complaining party. *Id.*

In the case at bar, it was error for the trial court to order severance for two reasons. First, severance in this case did not facilitate principles of judicial economy. Second, granting severance in this case prejudiced FMC and Agro. With regard to judicial economy, the record reveals that the two pilots responsible for spraying the wheat with Fury testified at trial. Their testimony was rather short and straightforward. To summarize, each admitted that they were licensed by the State Plant Board and that they were responsible for spraying Appellees' crops. Each pilot also admitted

that they had a duty to read the label of any insecticide they sprayed and that they did not do so in this case. Thus, the jury heard evidence regarding the role that these flying services played in this case. The jury also heard testimony that Appellees had nonsuited their claims against the flying services immediately prior to trial. Considering the fact that the pilots were present at trial and testified as to their role in this case, it is hard to fathom how severing the cross-claims promoted judicial economy.

More importantly, FMC and Agro were prejudiced by the order granting severance. They had a right to argue that the flying services were contributorily negligent and to have their argument considered in the context of this entire case. The pilots' actions are directly related to the harm alleged in this case. The jury, who was responsible for apportioning fault, heard testimony about the flying services' possible negligence, but were then told that Appellees' claims against them had been dropped. It is true that FMC and Agro could have still pursued their cross-claims in a subsequent trial, but to do so, they would be required to duplicate much of the work performed in the initial trial.

This court reversed a trial court's order denying severance in *Pennington*, 326 Ark. 704, 934 S.W.2d 485, after determining that the trial court abused its discretion. In so holding, this court noted that "[i]t is easy to be seduced by the appeal of judicial economy." *Id.* at 720, 934 S.W.2d at 494. Even though *Pennington* was a case where severance should have been granted, its rationale regarding the trial court's abuse of discretion can be applied in the instant case.

Here, the trial court reasoned that severance was appropriate because it would simplify the trial. However, this conclusion did not appropriately take into consideration the prejudicial effect severance had on FMC and Agro. As this court stated in *Alter*, "[i]n no area of the law are we disposed to promote the interests of judicial economy over a party's right to receive a fair trial." *Alter*, 309 Ark. at 437, 834 S.W.2d at 141. Accordingly, it was error for the trial court to grant severance where it did not facilitate judicial economy and resulted in prejudice to FMC and Agro.

Having determined that the trial court erred in ordering severance, we must remand this case for a new trial. Thus, it is not necessary for us to address each argument raised by FMC and Agro. There are some issues, however, that will necessarily be raised in

the course of a new trial that we are compelled to address in order to avoid any confusion on remand.

II. Mississippi Evidence

Next, we will consider FMC's argument that the trial court erred in refusing to exclude evidence related to allegations that Fury was sprayed on wheat crops in Mississippi. Specifically, FMC avers that the claims at issue in this case involve individuals, corporations, and farms in Arkansas only and, as such, the trial court abused its discretion in allowing evidence to be presented to the jury regarding communications and events that took place outside this state. FMC specifically challenges evidence regarding the off-label use of Fury on farms in Mississippi; national sales information; evidence of meetings that took place in Mississippi relating solely to Mississippi product applications; and, information regarding Mississippi farmers affected by the use of Fury. Moreover, FMC challenges the trial court's allowing Appellees' counsel to argue that there was a plot or scheme relating to FMC's alleged promotion of off-label use of Fury in Arkansas and Mississippi. According to FMC, the court's ruling violated its due process rights under both the United States Constitution and the Arkansas Constitution because it allowed the jury to consider its out-of-state conduct during the trial on the merits and in determining punitive damages.

Appellees counter that there is no merit to FMC's argument on this point. According to Appellees, FMC itself introduced evidence concerning off-label application of Fury in Mississippi. Thus, Appellees contend that FMC cannot invite error and then complain about it on appeal. Moreover, Appellees argue that the off-label application of Fury in Arkansas and Mississippi were so intertwined that they could not be separated at trial.

In reviewing this allegation of error, we should begin with Appellees' assertion that FMC invited any error by introducing evidence of actions in Mississippi itself. Appellees point to the fact that FMC introduced as an exhibit at trial the "Mississippi and Arkansas FURY Wheat Agreement." FMC counters that it only introduced that document after the trial court denied its motion. The record reflects that FMC's pretrial motion specifically objected to the admission of any evidence related to the use of Fury in Mississippi. Prior to trial, a hearing was held on the motion, and the trial court denied the motion. Thus, we disagree with Appellees' assertion that the doctrine of invited error is applicable.

Turning now to the merits of this argument, FMC argues that its constitutional rights were violated by introduction of the Mississippi evidence during the trial on the merits, and because the trial court failed to bifurcate the punitive-damages proceedings, the Mississippi evidence could have been considered by the jury in awarding damages. In support of its argument, FMC points to two United States Supreme Court cases, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). In both those cases, the Court held that a jury may not consider activity by a defendant that occurred in another state when assessing an award of punitive damages.

Notably, in *Campbell*, the Court recognized that a Utah trial court erred in approving a jury award, where it was, at least in part, based on evidence of State Farm's nationwide practices. In so ruling, the Court stated:

> This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells.

583 U.S. at 420.

In reviewing this case, it appears that Appellees attempted to use the Mississippi evidence in order to show a pattern or scheme on the part of FMC. In fact, the following statements were made by Appellees' counsel during opening statements:

> But the fact of the matter is there were over seventy-five farmers, at least seventy-five farmers in Arkansas and Mississippi, that had Fury sprayed on their wheat crop. There was over 1.4 million bushels of wheat that got sprayed with Fury. There was over 25,000 acres that got sprayed with Fury. They'll tell you this was just a simple miscommunication between these two people that got Fury sprayed on Mr. Helton and Mr. Clifton's farm but the fact of the matter is, folks, you will see plenty of evidence to tell you that maybe this wasn't just a miscommunication between two people over the telephone. So what happens? Fury has been unlawfully applied to these thousands of acres of wheat throughout Arkansas and Mississippi.
>
> . . . .
>
> There's no dispute on any of those matters but they are going to contend that these folks bear all the responsibility and it's not their

> fault that this product got put on their wheat even though they sprayed it all across Mississippi and Arkansas.

And, again during closing arguments, reference was made to Mississippi:

> Ladies and gentlemen, ask yourselves, and you will recall the testimony and I wrote a lot of it down, 75 farmers, two states, 24,000 acres, 1.5 million bushels of wheat.

We simply cannot determine whether the Mississippi evidence and the arguments of counsel impacted the jury's award of punitive damages in this case. It is certainly possible that the jury sought to impermissibly punish FMC for its actions in a state other than Arkansas. Thus, FMC's due process rights were violated in the instant case by the introduction of the evidence regarding the use of Fury in Mississippi. As the Supreme Court in *Gore*, 517 U.S. 559, 585, stated, "[w]hile each State has ample power to protect its consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation."

Therefore, on remand, any evidence regarding any events related to the use of Fury in Mississippi may not be introduced into evidence.

III. Evidence of Tax Returns

Another evidentiary matter to be considered is Agro's argument that it was error for the trial court to refuse to allow counsel to cross-examine Appellee Joyce Clifton with respect to various matters contained in her income tax statements. Appellees argue that there was no abuse of discretion on the part of the trial court in this regard. We agree with Appellees.

According to Agro, Clifton testified that not having access to funds generated from the sale of their wheat caused an economic hardship that resulted in emotional distress. In response to this testimony, counsel for Agro sought to cross-examine Clifton about various losses reported on her income tax statements. The trial court limited any such questions to the last three years of tax returns leading up to the 2001 Fury incident. Agro wanted to go back to Clifton's 1997 tax return, and the trial court refused to allow them to do so. Specifically, Agro wanted to show that there had been other times when Clifton had been faced with economic losses and wanted to compare those past losses to the emotional distress she now claimed.

The standard of review on admission of evidence is abuse of discretion. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002). This court has stated that abuse of discretion is a high threshold that does not simply require error in the trial court's decision, but requires that the trial court act improvidently, thoughtlessly, or without due consideration. *Nazarenko v. CTI Trucking Co., Inc.*, 313 Ark. 570, 856 S.W.2d 869 (1993).

Remaining mindful of this standard, this court cannot state the trial court abused its discretion with regard to Agro's cross-examination. The trial court allowed such examination, but limited it to tax issues that had occurred within a period of three years. Such a limitation seems reasonable and, thus, there was no abuse of discretion. Accordingly, Agro's argument on this point is without merit.

IV. Motion in Limine

Next, Agro argues that the trial court erred in denying its fourth motion in limine regarding the admission of any evidence related to the outrage claim against it and Land O'Lakes. It seems that in this argument, Agro is asserting that Appellees were not entitled to amend their pleadings. In support of its novel agreement, Agro points to this court's decision in *Dumas v. Crowder*, 178 Ark. 143, 10 S.W.2d 43 (1928), for the proposition that pleadings cannot be amended once they have been challenged in the trial court. We agree with Appellees that this case is unavailing, as it predates our rules of civil procedure, including those governing the amendment of pleadings. Accordingly, Agro's argument on this point fails.

V. Proffered Jury Instructions

Agro also argues that it was error for the trial court to refuse two of its proffered jury instructions. Specifically, Agro sought to submit a jury instruction on justifiable reliance and one on misrepresentation of law. Agro asserts that there was evidence supporting these instructions; thus, it was error for the trial court to refuse to instruct the jury. Agro concedes that the AMI instructions were correct recitations of the law, but argues that they were not thorough enough in explaining the law. Appellees counter that the proffered instructions did not thoroughly explain the applicable law to the jury.

It is well settled that this court will not reverse a trial court's refusal to give a proffered jury instruction unless there was an abuse

of discretion. *Williams v. First Unum Life Ins. Co.*, 358 Ark. 224, 188 S.W.3d 908 (2004). Moreover, this court has stated that it is not error for the trial court to refuse a proffered jury instruction, when the stated matter is correctly covered by other instructions. *Id.*

[redacted] Here, Agro admits that the model instructions given to the jury correctly stated that law. Thus, the trial court did not abuse its discretion in refusing to submit Agro's proffered instructions to the jury.

VI. Misrepresentation

It is unnecessary for us to fully discuss FMC's and Agro's arguments that the trial court erred in submitting Appellees' fraud claim to the jury. However, one of their underlying arguments is likely to be raised upon remand and, thus, for purposes of judicial efficiency, we will consider their argument that the misrepresentation at issue here is one of law, not fact. According to FMC and Agro, the misrepresentation, *i.e.*, that Fury could be used in a manner contrary to its labeling, is one of law because there is a statute in place governing the use of restricted-use pesticides. Therefore, they argue that Appellees cannot maintain a claim for fraud because Arkansas does not recognize a cause of action for misrepresentation of law.

In support of their argument, FMC and Agro rely on this court's decision in *Adkins v. Hoskins*, 176 Ark. 565 3 S.W.2d 322 (1928). That case is unavailing. *Adkins*, which stemmed from a divorce case, involved statements made by the appellee, who was a lawyer, to the appellant regarding certain elements of property division. As a result of the misleading statements made by the appellee, the appellant sought the recision of two executed contracts. This court rejected the appellant's argument, noting that the appellant's claims were that the appellee made misrepresentations of the law. This court stated:

> As a general rule, fraud cannot be predicated upon misrepresentations as to matters of law, nor upon opinions on questions of law based on facts known to both parties alike, nor upon representations as to what the law will not permit to be done, especially when the representations are made by the avowed agent of the adverse interest. Reasons given for this rule are that every one is presumed to know the law, both civil and criminal, and is bound to take notice of it, and hence has no right to rely on such representations or

> opinions, and will not be permitted to say that he was misled by them. Pursuant to this it has been held that fraud cannot be predicated on misrepresentations as to the legal effect of a written instrument, as, for example, a deed, or a Federal land warrant, or a contract of insurance.

Id. at 575, 3 S.W.2d at 326 (citation omitted).

The fact that there are statutes in place controlling restricted-use pesticides does not mean that the subsequent misrepresentation about the use of Fury was one of law. According to his testimony at trial, Teague represented that Fury could be used on Appellees' crops, but did not ascertain what type of crops were at issue. According to Teague, he assumed Davidson wanted a recommendation for a product that could be used on cotton. Davidson, who subsequently recommended Fury to Appellees for use on their wheat crops, admitted that he did not verify that Fury could now be used on wheat. There was simply no evidence that anyone ever made a representation that Fury could be used in a manner contrary to its label. In sum, the misrepresentation at issue in the present case is clearly one of fact, not law. Accordingly, FMC's and Agro's argument to the contrary is meritless.

VII. Damages for Mental Anguish

Next, FMC and Agro argue that it was error to allow an award for mental anguish in the absence of an allegation of some type of physical injury. Appellees argue that the damages for mental anguish were permitted under the ADTPA. Specifically, Appellees argue that the ADTPA provides that an injured party is entitled to recover actual damages, and actual damages include damages for mental anguish.

In their complaint, Appellees specifically sought recovery for mental anguish under their claim for negligence. In addition, Appellees averred in their complaint that they were entitled to an award of actual damages under the ADTPA claim. Nothing in the record reveals under what theory the jury awarded damages for mental anguish, thus, we will analyze each possibility.

Appellees were not entitled to damages for mental anguish under a theory of negligence. This court has stated that Arkansas does not recognize negligent infliction of emotional distress. *See Mechanics Lumber Co. v. Smith*, 296 Ark. 285, 752

S.W.2d 763 (1988). Thus, Appellees' claim for negligence does not support an award for mental anguish. This court has also held that a claim for fraud will not support an award of damages for mental anguish. *Allen v. Allison*, 356 Ark. 403, 155 S.W.3d 682 (2004).

Thus, this court must determine whether Appellees' verdict under the ADTPA supports an award of damages for mental anguish. Civil enforcement and remedies for violations of the ADTPA are set forth in Ark. Code Ann. § 4-88-113 (Repl. 2001). Pursuant to subsection (f), "[a]ny person who suffers actual damage or injury as a result of an offense or violation as defined in this chapter has a cause of action to recover actual damages, if appropriate[.]"

As previously stated, Appellees claim that actual damages include damages for mental anguish. In support of their argument, Appellees rely on this court's decision in *United Ins. Co. v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998). According to Appellees, the *Murphy* case stands for the proposition that actual damages include damages for mental anguish or suffering. Moreover, Appellees argue that the *Murphy* decision was handed down one year prior to the General Assembly's amendment of the ADTPA to include recovery of actual damages; thus, the General Assembly is presumed to be familiar with our decisions and clearly intended to allow for the recovery of damages for mental anguish in ADTPA cases.

Murphy, however, is not a suit under the ADTPA; rather, it is a case involving allegations of defamation. In *Murphy*, the trial court instructed the jury with regard to presumed damages. In analyzing whether such an instruction was appropriate, this court quoted the United States Supreme Court's opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), for the proposition that where there is no malice, a party is limited to recovering damages for actual injury, which included "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."

There appears to be no Arkansas case specifically defining what constitutes actual damages. According to *Black's Law Dictionary* 35 (6th ed. 1990), "actual damages" is defined as "[c]ompensation for actual injuries or loss." The definition goes on to note that actual damages are synonymous with compensatory damages. Contrary to *Murphy*, this court has also indicated that damages for

mental anguish are separate from actual damages. *See Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (2003) (holding that compensatory damages were reasonable in light of award for actual damages, as well as an award for mental anguish).

While we recognize that there is a perceived inconsistency regarding what is included in "actual damages," we need not address that issue in the present case. Even if this court were to accept Appellees' argument that "actual damages" include damages for mental anguish, such a ruling would not obviate the requirement that Appellees prove that they suffered a physical injury that led to the mental anguish or that FMC or Agro wilfully or wantonly committed wrongs with the intention of causing mental distress.

A similar issue was addressed by this court in *M.B.M. Co., Inc. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980). In describing the case, this court stated:

> This is not a case in which there was injury resulting from a physical impact, so appellant's right to recover damages for emotional distress depends upon the existence of a cause of action to recover these damages when distress is not merely "parasitic" as an element of damages for physical injury.

Id. at 273, 596 S.W.2d at 684. The court then explained that there are some instances where a party could recover damages for mental anguish in the absence of a physical injury, stating:

> The rule is well settled in this state, but it has no application to willful and wanton wrongs and those committed with the intention of causing mental distress and injured feelings. Mental suffering forms the proper element of damages in actions for willful and wanton wrongs and those committed with the intention of causing mental distress.

Id. at 274, 596 S.W.2d at 684 (quoting *Wilson v. Wilkins*, 181 Ark. 137, 139, 25 S.W.2d 428, 428 (1930)).

The exception recognized by this court in *Counce*, however, is not applicable in the present case. Appellees are claiming that they are entitled to damages for mental anguish under the ADTPA, simply as a recovery for actual damages. However, they do not allege that FMC or Agro violated the provisions of that Act with the intent to cause them mental distress or that they suffered a physical injury.

Having determined that Appellees could not recover damages for their mental-anguish claim under the ADTPA, we will next address Appellees' allegation that the trial court erred in dismissing their claim for outrage, which would have also supported the award for mental damages.

Appellees have filed a conditional cross-appeal in this case. Appellees submit that if this court determines that their ADTPA claim does not support an award of damages for mental anguish, then this court should review the trial court's grant of a directed-verdict in favor of Agro and Land O'Lakes on their claim for outrage. In other words, Appellees argue that it was error for the court to dismiss their outrage claim because there was sufficient proof to support the elements and, thus, their outrage claim would support the award of damages for mental anguish. There is no merit to the conditional cross-appeal.

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. *Woodall*, 347 Ark. 260, 61 S.W.3d 835; *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. *Conagra, Inc. v. Strother*, 340 Ark. 672, 13 S.W.3d 150 (2000). Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and the directed verdict should be reversed. *Howard v. Hicks*, 304 Ark. 112, 800 S.W.2d 706 (1990).

To establish an outrage claim, a plaintiff must demonstrate the following elements: (1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his or her conduct; (2) the conduct was extreme and outrageous, was beyond all possible bounds of decency, and was utterly intolerable in a civilized community; (3) the actions of the defendant were the cause of the plaintiff's distress; and (4) the

emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it. *Allen*, 356 Ark. 403, 155 S.W.3d 682.

In *Crockett v. Essex*, 341 Ark. 558, 19 S.W.3d 585 (2000), this court stated:

> The type of conduct that meets the standard for outrage must be determined on a case-by-case basis. *Hollomon v. Keadle*, 326 Ark. 168, 931 S.W.2d 413 (1996). This court gives a narrow view to the tort of outrage, and requires clear-cut proof to establish the elements in outrage cases. *Croom v. Younts*, 323 Ark. 95, 913 S.W.2d 283 (1996). Merely describing the conduct as outrageous does not make it so. *Renfro v. Adkins*, 323 Ark. 288, 914 S.W.2d 306 (1996).

Crockett, 341 Ark. at 564, 19 S.W.3d at 589 (quoting *McQuay v. Guntharp*, 331 Ark. 466, 470-71, 963 S.W.2d 583, 585 (1998)). This court further elaborated in *Island v. Buena Vista Resort*, 352 Ark. 548, 103 S.W.3d 671 (2003), that liability for the tort of outrage has been found only in those cases where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

In this case, the trial court determined that Appellees had failed to submit proof that the conduct at issue rose to that level enunciated in *Island*. The trial court also focused on the fact that the emotional distress must be so severe that no reasonable person could be expected to endure it. We agree with the trial court that Appellees failed to submit sufficient proof to satisfy either of these prongs.

The record reflects that there was evidence presented that Kevin Conrad, the Land O'Lakes's employee, became embroiled in a dispute with Appellees. The dispute climaxed when Conrad threatened to remove Appellees' wheat from the Wilkisons' farm and dump it on the ground. Conrad testified that his actions with regard to the wheat were simply in response to the agreement with the Wilkisons that the wheat would be removed from their bins by August 1. Conrad explained that the Wilkisons needed their bins to store their own crops that were about to be harvested. Conrad further testified that he did not intend to inflict emotional distress on anyone and that he was just trying to help the farmers.

[redacted] There was also an allegation that Appellees were injured by Agro cutting off their line of credit. The testimony of

Appellees indicated that prior to the Fury incident, both farmers were already on a cash basis with Agro. After the Fury incident, Agro allowed them to purchase some crop supplies on credit because it knew that their cash was tied up in the quarantined wheat. After Appellees failed to make any payments, though, the line of credit was revoked. Moreover, there was simply no evidence that J.R. Davidson or Doug Davidson recommended the use of Fury with the intent to inflict emotional distress or that they should have known that the recommendation would cause such distress. Nor was there any evidence that either of the Davidsons' conduct was so extreme or outrageous to rise to the level of outrage.

Finally, the testimony of Appellees failed to demonstrate that they suffered emotional distress so severe that no reasonable person could be expected to endure it. Roy Helton testified that as a result of his wheat being quarantined he was unable to sleep, lost weight, and had to start taking antidepressants. He also testified that the distress from this incident was as severe as that caused by losing his mother.

Ricky Clifton testified that he owned Clifton Farms with his mother, Joyce Clifton. He also reported problems sleeping and eating as a result of his wheat being quarantined. He stated that his wife had to take a second job and that his children were also affected by this incident. According to Clifton, the only time that he experienced worse mental distress was when his father passed away. Joyce also testified and stated that she was devastated when she was told that her wheat was being quarantined. She stated that she was nervous and could not sleep.

While Appellees testified about suffering sleep loss, loss of appetite, and anxiety, such distress is the type that reasonable people may be faced with throughout their lives. It does not satisfy the type of distress encompassed by a claim for outrage. Moreover, we agree with Agro's assertion that farmers are constantly faced with economic uncertainty. In fact, the Cliftons testified that they had declared Chapter 11 bankruptcy in March of 2001, well over a month before the Fury incident.

Accordingly, because all four elements of outrage could not be proven with sufficient evidence, the trial court correctly granted the motion for a directed verdict. Having determined that

Appellees' cross-appeal is without merit, we must conclude that there was no basis for Appellees' award of damages for mental anguish.

VIII. Attorneys' Fees

Finally, we must address the issue of the award of attorneys' fees in this case. Both FMC and Agro argue that the trial court erred in its award of attorneys' fees in this case. First, FMC argues that Appellees are not entitled to an award of attorneys' fees at all. Alternatively, it argues that any such award should be limited to their portion of recovery under the ADTPA. Agro argues that the only way Appellees could recover attorneys' fees under the ADTPA was by making them a part of the cause of action as required under Ark. R. Civ. P. 54(b), and because they failed to do so, they have now waived their right to such fees. Appellees argue that there was no error as the ADTPA provides for the award of attorneys' fees.

First, we note that Agro's argument that Appellees waived their right to seek attorneys' fees by not pleading them as part of their cause of action under the ADTPA is without merit. Agro cites to no authority in support of this novel concept. This court has repeatedly held that 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). Thus, we must now determine whether the trial court's award of attorneys' fees was reasonable. Notably, this court has not heretofore analyzed the reasonableness of fees in the context of an ADTPA case.

We have recognized generally, though, that a trial court is not required to award attorney's fees and, because of the trial judge's intimate acquaintance with the trial proceedings and the quality of service rendered by the prevailing party's counsel, appellate courts usually recognize the superior perspective of the trial judge in determining whether to award attorney's fees. *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000); *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). The decision to award attorney's fees and the amount to award are discretionary determinations that will be reversed only if the appellant can demonstrate that the trial court abused its discretion. *Nelson v. River Valley Bank & Trust*, 334 Ark. 172, 971 S.W.2d 777 (1998); *see also Chrisco*, 304 Ark. 227, 800 S.W.2d 717.

In *Chrisco*, this court set forth certain factors to be evaluated by a trial court when considering an award of attorney's fees. There, this court stated:

> Additionally, although there is no fixed formula in determining the computation of attorney's fees, the courts should be guided by recognized factors in making their decision, including the experience and ability of the attorney, the time and labor required to perform the legal service properly, the amount involved in the case and the results obtained, the novelty and difficulty of the issues involved, the fee customarily charged in the locality for similar legal services, whether the fee is fixed or contingent, the time limitations imposed upon the client or by the circumstances, and the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. *State Farm Fire & Casualty Co. v. Stockton*, 295 Ark. 560, 750 S.W.2d 945 (1988); *Southall v. Farm Bureau Mut. Ins. Co. of Arkansas, Inc.*, 283 Ark. 335, 676 S.W.2d 228 (1984); *New Hampshire Ins. Co. v. Quilantan*, 269 Ark. 359, 601 S.W.2d 836 (1980).

Id. at 229-30, 800 S.W.2d at 718-19.

In this case, the trial court awarded Appellees attorneys' fees of $233,572.50. The trial court in its order followed the *Chrisco* factors in evaluating the reasonableness of the fee request and, ultimately, predicated its award on the provision of section 4-88-113(f), which provides for an award of fees in cases involving a violation of the ADTPA. The problem with the trial court's award is that it awarded Appellees the full amount of attorneys' fees that they sought in this case. The only basis for that award was the ADTPA claim, as attorneys' fees are not recoverable under the claims for fraud and negligence, the other claims on which Appellees prevailed. The trial court recognized in its order that there were no cases interpreting the attorneys' fee provision of section 4-88-113(f), but reasoned that a prevailing party need not prevail on all of its claims in order to be entitled to attorneys' fees. Thus, the trial court determined that Appellees, as the prevailing parties, were entitled to all of their fees, not just those connected with their ADTPA claim. This was an abuse of discretion.

In ruling as it did, the trial court relied on Ark. Code Ann. § 16-22-308 (Repl. 2001), which provides for the recovery of attorney's fees by the prevailing party in a contract action. Nothing in that statute, nor in section 4-88-113(f), provides that a party is

entitled to an award of all fees in cases where multiple claims have been pursued. In *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992), this court affirmed a trial court's denial of attorneys' fees under section 16-22-308, because the appellant's cause of action *primarily* sounded in tort. Moreover, in *Wheeler Motor Co., Inc. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993), this court held that attorneys' fees were not justified in a case prosecuted under multiple theories, where it appeared that the jury's verdict was predicated upon a theory sounding in tort. Finally, the court of appeals has addressed the issue of attorneys' fees in the context of suits involving multiple claims and held that:

> We do not disagree with the chancellor's finding that the appellees are the prevailing party. However, we do not think it is sufficient to base a fee award under § 16-22-308 upon a finding that a contract claim is a "substantial issue." Where both contract and tort claims are advanced, an award of attorney's fees to the prevailing party is proper only when the action is based primarily in contract.

Meyer v. Riverdale Harbor Mun. Prop. Owners Imp. Dist. No. 1, 58 Ark. App. 91, 93, 947 S.W.2d 20, 22 (1997).

Thus, under the above-stated line of cases, the trial court abused its discretion in awarding Appellees' all of their requested attorneys' fees, where only one of their causes of actions, namely the ADTPA claim, provided for such an award. Accordingly, the order awarding attorneys' fees is reversed.

Reversed and remanded.

IMBER, J., concurs.

ANNABELLE CLINTON IMBER, Justice, concurring. In reversing the trial court's award of attorney's fees, the majority states, "[T]he trial court abused its discretion in awarding Appellees their requested attorneys' fees, where only one of their causes of actions, namely the ADTPA claim, provided for such an award." In support of this result, the majority cites *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992), *Wheeler Motor Co., Inc. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993), and *Meyer v. Riverdale Harbor Mun. Prop. Owners Imp. Dist. No. 1*, 58 Ark. App. 91, 947 S.W.2d 20 (1997). In my opinion, these cases do not mandate reversal of the trial court's award of attorney's fees; rather, the award of attorney's fees must be set aside as premature in view of the fact that this case is being remanded for a new trial. Thus, I concur with that part of the opinion.

In each of the above cases, the request for attorney's fees was based on Ark. Code Ann. § 16-22-308, which allows for the recovery of attorney's fees by the prevailing party in disputes of a contractual nature. In each case, the court reasoned that fees were not appropriate where the cause of action primarily sounded in tort. *Stein v. Lukas, supra; Wheeler Motor Co., Inc. v. Roth, supra; Meyer v. Riverdale Harbor Mun. Prop. Owners Imp. Dist. No. 1, supra.* Here, it seems the majority contends that attorney's fees are not proper because the appellees' claims sounded primarily in causes of action other than the ADTPA, namely fraud and negligence. Yet, because Ark. Code Ann. § 4-88-107(a)(1) (Supp. 2003) incorporates an element of knowing misrepresentation into its definition, ADTPA claims brought under this section will inherently involve substantial questions of fraud or misrepresentation. Thus, despite the fact that the present case sounds primarily in misrepresentation and fraud, an award of attorney's fees would still be proper pursuant to Ark. Code Ann § 4-88-113(f) (Repl. 2001).

The unique nature of an ADTPA claim brought under Ark. Code Ann. § 4-88-107(a)(1) mandates that all such claims will primarily sound in fraud or negligence. According to this section, trade practices prohibited by the act include:

> Knowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services, or as to whether goods are original or new, or of a particular standard, quality, grade, style, or model.

Ark. Code Ann. § 4-88-107(a)(1). Based on this language, any plaintiff attempting to establish a violation of the ADTPA will likely also be establishing a case for fraud. This close interrelation is not present with contract and tort claims. While it is entirely possible that a claim would be based in contract and have little or no relation to a tort claim, ADTPA claims under section 4-88-107(a)(1) will, by their very nature, be substantially based in claims of misrepresentation or fraud. Though it is true that attorney's fees are generally not allowed in a traditional tort case, the legislature has chosen to make such fees available where a fraud or misrepresentation is perpetrated on a consumer. *See* Ark. Code Ann. §§ 4-88-107(a)(1), 113(f). To disallow attorney's fees in these cases simply because the claim sounds primarily in fraud or misrepresentation is in direct conflict with the clear legislative intent of this statute. Additionally, other jurisdictions

have allowed for the recovery of attorney's fees in cases involving fraud or misrepresentation where such fees are authorized by a consumer protection statute. *Miles Rich Chrysler-Plymouth, Inc. et al v. Mass.*, 201 Ga.App. 693, 411 S.E.2d 901 (1991); *McRae v. Bolstad*, 32 Wash.App 173, 646 P.2d 771 (1982); *Barnhouse Motors, Inc. v. Godfrey*, 577 S.W.2d 378 (Tex. Civ. App. 1979). Where, as here, the legislature has expressed a clear intent to overrule our common law precedent and allow attorney's fees in cases of consumer fraud or misrepresentation, I would not reverse the trial court's grant of attorney's fees for the reasons set forth in the majority opinion.

Kirby ARBAUGH *v.* AG PROCESSING, INC.
and Specialty Risk Services

04-682 202 S.W.3d 519

Supreme Court of Arkansas
Opinion delivered February 3, 2005

Frederick S. Spencer, for appellant.

Anderson, Murphy & Hopkins, LLP, by: *Randy P. Murphy* and *Jason J. Campbell*, for appellee.

ANNABELLE CLINTON IMBER, Justice. On June 2, 2000, Appellant Kirby Arbaugh, an employee of AG Processing, Inc., was shocked with 440 volts of electricity when he attempted to turn on the electrical switch to a feed-bag line. Appellees AG Processing, Inc. and Specialty Risk Services accepted the June 2

incident as compensable and paid related medical benefits. Arbaugh claimed that he sustained a compensable organic-brain injury,[1] or in the alternative, a compensable psychological injury. Appellees controverted these claims and asserted that Arbaugh's problems were psychological and preexisted the injury. Furthermore, they contended that his problems were not causally related to the June 2 compensable injury.

A hearing was conducted on March 20, 2002, before the administrative law judge (ALJ). In an opinion and order dated June 18, 2002, the ALJ determined that Arbaugh failed to prove by a preponderance of the evidence that his cognitive dysfunction and psychological problems were causally related to the June 2 incident; that Arbaugh failed to prove that his cognitive dysfunction and psychological problems arose out of and in the course of his employment; that Arbaugh failed to establish by a preponderance of the evidence the elements necessary to prove a compensable organic-brain injury; and that Arbaugh failed to establish by a preponderance of the evidence the elements necessary to prove a compensable psychological injury.

The Arkansas Workers' Compensation Commission ("Commission") affirmed and adopted the ALJ's opinion, and Arbaugh then appealed to the Arkansas Court of Appeals. The Court of Appeals affirmed the Commission, holding that there was substantial evidence to support the Commission's finding that Arbaugh's problems were not causally related to the June 2 incident. Three dissenting judges would have reversed and remanded and instructed the Commission to enter an award of benefits for Arbaugh's organic-brain injury. *Arbaugh v. AG Processing, Inc.*, 86 Ark. App. 303, 184 S.W.3d 53 (2004). We granted a petition for review pursuant to Rule 1-2(e) of the Arkansas Rules of the Supreme Court. Accordingly, we consider the case as though it had been originally filed in this court. *Pifer v. Single Source Transp*, 347 Ark. 851, 69 S.W.3d 1 (2002).

On appeal, this court views the evidence and all reasonable inferences therefrom in the light most favorable to the Commission's decision and affirm that decision when it is supported by substantial evidence. *Gansky v. Hi-Tech Engineering*, 325

[1] Arbaugh alleged that the injury resulted in seizure-like symptoms, cognitive dysfunction, depression, and anxiety.

Ark. 163, 924 S.W.2d 790 (1996)(citing *Kuhn v. Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 158 (1996), and *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253 (1994)). It is for the Commission to determine where the preponderance of the evidence lies; upon appellate review, we consider the evidence in the light most favorable to the Commission's decision and uphold that decision if it is supported by substantial evidence. *Georgia Pacific Corp. v. Ray*, 273 Ark. 343, 619 S.W.2d 648 (1981). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Williams v. Prostaff Temporaries*, 336 Ark. 510, 988 S.W.2d 1 (1999). There may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we had sat as the trier of fact or heard the case *de novo*. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). It is exclusively within the province of the Commission to determine the credibility and the weight to be accorded to each witness's testimony. *Wade v. Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989). We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Freeman v. Con-Agra Frozen Foods*, *supra*; *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999).

In addressing Arbaugh's claims below that he suffered from both a psychological injury and an organic-brain injury, the ALJ noted that claims for mental injury or illness are governed by Ark. Code Ann. § 11-9-113(a) & (b) (Repl. 2002); whereas, organic-brain injury claims are treated as ordinary accidental-injury claims and governed by Ark. Code Ann. 11-9-102(4)(A)(i) (Repl. 2002). Section 11-9-113(a) sets forth the requirements for proving compensability of a "mental injury or illness":

> (a)(1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence.
>
> (2) No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psycholo-

> gist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

Ark. Code Ann. § 11-9-113(a)(1)(2). Under section 11-9-113(b)(1), the employee may only recover twenty-six (26) weeks of disability benefits for a claim based on a mental injury or illness. In the case of an accidental-injury claim, section 11-9-102(4)(A)(i) defines a "compensable injury" as

> [a]n accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence.

Ark. Code Ann. § 11-9-102(4)(A)(i). With regard to Arbaugh's organic-brain injury claim, the ALJ concluded that the following requirements must be satisfied to establish such an injury:

> (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment (see, Ark. Code Ann. § 11-9-102(4)(A)(i) (Cumm. Supp. 1997); Ark. Code Ann. § 11-9-102(4)(E)(i) (Cumm. Supp. 1997); see also, Ark. Code Ann. § 11-9-401(a)(1) (Cumm. Supp. 1997));
>
> (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death (see Ark. Code Ann. § 11-9-102(4)(A)(i) (Cumm. Supp. 1997));
>
> (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing injury (see, Ark. Code Ann. § 11-9-102(4)(D) (Cumm. Supp. 1997));
>
> (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence (see, Ark. Code Ann. § 11-9-102(4)(A)(i) (Cumm. Supp. 1997)).

As summarized earlier, the ALJ found, and the Commission affirmed and adopted, that Arbaugh failed to prove by a preponderance of the evidence that his cognitive dysfunction and psy-

chological problems were causally related to the June 2, 2000 incident or that they arose out of and in the course of his employment. The ALJ further found that Arbaugh failed to establish by a preponderance of the evidence that he had sustained a compensable organic-brain injury or a compensable psychological injury.

For his sole point on appeal, Arbaugh argues that no substantial evidence supports the Commission's finding that his organic-brain problems were not a result of the electrical shock he received at work on June 2, 2000.[2] To reiterate, in determining the sufficiency of the evidence to sustain the findings of the Commission, we must view the evidence in the light most favorable to the Commission's decision and its decision must be upheld if it is supported by substantial evidence. *Deffenbaugh Indus. v. Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993). In making our review, we recognize that the Commission, and not this court, determines where the preponderance of the evidence lies. *Georgia Pacific Corp. v. Ray, supra.*

The medical evidence supporting the Commission's findings on the organic-brain- injury issue may be summarized as follows. Dr. John Towbin, a seizure-disorder specialist, testified that Arbaugh was referred to him because he was having "seizure-like events." According to Dr. Towbin, the occurrence of a seizure involves abnormal activity in the cortex and creates a wave form on an EEG called a spike that is usually followed by a slow wave. Dr. Towbin proceeded to conduct video EEG monitoring of Arbaugh over two 24-hour contiguous periods of time during which Arbaugh experienced three seizure-like episodes. Throughout each episode, the EEG remained essentially unchanged. Dr. Towbin interpreted these test results to mean that the "seizure-like events" were non-epileptic and non-physiologic, but rather psychiatric in origin; that is, they were emotionally derived events and not events derived from brain pathology.[3]

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[2] Although Arbaugh contended before the ALJ that he suffered both a psychological injury and an organic-brain injury as a result of the electrical shock, he appears to have abandoned the psychological-injury argument on appeal.

[3] As to the etiology of the psychiatric events experienced by Arbaugh, Dr. Towbin stated that not being a psychiatrist, he did not know whether to ascribe them to traumatic factors or to other life experiences.

Dr. Towbin's findings based on the EEG test data were consistent with his opinion that Arbaugh's symptoms during the "seizure-like events" were atypical of seizures. Arbaugh described the episodes as beginning with a sudden feeling of fatigue followed by a numbness on the left side of his face and then a "pin and needles" feeling that would spread across his face and eventually down his entire left side. As explained by Dr. Towbin, fatigue would be common after a seizure, not at the beginning, and seizures usually cause some positive symptoms, such as movement, rather than negative symptoms, such as loss of function.

Furthermore, Dr. Towbin stated that while it was possible to have a seizure disorder as a result of electrical injury, he opined that it would be hard to have such an injury that is substantial enough to result in cortical injury so as to cause seizures without that electrical injury doing other physical damage, such as burns in the skin, spinal cord sequelae, cardiac sequelae, or other brain-related phenomena. In that regard, Arbaugh testified during the hearing that he had bruises on his back from when he fell after the accident and red lines on the back of his head. However, during his deposition, he denied that he had any bruises or scratches after the accident. Likewise, in giving a history to Dr. Michael Morse on August 17, 2000, he reported no burns at the entry or exit site.

Dr. Gary Souheaver, a clinical neuropsychologist, evaluated Arbaugh's medical records and data collected from 1997 forward. He noted that before the June 2, 2000 incident Arbaugh suffered from several major psychiatric disorders, including suicidal attempts, a diagnosis of bipolar disorder, and major depression disorder recurrent. He further noted a history of alcohol and methamphetamine abuse. The symptoms associated with these conditions included difficulties with concentration and memory, not being able to think clearly, and bizarre thinking. In addition, the records reflected two prior closed-head injuries, one which involved the loss of consciousness. Dr. Souheaver stated that such injuries produce symptoms of personality disorganization, memory complaints, concentration difficulties, ease of fatigueability, balance issues, and sometimes ringing in the ears. Based on his review of the medical records, Dr. Souheaver concluded that Arbaugh's major diagnosis, both before and after the accident, was a differential between a bipolar disorder or a major depressive

disorder recurrent.[4] He saw no reason to resort to an organic-brain-disorder diagnosis because Arbaugh's symptoms could not be attributed to an underlying brain disorder. Specifically, Dr. Souheaver noted an "out of pattern relationship for an underlying brain disorder" from the results of a battery of psychological tests conducted by other physicians, including Dr. Betty Back-Morse, after the June 2 incident. In his words, "to get a category score . . . as good as his score is just almost unheard of in a brain disorder." Moreover, according to Dr. Souheaver, there are a number of reasons, such as depression or drugs, that a person can experience cognitive dysfunction without having a brain disorder.

Dr. Bettye Back-Morse, also a neuropsychologist, personally evaluated Arbaugh. While her testimony was favorable to Arbaugh's claim, her analysis elicited criticism from Dr. Souheaver on grounds that she relied too much on history and what Arbaugh told her rather than objective data. In fact, Dr. Back-Morse acknowledged that she did not know whether Arbaugh had cognitive dysfunction problems before the incident on June 2, 2000. Dr. Vann Smith, another neuropsychologist, also evaluated Arbaugh and presented favorable testimony that Arbaugh suffered from moderate to severe impairment after the accident. Yet, he admitted that he did not know whether or not Arbaugh fell within the moderate to severe impairment range before the reported June 2 injury. Finally, Dr. Michael Morse, a neurologist, evaluated Arbaugh six times for his "spells" and neuropathy, a nerve injury in his arms. Dr. Morse was not able to say exactly what the spells were. In his opinion, the EEG and MRI of Arbaugh's brain were normal. More importantly, he stressed that Arbaugh's cognitive problems and history of mental illness were best addressed by other physicians; thus, as to those matters, he deferred to the neuropsychologists.

[redacted] Once again, we have repeatedly stated that the credibility of any witness is a matter exclusively within the province of the Commission. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001); *Kuhn v. Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 158 (1996). Because the record contains testimony and

[4] As reflected in the record, Dr. Souheaver testified that he thought three of the diagnoses noted in Arbaugh's medical records as of June 2000 (major depression recurrent, mild cognitive disorder (NOS), and bipolar disorder) may be relevant in this case; however, he could not say Arbaugh had more frequent or more severe episodes of depression as a result of the electrical shock on June 2.

reports from medical experts that Arbaugh did not sustain an organic-brain injury during the June 2 incident, and that his organic-brain problems were not causally related to the incident, we are not convinced that fair-minded persons could not have reached the conclusions arrived at by the Commission. Accordingly, we must affirm the Commission's decision as it is supported by substantial evidence.

Affirmed.

STATE of Arkansas *v.* Roger BROOKS

CR 04-902 202 S.W.3d 508

Supreme Court of Arkansas
Opinion delivered February 3, 2005

[redacted]

Mike Beebe, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., for appellant.

Armstrong Allen, PLLC, by: *Charles A. Banks* and *Benjamin D. Brenner*, for appellee.

BETTY C. DICKEY, Justice. Roger Brooks started chatting on the internet with a fourteen-year-old girl, who turned out to be a North Little Rock Police Officer, working undercover. After they had made plans to meet in North Little Rock to have sex, six officers of the North Little Rock Police Special Crime Unit arrested Brooks at Rivercrest School, Mississippi County, where he was a teacher, a coach, and vice-principal. The officers searched Brooks's home and interrogated him in Mississippi County, pursuant to a valid search warrant from Mississippi County.

On November 3, 2003, the Second Judicial District Prosecutor, representing Mississippi County, charged Brooks with knowingly possessing or viewing photographs over the internet depicting sexually explicit conduct involving a child. Ark. Code Ann. § 5-27-602 (Supp. 2003). The pictures were found on the hard drive of a computer seized from Brooks's house in Wilson, Arkansas. On December 23, 2003, the Sixth Judicial District Prosecutor, representing Pulaski County, charged Brooks with computer child pornography. Specifically, he was charged with using a computer internet service to either seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice a child or individual believed to be a child to engage in sexually explicit conduct. Ark. Code Ann. § 5-27-603 (Supp. 2003). This charge was based on the internet chat conversations between Brooks and the North Little Rock Police female officer who pretended to be a fourteen-year-old girl.

On January 7, 2004, Brooks filed a motion to dismiss or, in the alternative, a motion to transfer his case from the Pulaski County Circuit Court to the Mississippi County Circuit Court. At a February 11, 2004 hearing in Pulaski County, the trial court took under advisement the defense motions challenging that circuit court's jurisdiction. On May 3, 2004, the Pulaski County court granted Brooks's motion to transfer his case to Mississippi County. On May 12, 2004, the Sixth Judicial District Prosecutor moved to rescind that court's transfer order, or, in the alternative, to reconsider the court's ruling.

At a June 1, 2004 hearing, the Sixth Judicial District Prosecutor asked the trial court to rescind its previous order to transfer the case, arguing that Pulaski County and Mississippi County had concurrent jurisdiction. Brooks argued that the trial court properly applied Arkansas Rule of Criminal Procedure 21.3 (2004), by ordering that all charges against him be joined and tried in the Second Judicial District. Judge Proctor granted the motion to transfer and stated, "I think it would put the state in a position where they could, if they decide to, take an interlocutory appeal. I tried to put the record in a position where it could be decided on appeal by the Appellate Court."

The final order was entered on June 24, 2004, stating "upon consideration of the pleadings and corresponding law, the hearings held in this matter, and the arguments of counsel, specifically those related to Arkansas Rules of Criminal Procedure Rule 21 et seq. and Rule 23.1, the State's motion is DENIED." The State, on

behalf of the Sixth Judicial District Prosecutor, argues: (1) that the trial court erred as a matter of law by purporting to transfer Brooks's prosecution outside the judicial district where the offense was charged, or, (2) in the alternative, that this court should issue a writ of certiorari to review the trial court's transfer order and invalidate it.

We first review whether this is an interlocutory or direct appeal. The trial court repeatedly and mistakenly refers to this as an interlocutory appeal in this colloquy during the final hearing.

> THE COURT: All right. Okay. And also, if the State decides to take an *interlocutory* appeal, this is a final decision on the merits.
>
> Ms. RANEY: We have no more case left.
>
> THE COURT: Right. So I think it would put the State in a position where they could, if they decide to, take an *interlocutory* appeal. I tried to put the record in a position where it could be decided on appeal by the Appellate Court.
>
> Ms. RANEY: And I appreciate that very much. And you have denied my motion to reconsider, and you have granted the motion to transfer or dismiss on the basis of motion to transfer, the defendant's motion to transfer based on joinder, is that correct, which is the defendant raised on his motion?
>
> THE COURT: Right. And I did not grant the motion to dismiss either. That has not been granted.
>
> Ms. RANEY: So it wouldn't be an *interlocutory* because we now have no case in Pulaski County. That's been taken away from us, correct? So it would be a direct appeal or cert., a motion for a cert. Is there anything else that I need to do to make my record? I guess I need to say I object.
>
> Thank you for your patience, and I thank Mr. Banks for his patience.
>
> THE COURT: Do we have one more or is that — all right. We're adjourned then.

(Emphasis added.)

Despite the trial court's misappellation, we find this was a final order, as the Sixth Judicial District Prosecutor indicated when she said, "we have no more case left." This issue is properly before us under Arkansas Rules of Appellate Procedure—Criminal 3(c), which provides that this court review cases that involve the correct and uniform administration of the criminal law.

[redacted] This court's review of the State's appeals is not limited to cases that would establish precedent. *State v. Dawson,* 343 Ark. 683, 38 S.W.3d 319 (2001); *State v. Thompson,* 343 Ark, 135, 34 S.W.3d 33 (2000); *State v. Gray,* 330 Ark. 364, 955 S.W.2d 502 (1997). As a matter of practice, this court has only taken appeals "which are narrow in scope and involve the interpretation of law." *Id.; State v. Banks,* 322 Ark. 344, 345, 909 S.W.2d 634 (1995). Where an appeal does not present an issue of interpretation of the criminal rules with widespread ramifications, this court has held that such an appeal does not involve the correct and uniform administration of the law. *Id.; State v. Harris,* 315 Ark. 595, 868 S.W.2d 488 (1994). Appeals are not allowed merely to demonstrate the fact that the trial court erred. *State v. Spear and Boyce,* 123 Ark. 449, 185 S.W. 788 (1916). Where the resolution of the issue on appeal turns on the facts unique to the case, the appeal is not one requiring interpretation of our criminal rules with widespread ramification, and the matter is not appealable by the State. *State v. McCormack,* 343 Ark. 285, 34 S.W.3d 735 (2000); *State v. Guthrie,* 341 Ark. 624, 19 S.W.3d 10 (2000).

In accordance with Rule 3(c), this court accepts the appeal by the State in this case because it is narrow in scope, involves the interpretation of the law, and involves the correct and uniform administration of justice which requires us to review this point.

[redacted] This appeal raises the question of whether criminal proceedings can be transferred from one judicial district to another. This court has held that disposition of a criminal charge which occurs outside the territorial boundaries of the judicial district in which the charge was brought is void. *State v. Circuit Court of Lincoln County,* 336 Ark. 122, 984 S.W.2d 412 (1999). While a defendant in a criminal case may waive venue within the territorial boundaries of a judicial district, a defendant may not do so where charges have been filed in a county outside of those boundaries. *Id.* This court held that such an extraterritorial order by a circuit judge in a criminal case was void, and that jurisdiction for such an order could not be waived or conferred by consent. *Id.*

While it is true that both counties have jurisdiction in this case, the trial court lacked the authority to transfer to the Second Judicial District. The trial court did not have the power or authority to join or transfer a case outside of its jurisdiction. Such an order would bar a prosecutor from prosecuting crimes within his or her jurisdiction simply because a defendant would prefer a different district with concurrent jurisdiction. An accused is not entitled to a judicial review of the prosecutor's filing an information charging him with an offense. *Nance v. State,* 323 Ark. 583, 918 S.W.2d 114 (1996). Each prosecutor in each district has the sole authority, with grand jury's concurrent authority, to bring charges within that district. The Arkansas Constitution provides that the duty of charging an accused with a felony is reserved to the grand jury or to the prosecutor. *State v. Knight,* 318 Ark. 158, 884 S.W.2d 258 (1994). We have consistently held that a circuit judge does not have the authority to amend the charge brought by the prosecuting attorney. *State v. Knight, supra*; *Simpson v. State,* 310 Ark. 493, 837 S.W.2d 475 (1992); *State v. Hill,* 306 Ark. 375, 811 S.W.2d 323 (1991); *State v. Brooks,* 301 Ark. 257, 783 S.W.2d 368 (1990).

In *Simpson v. State,* 339 Ark. 467, 6 S.W.3d 104 (1999), this court held that the choice of which charges to file against an accused is a matter entirely within the prosecutor's discretion. Transferring a criminal count from one prosecuting attorney's district to another has the effect of impermissibly compelling the receiving prosecuting attorney to file charges in his district, or have no criminal prosecution at all. Here, the Second Judicial District Prosecutor could have exercised his authority within his jurisdiction by filing the criminal count at issue, but he did not; the Sixth Judicial District Prosecutor chose to exercise his authority instead.

Brooks cites *Cozzaglio v. State,* 289 Ark. 33, 709 S.W.2d 70 (1986), as justification for joinder of the charges in Mississippi and Pulaski County. In that case, Cozzaglia was convicted of kidnapping in Washington County and was convicted of rape in Madison County. This court held that the trial judge should have granted appellant's motion for joinder, and reversed and dismissed the rape conviction. *Id.* Cozzaglio could have been tried in either county for both offenses, but not separately on separate charges. *Cozzaglio* stands for the proposition that a defen-

dant's motion for joinder of two or more offenses should be granted when they are within the same jurisdiction of the same court, for example, within Sixth Judicial District from Perry County to Pulaski County. However, this appeal involves charges not in different counties within the same district, but two separate districts. The duty of charging an accused with a felony is reserved to the grand jury and the Prosecuting Attorney. *State v. Knight,* 318 Ark. 158, 884 S.W.2d 258 (1994).

Ark. R. Crim. P. 21.1 (2004) states:

> Two (2) or more offenses *may* be joined in one (1) information or indictment with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
>
> (a) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

(Emphasis added.) This rule is permissive and not mandatory. Once Brooks was charged in the Sixth Judicial District, the trial court possessed no power to transfer the case outside the district. The trial court's order is reversed and the case is remanded for prosecution in the Sixth Judicial District.

Since we reverse based on the trial court's attempt to transfer the appellee's prosecution outside the judicial district where the offense was charged, the State's alternate argument that we issue a writ of certiorari is moot. The appellee's motion to dismiss the appeal is denied.

Reversed and Remanded.

Carey WYATT and Patsy Wyatt *v.*
ARKANSAS GAME & FISH COMMISSION

04-770 202 S.W.3d 513

Supreme Court of Arkansas
Opinion delivered February 3, 2005

Oscar Stilley, for appellants.

The McMullen Law Firm, by: *Marian McMullen*; and *James F. Goodhart*, for appellee.

BETTY C. DICKEY, Justice. This is an appeal of an order quieting title to ten acres of land in Newton County in the Arkansas Game and Fish Commission (AGFC). Carey and Patsy Wyatt occupied three of the ten acres under a 1998 quitclaim deed that contains the following description: "Part of the SE 1/4 of the NE 1/4 of Section 11, Township 15 North, Range 19 West, containing 3 acres, more or less." In 2000, the AGFC received a deed conveying, ". . . that part of the SE 1/4 of the NE 1/4 containing 7 acres, lying

West and North of Cave Creek; also a part of the NW 1/4 of the SE 1/4 lying on the north side of Cave Creek, containing 5 acres, more or less, and being in the aggregate of 52 acres, more or less. . . ."

Although the AGFC's deed, on its face, conveyed seven acres, the AGFC interpreted the deed to convey the entire ten-acre tract lying north and west of the creek, based on the rule of construction that references to acreage in a deed are secondary to references to artificial and natural monuments. In 2001, the AGFC attempted to remove the Wyatts by filing a criminal trespass action. The Wyatts filed suit to quiet title in their three acres. The AGFC answered that the Wyatts's title was void for lack of a definite description, and counterclaimed to quiet title in the ten acres.

On September 16, 2002, the AGFC filed a motion for summary judgment, arguing that its deed should be interpreted to convey all ten acres lying north and west of the creek. The AGFC argued that, if the deed's reference to seven acres was removed from the description, the deed would describe the entire acreage lying north and west of the creek: "that part of the SE 1/4 of the NE 1/4 [containing 7 acres] lying West and North of Cave Creek." The AGFC's motion was accompanied by the affidavit of its own surveyor, Steve Parish, and the affidavit of another surveyor, William Cochrane, interpreting the legal description in the AGFC deed as transferring all of the land in the SE 1/4 of the NE 1/4 lying north and west of the creek. The AGFC also argued that if it were not the titleholder of the ten acres by virtue of its deed, it was entitled to ownership by adverse possession.

The Wyatts, recognizing the infirmity in their own deed, responded to the motion by abandoning their quiet-title action and instead challenged only the AGFC's ability to quiet title in the ten acres on the strength of its deed. They asserted that the AGFC's deed was indefinite because it failed to identify which seven of the ten acres lying north and west of the creek were being conveyed. The Wyatts further argued that the AGFC was not entitled to have its deed reformed to reflect a conveyance of all ten acres lying north and west of the creek.[1]

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[1] Even though the Wyatts's deed was abandoned, they were in possession when the suit was filed and are therefore in a position to question the title asserted by the AGFC. *Irby v. Drush,* 220 Ark. 250, 247 S.W.2d 204 (1952).

After a hearing, the trial court granted summary judgment to the AGFC, deleting the deed's reference to seven acres, and changing the words "that part of the SE 1/4 of the NE 1/4," to, "All of the property." The court then entered an order interpreting the land description in the AGFC's deed as follows:

> All of the property lying West and North of Cave Creek in the SE 1/4 of the NE 1/4 of Section 11, Township 15 North, Range 19 West, Newton County, Arkansas.

The trial court did not address the AGFC's claim for adverse possession, having ruled in the AGFC's favor on the deed. The trial court based its decision on *Dierks Lumber and Coal Co. v. Tedford*, 201 Ark. 789, 146 S.W.2d 918 (1941) and *Scott v. Dunckel Box & Lumber Co.*, 106 Ark. 83, 152 S.W.1025 (1912).

The Arkansas Court of Appeals reversed the trial court, noting that the issue was one of law and ruling that the trial court had erred in reforming the deed rather than interpreting it. The court of appeals held that, because the creek is only a directional indicator of where the seven acres are located, the AGFC deed did not describe the conveyance by reference to the creek but by reference to the seven acres. Characterizing the deed as containing an indefinite "part" description, the court of appeals held that there were no monuments to elevate over acreage and the AGFC's deed was void for indefiniteness. The court of appeals remanded for the AGFC to pursue its claim of adverse possession, which the trial court had not reached.

The AGFC petitioned this court for review, arguing that monuments control over references to acreage, and contending that the court of appeals decision reversed precedent. When this court grants 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).

In this case, the Wyatts argue that the trial court erred in interpreting a deed which grants seven unspecified acres in a ten-acre tract to actually encompass the entire ten acres, and changing the legal description to reflect ownership of all ten acres, to the detriment of the Wyatts, who peacefully possessed three acres in the same tract pursuant to a deed purchased for value.

This court does not consider the legal description contained in the Wyatts's deed because the Wyatts abandoned their quiet-title action and instead challenged only the AGFC's ability to quiet title in the ten acres on the strength of its deed. In an action to quiet title, the plaintiff must recover on the strength of his own title and not on the weakness of the defendant's title. *Wyatt v. Wycough*, 232 Ark. 760, 341 S.W.2d 18 (1960).

The AGFC legal description at issue in this case reads:

> The SW 1/4 of the NE 1/4, 40 acres, more or less; that part of the SE 1/4 of the NE 1/4 containing 7 acres, lying West and North of Cave Creek; also a part of the NW 1/4 of the SE 1/4 lying on the north side of Cave Creek, containing 5 acres, more or less, and being in the aggregate of 52 acres, more or less, all in Section 11, Township 15 North, Range 19 West, all in Newton County, Arkansas.

According to the AGFC, the language of the deed should be read to omit the words, "containing 7 acres" lying West and North of Cave Creek. We agree.

Here, the trial court actually reformed the deed to read, "*All* of the property lying West and North of Cave Creek in the SE 1/4 of the NE 1/4 of Section 11, Township 15 North, Range 19 West, Newton County, Arkansas." (Emphasis Added). However, before an instrument can be reformed, it must appear

that it fails to express the agreement of the parties because of a mutual mistake or mistakes on one side and fraud and inequitable conduct on the other. *See Jeffers v. American Pioneer Life Insurance,* 256 Ark. 332, 507 S.W.2d 713 (1974). Neither party is entitled to such reformation because neither fraud nor mutual mistake was pled or proven. In the present case, the trial court reformed the deed by adding and substituting language such as "all" for "that part." Although the trial court ruled in favor of the AGFC on the basis of reformation, it was error to do so. Nonetheless, the trial court is affirmed because it was correct for another reason. *Releford v. Pine Bluff School District No. 3,* 355 Ark. 503, 140 S.W.3d 483 (2004). In short, the legal description in the AGFC's deed is not void for vagueness because it can be read and interpreted to identify the disputed property.

[redacted] In *Scott v. Dunkel Box & Lumber Co.,* 106 Ark. 83, 152 S.W.1025 (1912), a deed passed title to 100 acres, more or less, but the actual acreage conveyed was about 254 acres. This court held that the discrepancy between acreage as given in a deed and that which appellant claims does not alone render the deed void. This court stated:

> The most general terms of description employed in deeds to ascertain the things granted are: (1) quantity; (2) course and distance; (3) artificial or natural objects and monuments. And whenever a question arises as to description, the terms or objects most certain and material will govern. Therefore quantity yields to course and distance, and course and distance to artificial and natural objects. A call for quantity in a deed must yield to a more definite description by metes and bounds. The quantity of land conveyed is generally mentioned in the deed; but, without an express averment or covenant as to quantity, it will always be regarded as a part of the description merely, and it will be rejected if it be inconsistent with the actual area of the premises, if the same is indicated and ascertained by known monuments and boundaries. It aids, but does not control, the description of the granted premises. Our own court has said of the words "more or less," when used in the description of land conveyed, that they are words of precaution, intended to cover slight or unimportant inaccuracies, but that they do not control an otherwise good description.

Id. (Internal Citations Omitted).

This court held in *Turner v. Rice*, 178 Ark. 300, 10 S.W.2d 885 (1928), that the acreage mentioned in a government call of lands, even without the words "more or less," does not control or dominate the description. Wherever one is granted land by government call, he takes the whole of the call without reference to the amount of acreage added to the description. *Id.* "In other words, if one is deeded the northeast quarter of any particular section containing any particular number of acres, he would take the whole quarter section, irrespective of the number of acres mentioned." *Id.* at 303.

Later, in *Tedford,* 201 Ark. 789, 146 S.W.2d 918, citing *Scott* and *Turner,* this court held that in the absence of an express averment or covenant as to quantity, the quantity mentioned in the deed does not control the description of the granted premises. The applicable rule is that where the instrument contains words of qualification, such as "more or less" or words of similar import, the statement of quantity of acres conveyed is a mere matter of description, and not of the essence of the contract, and the purchaser takes the risk of quantity, there being no fraud or gross mistake. *Hays v. Hays,* 190 Ark. 751, 81 S.W.2d (1935). The mention of quantity of acres, after a certain description of the subject by metes and bounds, or by other known specifications, is but a matter of description, and does not amount to any covenant, or afford ground for the breach of any of the usual covenants, though the quantity of acres should fall short of the given amount. *Id.* In *Hays*, the court wrote, "whenever it appears, by definite boundaries, or by words of qualification, as 'more or less' or as 'containing by estimation,' or the like, that the statement of the quantity of acres in the deed is mere matter of description and not of the essence of the contract, as a general rule, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case."

The applicable general rules are not in dispute. Where land is sold "in gross" or where the legal description is qualified by the words "more or less," the buyer takes the risk of the quantity, in the absence of fraud. *Clover v. Bullard*, 170 Ark. 58, 278 S.W.2d 645 (1926). The law does not look solely to the quantity of the shortage but also to all other relevant facts and circumstances. *Hays, supra; Birch-Brook. Inc. v. Ragland*, 253 Ark. 161, 485 S.W.2d 225 (1972). A deed will not be held void for

uncertainty of description if by any reasonable construction it can be made available. *Gipson v. Pickett*, 256 Ark. 1035, 512 S.W.2d 532 (1974). A description of land is sufficient if the descriptive words in the deed furnish a key of identifying the land conveyed. *Davis v. Burford*, 197 Ark. 965, 125 S.W.2d 789 (1939). A deed is not void for uncertainty if the land can be located by the description used. *Tolle v. Curley*, 159 Ark. 175, 251 S.W. 377 (1923).

Since it can be determined what part of the property is being conveyed, the trial court correctly concluded that the acreage mentioned in a deed does not control the description of the granted premises, but must yield to the land described by a monument, whether natural or artificial. *Tedford, supra.* Here, the phrase "that part" in the description references the phrase "lying West and North of Cave Creek," so that the specific location of the grant is easily ascertainable. The deed grants "that part" of the SE 1/4 of the NE 1/4 that lies West and North of Cave Creek. In this instance, that part of the quarter section lying West and North of Cave Creek contains ten acres. It is of no consequence that the stated acreage, seven acres, is incorrect. In *Turner v. Rice*, this court rejected an argument that the description was insufficient to identify and locate the land simply because the mentioned acreage was incorrect. Similarly, here, the phrase "containing 7 acres" is not controlling because the description is otherwise sufficient to identify the land. Consequently, the deed is not void.

Moreover, if the phrase "that part" modified the phrase "containing 7 acres," this court's precedent would dictate a similar result. As stated previously above in *Tedford, supra,* the court interpreted the phrase "that part of the Northwest Quarter Southeast quarter, containing 25 acres lying east of the Center Point and Caddo Gap road" as "containing 25 acres, more or less . . ." *Id.* at 791-92, 146 S.W.2d at 919. Where the instrument contains words of qualification, such as "more or less," or words of similar import, the statement of quantity of acres conveyed is a mere matter of description. *Hayes, supra; Scott, supra.*

While the phrase in question in this case does not expressly contain the words "more or less," the phrase is substantially similar to the phrase "containing 25 acres" in *Tedford, supra,* which is interpreted to mean "containing 25 acres, more or less." Here, too, the phrase could be interpreted to mean, "That part of the SE 1/4 of the NE 1/4 containing 7 acres *more or less*, lying West and North of Cave Creek." Thus, under *Tedford,* the deed's legal

description can be interpreted to identify the ten-acre tract as having been conveyed to the AGFC.

Affirmed as Modified.

Sherry CHILDERS *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

05-30 202 S.W.3d 529

Supreme Court of Arkansas
Opinion delivered February 3, 2005

Gary Allen Turner, for appellee.

No response.

PER CURIAM. This case is an appeal from an order entered by the Sebastian County Circuit Court, Fort Smith District, Juvenile Division, on December 18, 2003, terminating the parental rights of Appellant Sherry Childers. Counsel appointed by the circuit court to represent Ms. Childers filed a timely notice of appeal on January 15, 2004, and an order extending the time to file the record until June 4, 2004, was entered by the circuit court. See Ark. R. App. P.—Civ. 5(b). The time granted under the extension order passed, and the record was not timely filed with our clerk. See Ark. R. App. P.—Civ. 5(a) (2004). Eventually, on January 7, 2005, the Department of Human Services (DHS) filed a partial record along with its motion to dismiss the instant appeal. Ark. R. App. P.—Civ. 5(c) (2004). The partial record does not contain an affidavit of

indigency, but the notice of appeal filed by appointed counsel states that Ms. Childers "has been found to be indigent and the undersigned lawyer . . . was appointed to represent her."

If this were a criminal case and appointed counsel failed to timely tender the record to this court as required by Ark. R. App. P.—Civ. 5 (2004), Ms. Childers could have petitioned this court *pro se* for a rule on clerk to enable her to file the record and thereby perfect her appeal. *Atkins v. State*, 308 Ark. 675, 827 S.W.2d 636 (1992). No such remedy, however, exists for appellants in civil cases. *Bogachoff v. Arkansas Dept. of Human Services*, 360 Ark. 259, 200 S.W.3d 884 (2005). Thus, Ms. Childers should not be penalized for her failure to file a motion for rule on clerk.

Under our recent decision in *Linker-Flores v. Ark. Dept. of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004) (*Linker-Flores v. Ark. Dept. of Human Services II*), indigent parents have a right to an appeal from a judgment terminating parental rights. We have also held that indigent parents are entitled to court-appointed counsel on appeal. *Linker-Flores v. Arkansas Dept. of Human Services*, 356 Ark. 369, 149 S.W.3d 884 (2004) (*Linker-Flores v. Ark. Dept. of Human Services I*). Thus, Ms. Childers's appointed attorney is obligated to proceed with her appeal in accordance with the procedures recently adopted by this court for appeals involving indigent parents in termination cases. See *Linker-Flores v. Ark. Dept. of Human Services II, supra; Bogachoff v. Arkansas Dept. of Human Services, supra.* More specifically, Ms. Childers's right to appeal from the termination of her parental rights cannot be conditioned on her ability to pay for the preparation of a record. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). If Ms. Childers's is unable to afford the preparation of a transcript, she may proceed *in forma pauperis*, and the transcript shall be furnished at the State's expense. *Bogachoff v. Arkansas Dept. of Human Services, supra; Petition of Hutton*, 301 Ark. 538, 785 S.W.2d 33 (1990). Furthermore, if appointed counsel, after a conscientious review of the record, believes the appeal is frivolous, counsel should file a no-merit brief with this court along with a petition to withdraw as counsel. *Linker-Flores v. Ark. Dept. of Human Services II, supra.*

Because the *Linker-Flores* and *Bogachoff* cases were decided well after Ms. Childers's extended time for filing the record had expired, we will not penalize her or her attorney for failing to

comply with the court's directives set forth in those decisions. Instead, we now direct Ms. Childers's appointed attorney to proceed with the appeal in a manner consistent with the procedures adopted by this court in the *Linker-Flores* and *Bogachoff* cases. If Ms. Childers has chosen to waive her right to an appeal, she should file an affidavit of waiver with this court.

Motion to dismiss denied.

Arthur E. DICKERSON a/k/a Bolden *v.* STATE of Arkansas

CR 04-1320 202 S.W.3d 532

Supreme Court of Arkansas
Opinion delivered February 3, 2005

Ben Beland, for appellant.

No response.

PER CURIAM. Appellant Arthur E. Dickerson a/k/a Bolden was convicted of first-degree murder in the Sebastian County Circuit Court and sentenced to life imprisonment. He was represented at trial by two public defenders, Ben Beland and John Joplin. Recently, we issued a *per curiam* opinion granting Joplin's motion to withdraw as counsel on appeal, on the ground that he is a

full-time public defender with a full-time state-salaried secretary and is thus ineligible to receive compensation for appellate work. *See Dickerson v. State*, 360 Ark. 305, 200 S.W.3d 899 (2005). We declined to appoint substitute counsel at that time, however, as we noted that Beland remained attorney of record and had not filed a motion to withdraw.

Since our order, Joplin has filed a motion on behalf of Beland, asking that Beland also be relieved as counsel on appeal. The motion reflects that Beland left the public defender's office as of December 31, 2004, following his election as Fort Smith District Judge. We grant the motion and appoint J. Brent Standridge to represent Appellant in this case. Our clerk is directed to set a new briefing schedule for this appeal.

It is so ordered.

SERVEWELL PLUMBING, LLC *v.*
SUMMIT CONTRACTORS, INC., and
The Gables of Maumelle Limited Partnership

04-1306 202 S.W.3d 525

Supreme Court of Arkansas
Opinion delivered February 3, 2005

Kent Jay Rubens, and *Lawrence Wayne Jackson*, for appellant.

Stephen Reese Lancaster, for appellees.

PER CURIAM. Appellant Servewell Plumbing, LLC, moves the court for a rule on clerk. Servewell states that the clerk of this court erroneously refused to file the record in this matter on November 24, 2004, and noted it as tendered. Servewell's motion sets forth the following sequence of events:

- 12.31.03 Order entered dismissing all of Servewell's claims, except its claim against The Gables for unjust enrichment
- 01.30.04 Servewell filed a notice of appeal
- 05.11.04 Order entered dismissing Servewell's entire complaint, including the unjust-enrichment claim

- 05.19.04 Servewell filed a notice of appeal for both the 05.11.04 and 12.31.03 orders
- 07.30.04 Order entered extending the time to lodge the record
- 11.24.04 Servewell's tender of a partial record to the Supreme Court Clerk
- 2.08.04 Full record tendered

Servewell contends that its second notice of appeal was filed eight days after entry of the only final, appealable order and was timely filed. It asserts that it is entitled to an order granting a rule on clerk and directing that the record be filed. There is no response from the appellees.

Arkansas Rule of Appellate Procedure–Civil 5(a) provides that the record on appeal shall be filed with this court's clerk within ninety days from the filing of "the first notice of appeal," unless the time is extended by an order of the circuit court. *See* Ark. R. App. P.–Civ. 5(a) (2004). Rule 5(a), however, contemplates a notice of appeal from a *final* judgment or order. *See* Ark. R. App. P.–Civ. 2(a)(1) (2004). A review of the record in the instant case reveals that while Servewell filed a notice of appeal from the circuit court's order of December 31, 2003, that order was not a final order, because the unjust-enrichment claim was still pending, and the order contained no certification pursuant to Arkansas Rule of Civil Procedure 54(b). Thus, any appeal from that order was subject to dismissal by this court. *See, e.g., Dodge v. Lee*, 350 Ark. 480, 88 S.W.3d 843 (2002); *Tri-State Delta Chems., Inc. v. Crow*, 347 Ark. 255, 61 S.W.3d 172 (2001); *Rigsby v. Rigsby*, 340 Ark. 544, 11 S.W.3d 551 (2000). Because the December 31, 2003 order was not a final order, the notice of appeal filed by Servewell on January 30, 2004, was a nullity.

A final order, disposing of all claims, was entered by the circuit court on May 11, 2004. Servewell then filed a timely notice of appeal from that order and the order of December 31, 2003, on May 19, 2004. A timely extension of time in which to file the record was obtained, and the partial record was timely tendered to the clerk on November 24, 2004. Because the record in the instant matter was tendered timely with respect to the May 19, 2004 notice of appeal from the final order disposing of all claims in the instant matter, we grant the motion for rule on clerk.

In holding as we do on this point, we note that the cases of *Smith v. State*, 351 Ark. 325, 97 S.W.3d 380 (2002) (*per curiam*) and *Street v. Kurzinski*, 290 Ark. 155, 717 S.W.2d 798 (1986), are distinguishable. In both those cases, we upheld the first notice of appeal, but our reasoning in both cases was based on the fact that the judgments appealed from were effective. Here, that is not the case, because the first order appealed from was not a final order and, therefore, was subject to dismissal rendering the first notice of appeal a nullity.

Servewell also petitions this court for *certiorari* to complete the record. It asserts that it has already received an extension of seven months from the date of the entry of the order, until December 11, 2004, in which to file its record on appeal. Servewell states that on November 24, 2004, it obtained and filed a partial record and that to date, the transcript is still not ready.[1] Counsel for Servewell further states that he has been unable to obtain information regarding the status of the record and, therefore, seeks a writ of *certiorari* to the court reporter to complete the record within thirty days.

The court reporter, Sheila Russell, responds that she called Servewell's counsel on November 29, 2004, to inform him that the transcript was ready. She avers that she had until December 11, 2004, to have the record prepared and that prior to receiving a copy of the instant petition on December 2, 2004, she had no prior knowledge of this petition or any other action. She states that when she contacted counsel to inform him that the record was ready, he informed her that he would pick it up "on [December] 7th or 8th[.]" Finally, she responds that she has not tried to hide from counsel and has had no communication from him in several months. She prays that the petition be dismissed as premature and moot.

A review of the docket in this case reveals that the two-volume record was tendered to the Supreme Court Clerk, pending this court's decision on the above motion for rule on clerk, on December 8, 2004. Because the record has been tendered in its entirety, we add that the instant petition for *certiorari* to complete the record is moot.

Servewell has further moved this court to supplement the record in the instant case. Servewell's counsel states that the

[1] The instant petition was tendered November 30, 2004.

record, which was tendered on December 8, 2004, is lacking two exhibits which were proffered to the circuit court and are, or may be, essential to a full understanding of the issues on appeal: (1) a letter from Servewell's counsel to the circuit clerk and (2) a copy of a payment bond. Servewell requests that the court permit the record to be supplemented. There is no response from the appellees. We grant the motion to supplement the record.

We direct the Supreme Court Clerk to file the record in this case and to set a briefing schedule. Motion for rule on clerk granted. Petition for writ of *certiorari* to complete the record moot. Motion to supplement the record granted.

IMBER, J., concurs.

ANNABELLE CLINTON IMBER, Justice, concurring. I concur with the majority that the motion for rule on the clerk should be granted. However, I write because I disagree with the majority's interpretation of Arkansas Rules of Appellate Procedure – Civil 5(a) (2004).

On December 31, 2003, an order was entered dismissing all of Servewell's claims, except its claim against The Gables for unjust enrichment. On January 30, 2004, Servewell filed its first notice of appeal and designated the order appealed from as the December 31 order. On May 11, 2004, an order was entered dismissing Servewell's entire complaint, including the unjust-enrichment claim. Servewell filed a second notice of appeal on May 19, 2004, and designated the orders appealed from as the December 31 and May 11 orders. The circuit court entered an order on July 30, 2004 extending the time to lodge the record. Meanwhile, Servewell waited until November 24, 2004, to tender a partial record to our clerk.

Arkansas Rule of Appellate Procedure–Civil 5(a) clearly provides that the record on appeal shall be filed with the court's clerk "within 90 days from the filing of the *first* notice of appeal, unless the time is extended by an order of the circuit court." *See* Ark. R. App. P.–Civ. 5(a) (2004) (emphasis added). Yet, because an appeal may be taken from a final judgment pursuant to Ark. R. App. P.–Civ. 2(a)(1) (2004), the majority summarily jumps to the conclusion that Appellate Rule 5(a) only contemplates the filing of a valid and effective "first" notice of appeal. In so doing, it changes the language in the rule by inserting the word "effective."

Under the plain language of Appellate Rule 5, the 90-day limit for filing the record begins to run upon the filing of the "first notice of appeal" from any order, whether final or not. For

example, in this case, Servewell filed its "first notice of appeal" on January 30, 2004. Thus, the deadline to file the record would have been April 30, 2004. As of that date, the circuit court had not yet entered a final order. If Servewell had filed the record on or before April 30, 2004, we would have dismissed its appeal for lack of a final order. In this case, however, the 90-day period expired without a record being filed. Thus, Servewell lost its right to file the record and thereby attempt to perfect an appeal based on the January 30 notice of appeal. A final order was subsequently entered on May 11, 2004, such that a new 90-day period began with the filing of a "first notice of appeal" on May 19, 2004, after entry of the final order. This interpretation of Appellate Rule 5 conforms with our practice when an appeal is dismissed for lack of a final order. Upon the circuit court's subsequent entry of a final order and the filing of a timely notice of appeal from that order, an appeal may be taken from the final order, which appeal also brings up any intermediate order involving the merits and necessarily affecting the judgment. *See* Ark. R. App. P.–Civ. 2(b), 3(a) (2004).

The disposition of this matter would have been different under the plain language of Appellate Rule 5(a) if a final order had been entered during the original 90-day period and if Servewell had filed a timely notice of appeal from that order. In that situation, an appeal from the final order could only have been preserved by filing the record within 90 days from the filing of the "first notice of appeal" on January 30. In other words, when a final order is entered within the original 90-day period, a subsequent notice of appeal only amends the "first notice of appeal." Pursuant to Appellate Rule 5, the 90-day period begins to run upon the filing of the first notice of appeal and, not as the majority posits, upon the filing of the first "effective" notice of appeal. Under the majority's interpretation, notwithstanding the entry of a final order and the filing of a second notice of appeal within the first 90-day period, a second 90-day period would commence upon filing the second notice of appeal.

To apply Appellate Rule 5 as the majority suggests will require our clerk to engage in determining whether a first notice of appeal is effective, or it will open the door to numerous motions for rule on the clerk requesting that we make such a determination. Such a process is unnecessarily burdensome and is contrary to the plain language of Appellate Rule 5. That rule establishes a clear, objective starting point in time for calculating the deadline to file the record — the filing of the first notice of appeal. Once

again, the majority's interpretation of Appellate Rule 5 changes the language in the rule by inserting the word "effective."

Moreover, I submit that we should endeavor to maintain a modicum of consistency with our prior decisions in *Smith v. State*, 351 Ark. 325, 97 S.W.3d 380 (2002) (*per curiam*) and *Street v. Kurzinski*, 290 Ark. 155, 717 S.W.2d 798 (1986). In *Smith v. State, supra*, we strictly construed Appellate Rule 5's first-notice-of-appeal rule when considering a situation governed by Ark. R. App. P.–Crim. 2(b)(2) (2004). In that case, the posttrial motion and the first notice of appeal were filed on the same day. Pursuant to the express language in Ark. R. App. P.–Crim. 2(b)(2) (2004), we held that the first notice of appeal was not made effective until the day after the posttrial motion was denied. Similarly in *Street v. Kurzinski*, we stated that "[t]he reference to the 'first' notice of appeal removes any possible doubt when both parties file notices of appeal or when one party files notices of appeal from different orders." 290 Ark. at 157, 717 S.W.2d at 799. In sum, the important principle undergirding each of these cases was not the existence of a final order before the filing of a timely notice of appeal, but our strict construction of Appellate Rule 5. It is well settled that the timely lodging of the record is a jurisdictional requirement to perfecting an appeal. *See Seay v. Wildlife Farms, Inc.*, 342 Ark. 503, 29 S.W.3d 711 (2000).

More significantly, until this opinion, we have never suggested the 90-day period prescribed by Ark. R. App. P.–Civ. 5(a) would only begin to run upon the filing of the first "effective" notice of appeal. In fact, our appellate rules of procedure expressly address other situations involving premature notices of appeal. For example, Ark. R. App. P.–Civ.4(a) (2004) provides that a notice of appeal filed after the circuit court announces its decision but before the entry of final judgment shall be treated as filed on the day after the judgment was entered. Similarly, Ark. R. App. P.–Crim. 2(b)(2) provides that a notice of appeal filed before disposition of any posttrial motions shall be treated as filed on the day after entry of an order disposing of the last motion outstanding.

To summarize, I believe that Servewell's motion for rule on the clerk should be granted because to do so is consistent with our practice when an appeal is dismissed for lack of a final order; that is, when a final order is not entered within "90 days from the filing of the first notice of appeal," the time limit established by Appellate Rule 5(a) to file the record on appeal. Accordingly, I concur with the majority's disposition of this matter.

FIRST NATIONAL BANK of DeWitt *v.*
Claude CRUTHIS, Catherine Cruthis, Bill Cruthis, Terry Cruthis, Cruthis Brothers, Riceland Seed Company and Stratton Seed

04-448 203 S.W.3d 88

Supreme Court of Arkansas
Opinion delivered February 10, 2005

[Rehearing denied March 10, 2005.]

[redacted]

[redacted]

[redacted]

Berry Law Firm, by: *Russell D. Berry, Bradley A. Chambless*, and *M. Elizabeth Skinner*, for appellant.

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

JIM HANNAH, Chief Justice. The First National Bank of DeWitt (FNB) appeals a judgment on a jury verdict and

alleges that the circuit court erred in submitting an equitable issue for decision by the jury, in denying motions for judgment notwithstanding the verdict and new trial, and in failing to modify the jury verdict to conform to the jury's intent. We hold that the circuit court erred in submitting to the jury the equitable issues contained in Count I of FNB's Amended Complaint. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(1) and (b)(1).

Facts

This case involves money lent by FNB to Claude Cruthis, Catherine Cruthis, Bill Cruthis, Terry Cruthis, individually, and as partners of Cruthis Brothers, a partnership (Cruthis). The loans were used to fund farming operations. FNB lent Cruthis a total of $148,500 through six loans extended between 1993 and 1996. The loans were variously secured by personal and real property. In 1996, when Cruthis's wheat and oat crop were planted and growing, Cruthis told the FNB that due to a lack of funds, operations would cease. Cruthis sold some but not all property in which FNB held a security interest and forwarded the proceeds to FNB. This did not satisfy the total loan obligation. FNB decided to protect its exposure on the outstanding loans by finishing Cruthis's wheat and oat crops, which required an investment of more than $14,000. Wheat prices were rising during this time, and Cruthis approached FNB and asked that a portion of the future crop be committed to Bunge Corporation to obtain the higher price then available. FNB obligated itself to Bunge to acquire a higher price than might exist when the crop was actually harvested. However, Cruthis had previously obligated some portion of the crop to Riceland Seed Company d.b.a. Stratton Seed Company (Stratton). Cruthis alleges that only a small portion of the crop was promised to Stratton, and that there was more than sufficient grain to meet both the obligation to Stratton, as well as make an offer to Bunge. When it came time to harvest, Cruthis stopped FNB from harvesting the grain and delivering it to Bunge, threatened prosecution for criminal trespass, rented equipment, harvested the grain, and delivered it to Stratton. Stratton sold the grain and received funds in the amount of $50,618; Stratton issued checks for the $50,618 and delivered the checks to FNB, however, the checks were not cashed, were never negotiated and Stratton retains the $50,618 today. In 1998, Cruthis brought an action in Monroe County against FNB in conversion, interference with contract, and breach of fiduciary duty. The Monroe County case resulted in a dismissal of Cruthis's complaint because it should have been brought as a

compulsory counterclaim in the case before us, an already existing action filed in chancery court in Arkansas County on May 30, 1997. *See First National Bank of Dewitt v. Cruthis*, 352 Ark. 292, 100 S.W.3d 703 (2003). In the present action, by way of its Amended Complaint filed August 8, 2003, FNB sought restitution including an equitable lien, damages for breach of contract, damages for conversion, and damages for breach of warranty.

After dismissal of the action in the appeal noted above, Cruthis filed a counterclaim in the present action asserting causes of action for conversion, fraud and misrepresentation, tortious interference with contract, undue control and breach of fiduciary capacity. A jury demand was included in the counterclaim. Cruthis filed a motion to dismiss FNB's action in chancery for failure to assert that there was no adequate remedy at law. By the time the court heard the matter, Amendment 80 had taken effect, and the chancery court had become a circuit court. The circuit court stated that there was merit to the claim that FNB failed to assert a lack of an adequate remedy at law and concluded that there was an adequate remedy at law. However, rather than dismiss the case, the circuit court stated that the case would be decided at law rather than at equity.

Following a jury verdict, FNB filed a motion for judgment not withstanding the verdict, or in the alternative, for a new trial. FNB alleged that there was a lack of substantial evidence supporting the jury verdict. More specifically, FNB argued that there was a lack of substantial evidence supporting the jury's verdict that Stratton was not unjustly enriched. Alternatively, FNB argued for a new trial based on an error in the jury's assessment "due to an erroneous conclusion as to the effect of their verdict form."

Amendment 80

This case involves a question of whether the circuit court erred in trying the case as one at law rather than at equity. This implicates Amendment 80 to the Arkansas Constitution and its effect on jurisdiction formerly residing in circuit and chancery courts. Amendment 80 is now part of our constitution. In interpreting the constitution on appeal, our task is to read the law as it is written and interpret it in accordance with established principles of constitutional construction. *Smith v. Sidney Moncrief Pontiac, Buick, GMC, Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003); *Brewer v. Fergus*, 348 Ark. 577, 79 S.W.3d 831 (2002). It is this court's responsibility to decide what a constitutional provision means, and

we will review a lower court's construction de novo. Id. We are not bound by the decision of the circuit court; however, in the absence of a showing that the circuit court erred in its interpretation of the law, that interpretation will be accepted as correct on appeal. *Id.* Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning. *Smith, supra; Worth v. City of Rogers*, 341 Ark. 12, 14 S.W.3d 471 (2000); *Daniel v. Jones*, 332 Ark. 489, 966 S.W.2d 226 (1998). Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision. *Id.*

As we previously stated:

> The passage of Amendment 80 on November 7, 2000 was a watershed event in the history of the Judicial Department of this state. Jurisdictional lines that previously forced cases to be divided artificially and litigated separately in different courts have been eliminated. This fundamental change naturally brings with it a whole host of issues, both theoretical and practical, concerning the form and structure of our court system.

In Re Implem. of Amend. 80, 345 Ark. Appx. 664, 47 S.W.3d 262 (2001). Amendment 80 to the Arkansas Constitution merged the chancery and circuit courts. *Summit Mall Co. v. Lemond*, 355 Ark. 190, 211, 132 S.W.3d 725 (2003); *United Food & Com. Workers, Int. Union v. Wal-Mart*, 353 Ark. 902, 120 S.W.3d 89 (2003). Section 6(A) of Amendment 80 to the Arkansas Constitution provides "Circuit Courts are established as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to this Constitution." As a consequence of Amendment 80, courts that were formerly chancery and circuit courts are now referred to as circuit courts. *Id.* Because Amendment 80 states that circuit courts assume the jurisdiction of chancery courts, circuit courts simply have added to their already existing jurisdiction as a court of law the equitable jurisdiction which chancery courts held prior to adoption of the Amendment. *Ark. Prof'l Bail Bondsman Licensing Bd. v. Frawley*, 350 Ark. 444, 453, 88 S.W.3d 418 (2002). In other words, no new or expanded jurisdiction beyond that formerly existing in the chancery and circuit courts was created through Amendment 80. Rather, circuit court jurisdiction now includes all matters previously cognizable by circuit, chancery, probate, and juvenile court. *See* Amendment 80, § 19(B)(1); Administrative Order No. 14, §§ 1(a) and (b), 344 Ark. Appx. 747- 48 (2001). *See also Moore v. Sipes*, 85 Ark. App. 15, 106 S.W.3d 903 (2004).

Prior to adoption of Amendment 80, a choice had to be made by a plaintiff of whether it was best to file suit in chancery or circuit court. The clean-up doctrine was used to allow a chancery court to decide law issues because under that longstanding rule, once a chancery court acquired jurisdiction for one purpose, it could decide all other issues. *Douthitt v. Douthitt*, 326 Ark. 372, 930 S.W.2d 371 (1996). The doctrine reached the point in recent years that unless the chancery court had no tenable nexus to the claim, this court would consider the matter of whether the claim should have been heard in chancery to be one of propriety rather then one of subject-matter jurisdiction. *Douhitt, supra; Liles v. Liles,* 289 Ark. 159, 711 S.W.2d 447 (1986). Further, it was possible to sever claims at law to be tried in circuit court. *Tyson v. Roberts*, 287 Ark. 409, 700 S.W.2d 50 (1985); *see also Spitzer v. Barnhill*, 237 Ark. 525, 374 S.W.2d 811 (1964).

[redacted] There is no longer a need to elect in which court to file a lawsuit. *See Clark v. Farmers Exchange, Inc.*, 347 Ark. 81, 89, 61 S.W.3d 140 (2001). However, as already discussed, Amendment 80 did not alter the jurisdiction of law and equity. It only consolidated jurisdiction in the circuit courts. Therefore, matters that could be submitted to a jury for decision and the matters that must be decided by the court remain unaltered.

[redacted] The circuit court submitted this case to the jury, although FNB sought restitution and an equitable lien in Count I. FNB did not request a jury and argues on appeal that submission of restitution to the jury was error. Cruthis requested a jury in their counterclaim. Cruthis argues that it was not error to submit the case to the jury. The right to a jury trial set out in the Arkansas Constitution in Art. 2, Sec. 7 was unaffected by Amendment 80. All five Arkansas Constitutions have provided that the right to a jury trial "shall remain inviolate." The 1868 and 1874 constitutions include the additional language that the right to a jury trial extends to "all cases at law." This court has clearly stated that Art. 2, Sec. 7 does not assure the right to a jury trial in all possible instances, but rather in those cases where the right to a jury trial existed "when our constitution was framed." *Jones v. Reed*, 267 Ark. 237, 248, 590 S.W.2d 6 (1979). *See also McClanahan v. Gibson*, 296 Ark. 304, 756 S.W.2d 889 (1988); *Dunn v. Davis*, 291 Ark. 492, 725 S.W.2d 853 (1987); *Colclasure v. Kansas City Life Ins. Co.*, 290 Ark. 585, 720 S.W.2d 916 (1986); *St. Louis I.M. & S. Ry. Co. v. Hays*, 128 Ark. 471, 195 S.W. 28 (1917); *Wheat v. Smith*, 50 Ark.

266, 7 S.W. 161 (1888); *Neel v. State*, 9 Ark. 259 (1845). Further, the right to a jury trial "does not apply to new rights created by the legislature since the adoption of the constitution." *Henry v. Goodman*, 294 Ark. 25, 741 S.W.2d 233 (1987) (*rev'd on other grounds by Act 293 of 1989*). *See also Lockley v. Easley*, 302 Ark. 13, 786 S.W.2d 573 (1990). As this court stated in *State v. Johnson*, 26 Ark. 281, 289 (1870), "It has truly been said that a 'Constitution is not the beginning of government,' and that it is adopted with a knowledge that it is, and was made in harmony and consonance with the condition of the things existing at the time of its adoption."

Because Amendment 80 left the right to a jury trial unaltered, the question presented is whether prior to adoption of Amendment 80, Count I could be properly submitted to a jury for decision. FNB argues that because restitution was sought in Count I, it was an equitable action that had to be tried to the court.

Restitution is founded upon the doctrine of unjust enrichment. *Coley v. Green*, 232 Ark. 289, 335 S.W.2d 720 (1960). Unjust enrichment is an equitable doctrine. *Brookfield v. Rock Island Improvement Co.*, 205 Ark. 573, 169 S.W.2d 662 (1943). However, even though the doctrine is equitable, the issue of unjust enrichment has been submitted to the jury in circuit court where the assertion is wrongful retention of money because the cause of action "is one corresponding with the common law action of assumpsit for money had and received." *Arkansas Natl Bank v. Martin*, 110 Ark. 578, 584, 163 S.W. 795 (1914). *See also Hutchinson v. Phillips*, 11 Ark. 270 (1850). "The action for assumpsit is one for the recovery of damages for the nonperformance of a simple contract. Such a contract may be express or implied, and the action is based on the breach thereof, and is therefore *ex contractu*." *Bertig v. Norman*, 101 Ark. 75, 80, 141 S.W. 201 (1911). "In both the civil and common law, rights and causes of action are divided into two classes — those arising *ex contractu* (from a contract), and those arising *ex delicto* (from a delict or tort)." *Helton v. Sisters of Mercy of St. Joseph's Hospital*, 234 Ark. 76, 85, 351 S.W.2d 129 (1961); quoting *Black's Law Dictionary* 660 4th ed. (1951) (citing 3 *Blackstone's Commentary* 117). The use of courts of law in such actions is illustrated by a discussion in *Import Motors v. Luker*, 268 Ark. 1045, 599 S.W.2d 398 (1980), where this court stated:

> The right to recover the $5,000.00 is on the basis of the common law action of assumpsit. Assumpsit has its origin in relief

anciently afforded by chancery in respect to an implied obligation arising by operation of law, and is grounded in equitable principle. In *Hartford Accident & Indemnity Co. v. Benevento*, 133 N.J.L. 315, 44 A. 2d 97 (1945), the court said the action of assumpsit has been extended:

> To almost every case where an obligation arises from natural reasons, and the just construction of law, that is *quasi ex contractu* . . . It lies only for money, which *ex aequo et bono*, the defendant ought to refund . . . This action is greatly favored by the courts. It is less restricted and fettered by technical rules and formalities than any other form of action. . . . It approaches nearer to a bill in equity than any other common law action.

This concept is supported by *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 54 S.Ct. 443; *Holcomb v. Kentucky Union Co.*, 262 Ky. 192, 90 S.W.2d 25; *Beauregard v. Orleans Trust Co.*, 108 Vt. 42, 182 A. 182; and *Allen v. Mendelsohn & Co.*, 207 Ala. 537, 93 So. 416. In the latter case the court said:

> Assumpsit is an action of an equitable character, liberal in form, and greatly favored by the court as a remedy . . . no agreement is necessary; assumpsit will lie wherever the circumstances are such that the law, *ex debito justitiae* will imply a promise.
>
> . . .
>
> While an action of assumpsit, although based on equitable principles is an action at law, the law is well settled that when the chancery court has jurisdiction of a case for one purpose, it will retain jurisdiction to settle the rights of the parties arising out of the subject matter, *Austin v. Dermott Canning Co.*, 182 Ark. 1128, 34 S.W.2d 773 (1931); *Spears v. Rich*, 241 Ark. 15, 405 S.W.2d 929 (1966). Unquestionably, this action for injunctive and other relief was one cognizable in equity, and therefore, the court has jurisdiction to do complete justice as between the parties.

Import Motors, 268 Ark. 1052-53. In *Fite v. Fite*, 233 Ark. 469, 345 S.W.2d 362 (1961), this court stated:

> The decisive questions for decision are whether the trial court erred in submitting the issues to the jury on the principle of unjust enrichment, and whether the facts in this case sustain an application of that principle.

. . .

> We find that the principle of unjust enrichment is more frequently applied in courts of Chancery, but as heretofore noted, it is also recognized in courts of law. It has been approved by this court as applied to a law court in the case of *Arkansas National Bank v. Martin,* 110 Ark. 578, 163 S.W. 795. This case was tried in Circuit Court of Garland County on dissimilar facts but involving the principle of unjust enrichment.

Fite, 233 Ark. at 472-73.

Thus, although unjust enrichment is an equitable cause of action, because it is based on the alleged breach of an implied contract, it may be heard in circuit court and may be heard by a jury. *See, e.g., Fite, supra.* However, we must reverse because restitution was not the only equitable remedy sought in Count I. FNB also sought an equitable lien on certain property. An equitable lien is a right to have a demand satisfied from a particular fund or specific property. *Kane Enter. v. MacGregor, Inc.*, 322 F.3d 371 (5th Cir. 2003) (quoting *Blacks Law Dictionary* 934 7th ed. (1999)). An equitable lien has also been defined as a remedy that awards a nonpossessory interest in property to a party who has been prevented by fraud, accident or mistake from securing that to which he was equitably entitled. *J. Lorimer v. Berrelez*, 331 F. Supp.2d 585 (E.D. Mich. 2004) (quoting *Senters v. Ottawa Sav. Bank*, 443 Mich. 45, 503 N.W.2d 894 (1993). An action on an equitable lien was historically heard in chancery court because it is an equitable remedy. *See Dews v. Halliburton Indus. Inc.*, 288 Ark. 532, 708 S.W.2d 67 (1986); *Rose City Bottling Works v. Godchaux Sugars, Inc.*, 151 Ark. 269, 256 S.W. 825 (1922). Because an equitable lien was sought, the circuit court erred in submitting Count I to the jury, and because we reverse on this basis, we need not address the remaining issues.

Reversed and remanded.

Stacey L. POINDEXTER *v.* Ryan M. POINDEXTER

04-230 203 S.W.3d 84

Supreme Court of Arkansas
Opinion delivered February 10, 2005

The Farrar Law Firm, by: *Michelle Strause*, for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *Susan M. Coleman*, for appellee.

JIM HANNAH, Chief Justice. Appellant Stacey Poindexter appeals from a divorce decree entered by the Garland County Circuit Court that granted a motion by appellee Ryan Poindexter to change the parties' infant son's name from Seth Malcolm Poindexter to Seth Joseph Poindexter. Stacey argues that the circuit court erred in finding that the child's middle name should be changed because Ryan failed to show that it would be in the child's best interest to change his middle name. This case was certified to this court as an issue requiring clarification or development of the law; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(5). We reverse and remand.

Facts

Stacey filed a complaint for divorce on February 19, 2003. In her complaint, she stated that she and Ryan had one child, Noah Elliot Poindexter, and that she was pregnant with another child due on March 21, 2003. In her complaint, Stacey requested, among other things, custody of the children and support. Subse-

quently, Stacey was awarded temporary custody of Noah, and Ryan was given alternating weekend visitation with Noah. The circuit court also ordered that Ryan begin paying child support for Noah and, beginning the Friday after the second child was born, Ryan was to pay child support for both children.

On March 25, 2003, Stacey gave birth to a second child, whom she named Seth Malcolm Poindexter. Subsequently, on June 22, 2003, Ryan filed a Petition to Establish Paternity, alleging that although the second child was born during the marriage, he might not be the child's father. The circuit court issued an order providing that Stacey, Ryan, and Seth were to submit to paternity testing. The results of the DNA test, filed with the circuit court on August 25, 2003, established that the probability that Ryan was the father of Seth was 99.995%.

At the final divorce hearing conducted on September 10, 2003, Ryan made his first request that the circuit court change the child's name from Seth Malcolm Poindexter to Ryan Joseph Poindexter. At the hearing, Ryan testified that prior to the birth of the child, he and Stacey had agreed that the child would be named Ryan Joseph Poindexter. Ryan related that the parties agreed that the child's middle name would be Joseph, in honor and remembrance of Ryan's deceased brother Mark Joseph Poindexter.

Stacey denied that she and Ryan had ever agreed to name the child Ryan Joseph Poindexter. In addition, she stated that the significance of the name Malcolm was in honor of her grandfather, who was also named Malcolm. Ryan admitted that he and Stacey had discussed other names for the child, including the name Seth Malcolm; however, he testified that he and Stacey had agreed on the name Ryan Joseph. Ryan stated that in the event the circuit court was inclined to change only one name, he would request that the circuit court change the child's middle name from Malcolm to Joseph.

At the hearing, Ryan denied Stacey's claims that he had physically abused her and their son Noah. Ryan admitted that he had only seen Seth twice, the day the child was born and the day of the paternity testing, and he acknowledged that Stacey had offered other times for visitation. However, Ryan testified that he declined to visit Seth because the visits would take place at Stacey's parent's home, where he would "get harassed" because Stacey's parents were "sarcastic" and "rude" to him.

At the conclusion of the hearing, the circuit court ordered that the child's name be changed from Seth Malcolm Poindexter to

Seth Joseph Poindexter. The circuit court made no finding concerning whether the name change would be in the best interest of the child.

Name Change of a Minor

[redacted] As an initial matter, we note that this court has not had occasion to address disputes concerning the first names[1] and middle names of minors. However, we are guided by our cases involving disputes over a child's surname. Ultimately, the controlling consideration in any change in status is whether the change is in the child's best interest. *See Huffman v. Fisher*, 337 Ark. 58, 987 S.W.2d 269 (1999) (*Huffman I*). In *Huffman I*, we held that when considering a petition to change the surname of a minor child, the circuit court should consider at the least the following factors to determine whether the surname change would be in the child's best interest:

> (1) the child's preference; (2) the effect of the change of the child's surname on the preservation or development of the child's relationship with each parent; (3) the length of time the child has borne a given name; (4) the degree of community respect associated with the present and proposed surnames; (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (6) the existence of any parental misconduct or neglect.

Huffman I, 337 Ark. at 68, 987 S.W.2d at 274. Where a full inquiry is made by the circuit court of the factors set out above and a determination is made with due regard to the best interest of the child, the circuit court's decision will be upheld so long as it is not clearly erroneous. *Huffman I*, 337 Ark. at 69, 987 S.W.2d at 274.

We now turn to the circuit court's rationale for changing the child's middle name in the present case. At the hearing, subsequent to the circuit court's announcement that the child's middle name would be changed, Stacey's counsel made the following request:

> Your Honor, the plaintiff testified as the name Malcolm being a family name and her grandfather's name, and we just ask that the

[1] In this case, the child's first name is not at issue. Ryan does not appeal the circuit court's decision not to change the child's first name from Seth to Ryan.

> Court reconsider allowing her to insert — add the name Joseph but leave Malcolm so that the child's name would be Seth Joseph — even put Joseph first Malcolm — Poindexter, so that the grandfather's name —

The circuit court denied the request, stating:

> Actually, I had thought about that, as a hyphen type name, I really did think about that. Of course, I also thought about changing the child's name to David, because I've always liked that name. And I even — you all, I don't care if you tell your clients or not, I even said Michael or Susan would be — I mean, that's what we're talking about. . . .
>
> . . . Yeah, it's important, I understand. You want the baby named after your grandpa. I can understand. You want the baby named after your brother. The two of you should be able to sit down and work that out, but you didn't and you couldn't. You left it to me, a complete stranger, to make that decision for your child. You left it to the people of the State of Arkansas. Is there a good reason? No, there's not. Malcolm, Joseph, David, you know. Yeah, what tipped the balance, to be honest with you, it's probably because of the deceased brother. I can't think of any other good particular reason to name a kid Joseph, other than that's my son's name, your son's name. And why I didn't do the hyphen, 'cause I thought of that. I thought that's the easy way out for me, you know, give him both names. I'll tell you what would happen. You want to know what would happen? I guarantee you, and you lawyers know this is true. You've done enough of this. One of 'em would call him Malcolm, and the other one would call him Joe. They would, because they're not going to rise above this, or are they?

* * *

[redacted] It is apparent that the circuit court failed to consider whether the name change was in the best interest of the child. Accordingly, we reverse and remand. In determining whether the name change is in the child's best interest, the circuit court should consider the factors established in *Huffman I*. We are mindful of the fact that some of the *Huffman I* factors refer specifically to the

child's surname.[2] When considering those factors, the circuit court should substitute the word "name" for the word "surname." Thus, in cases involving disputes over a child's first name or middle name, the circuit court, in determining the child's best interest, should consider at least the following factors:

> (1) the child's preference; (2) the effect of the change of the child's name on the preservation and development of the child's relationship with each parent; (3) the length of time the child has borne a given name; (4) the degree of community respect associated with the present and proposed names; (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed name; and (6) the existence of any parental misconduct or neglect.

Reversed and remanded.

SOUTHERN COLLEGE of NATUROPATHY d/b/a Southern College of Naturopathic Medicine and Gary Axley, D.O.M. *v.* STATE of Arkansas, *ex rel.* Mike Beebe, Attorney General

04-862 203 S.W.3d 111

Supreme Court of Arkansas
Opinion delivered February 10, 2005

[2] We note that the court of appeals recently relied upon the *Huffman I* factors to address the issue of changing a child's *entire* name. *See Sheppard v. Speir*, 85 Ark. App. 481, 157 S.W.3d 583 (2004).

Treeca J. Dyer, P.A., for appellant.

Mike Beebe, Att'y Gen., by: *Lamar B. Davis*, Ass't Att'y Gen., for appellee.

TOM GLAZE, Justice. This is the second appeal before this court involving Gary Axley and the Southern College of Naturopathy. *See Axley v. Hardin*, 353 Ark. 529, 110 S.W.3d 766 (2003). In the present case, the State filed a complaint against the Southern College of Naturopathy, doing business as the Southern College of Naturopathic Medicine ("SCN" or "the College"), Gary Axley, the president of SCN, and others,[1] alleging that the defendants had violated the Arkansas Deceptive Trade Practices Act.

In particular, the State contended that SCN purported to confer upon its students a "doctoral degree in naturopathic medicine" after a two-week course at SCN's campus in Waldron. In addition, SCN informed its students that, once they had completed their "degree," they would be able to apply to the American Association of Drugless Practitioners, the International Association of Naturopathic Physicians, and the American Naturopathic Medical Association for membership and board certification. However, the State alleged, these claims were fraudulent and misleading, because none of those entities are recognized by the United States Department of Education as authorized accreditation entities in the field of naturopathic medicine. Therefore, the State claimed, contrary to SCN's assertions, students who enroll at SCN and complete the two-week program are not eligible to take the Naturopathic Physicians' Licensing Examination ("NPLEX"), nor are they eligible to transfer their SCN credits to any of the nationally recognized or regionally accredited naturopathic medical institutions in the United States.

[1] The other named defendants were The Herbal Healer Academy, Inc., Marijah McCain, the Natural Path Massage Clinic, and Robert Maki, LMT. None of these defendants are parties to the instant appeal.

In addition, the State's complaint alleged that Axley was holding himself out to the public as an authorized naturopathic physician, contrary to Arkansas law, and that these and other activities constituted the unlicensed practice of medicine, thereby creating a public nuisance.

On April 4, 2003, the State filed a petition for preliminary injunction, in which it alleged that Axley and SCN offered a two-week training course to become a licensed naturopathic physician; in doing so, the State contended, Axley and SCN "encourage[d] and allow[ed] unlicensed and otherwise unqualified students to engage in clinical trials where invasive medical techniques are performed." These activities, according to the State, presented a substantial danger to the health, welfare, and safety of the public. After a hearing on the State's petition for injunction, the trial court issued a preliminary injunction barring Axley and SCN from certain enumerated business practices.[2]

On September 9, 2003, the State filed a motion to compel discovery. After a hearing, the trial court granted the State's motion, directing Axley and SCN to produce all information requested by the State by December 31, 2003; the material sought included, among other things, student information and records. However, on February 12, 2004, the State filed a motion for discovery sanctions, alleging that Axley and SCN had redacted all identifying information from the material provided. The State pointed out that this had been precisely the information that was requested in several of its interrogatories and requests for production, and that the redaction appeared to have occurred on original copies of the records.

On May 3, 2004, the trial court entered an order granting the State's motion for discovery sanctions and issuing a default judgment against SCN and Axley, thereby making the preliminary

[2] These practices included the following: facilitating or permitting persons not licensed to practice medicine to engage in clinical trials involving invasive medical techniques; engaging in clinical trials or procedures that involve invasive medical techniques outside of Axley's scope of practice; disseminating documents or certificates stating that the holder is a naturopathic doctor or "N.D."; facilitating or permitting unlicensed persons to hold themselves out as being able to suggest, recommend, prescribe, or administer forms of treatment or healing; offering medical or other services or selling any medical product or service while using the title "doctor of naturopathy" or "naturopathic physician"; and entering into or forming any legal structure for the purpose of avoiding compliance with the terms of the injunction.

injunction permanent. From this order, Axley and SCN bring the instant appeal, in which they contend the trial court erred in the following three respects: 1) by refusing to consider the rules and regulations of the Arkansas State Board of Acupuncture and Related Techniques; 2) by "extending its injunction to cover health procedures that Axley is licensed to perform; and 3) by "entering summary judgment [*sic*] for failure to allow the State to discover certain information because the discovery request was too broad in scope."

[redacted] In their first point on appeal, SCN and Axley, who holds a license to practice acupuncture, assert that the trial court erred when it refused to consider the rules of the Arkansas State Board of Acupuncture and Related Techniques ("ASBART") that define the scope of practice for licensed acupuncture practitioners. We review evidentiary errors under an abuse-of-discretion standard. *Southern Farm Bureau Cas. Ins. v. Daggett*, 354 Ark. 112, 118 S.W.3d 525 (2003); *Arkansas Department of Human Services v. Huff*, 347 Ark. 553, 65 S.W.3d 880 (2002). The trial court has broad discretion in its evidentiary rulings; hence, the trial court's findings will not be disturbed on appeal unless there has been a manifest abuse of discretion. *Id.*

At the hearing on the State's motion for preliminary injunction, Axley and SCN attempted to introduce what was purported to be a "certified copy" of the Rules and Regulations of ASBART, which describe the scope of practice for an acupuncturist or practitioner of oriental medicine. Axley sought to introduce the rules in order to argue that his conduct fell within his scope of practice. Although the court initially agreed to allow the rules into evidence, when defense counsel gave the court a copy of the rules, the following colloquy ensued:

> THE COURT: Well, this is only part of a document.
>
> COUNSEL: Your Honor, it's all their regulations that they have on file.
>
> THE STATE: Your Honor, letter A usually precedes letter B.
>
> THE COURT: Yeah. This is not a complete document.
>
> COUNSEL: Your Honor, they filed this Title One on August 9th of 2001. They filed B and Title One on

August 9, 2001; they filed B before they filed the rest of it, if you look at the time and date stamp.

THE COURT: I'm not going to allow it. I'm not going to allow any testimony about it.

COUNSEL: For what reason, Your Honor?

THE COURT: It doesn't make sense to me.

COUNSEL: But Your Honor, it's a certified copy.

THE COURT: Well, you need —

COUNSEL: The fact that the Secretary of State organized it in this fashion does not mean that it doesn't make sense.

THE COURT: Well, you'll need to get somebody here to testify about this.

COUNSEL: So you're not admitting it on what basis?

THE COURT: It's in the — I already said I would admit it as Defendant's Exhibit Number 1. But I don't — I'm not going to allow any testimony about it because it doesn't — I was iffy on admitting it. Now, I look at it and it's not in any kind of order. If you'll have somebody to testify about this, I will listen to it.

COUNSEL: I guess I'm confused, Your Honor. The Secretary of State filed these regulations in reverse order. They filed B before they filed one, so they provided the packet.

THE COURT: Then you'll need to get somebody here to testify about that because just looking at it, it doesn't make a lick of sense.

COUNSEL: And so the reason that you're not allowing testimony is because it doesn't make sense.

THE COURT: Yes.

COUNSEL: And does that go to relevance or what, Your Honor? I'm just trying for purposes of the record to determine the reason for the court's denying this after having first admitted it.

THE COURT: It goes to the competency of this evidence. I look at it and it doesn't make sense, so I'm not going to allow testimony about it until you get somebody here to tell me what it means and how it's organized. On its face, it doesn't make sense.

COUNSEL: And that refers to which rule of evidence, Your Honor?

THE COURT: Hearsay rule.

COUNSEL: Which part of the hearsay rule? Just that it's hearsay?

THE COURT: That it's hearsay, sure. It's not competent; it's not relevant. Move on.

On appeal, Axley and SCN assign error to this ruling, asserting that the court was required to take judicial notice of the Board of Acupuncture's rules and regulations. They assert that, had the court considered the rules and regulations, it would have found that the procedures about which the State complained was a procedure covered by the scope of practice of ASBART and Axley's license. Axley and SCN conclude that the court's failure to consider the rule should be reversed because the injunctions issued prohibited conduct by Axley and SCN that was otherwise lawful under ASBART's rules.

We do not reach the merits of Axley's judicial notice argument, because he has changed his argument on appeal. It is well settled that an appellant may not change the grounds for objection on appeal, but is limited by the scope and nature of his or her objections and arguments presented at trial. *Divers v. Stephenson Oil Company, Inc.*, 354 Ark. 695, 128 S.W.3d 805 (2003); *Barnes v. Everett*, 351 Ark. 479, 95 S.W.3d 740 (2003). At the trial court level, Axley did not ask the court to take judicial notice of the rules; instead, he attempted to introduce a document into evidence. The court never refused to take judicial notice of the rules, because it was never asked to take judicial notice.

Under Ark. R. Evid. 201(c), a trial court "*may* take judicial notice [of adjudicative facts] whether requested or not," although under Rule 201(d), a court "*shall* take judicial notice if requested by a party and supplied with the necessary information." As stated above, Axley never asked the trial court to take judicial notice of the Acupuncture Board's rules and regulations. Instead, he proffered a copy of the rules for introduction into evidence, and the trial court concluded that the copy was not properly admissible. Because Axley did not raise the issue of judicial notice before the trial court, we do not consider his judicial notice argument on appeal.

We also note, however, that the court gave Axley an opportunity to clear up the confusion surrounding the document. The court offered to allow Axley to call someone from the Secretary of State's office to come in and testify how the documents were organized. Axley failed to take the court up on that offer, and should not be heard to complain about the situation on appeal. *See Houston v. Knoedl*, 329 Ark. 91, 947 S.W.2d 745 (1997) (not an abuse of discretion for trial court to refuse to admit property deeds when no witness was offered to explain confusion surrounding those deeds).

In his second point on appeal, Axley argues that the trial court erroneously enjoined him from engaging in practices that he is licensed to perform. The State sought to enjoin Axley's activities pursuant to the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-101 *et seq.* (Repl. 2001). In particular, Ark. Code Ann. § 4-88-107(a)(1) (Repl. 2001) prohibits, among other things, "[k]nowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services[.]" Further, Ark. Code Ann. § 4-88-104 (Repl. 2001) provides the following:

> In addition to the criminal penalty imposed hereunder, the Attorney General of this state shall have authority, acting through the Consumer Counsel, to file an action in the court designated in § 4-88-112 for civil enforcement of the provisions of this chapter, including, but not limited to, the seeking of restitution and the seeking of an injunction prohibiting any person from engaging in any deceptive or unlawful practice prohibited by this chapter.

This court has held that when the Attorney General has a specific statutory mandate to protect the public interest, the

traditional common-law prerequisites for an injunction in civil litigation, such as irreparable harm and likelihood of success on the merits, are not applicable. *See Mercury Marketing Tech. Of Delaware v. State*, 358 Ark. 319, 189 S.W.3d 414 (2004) (citing *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 466 N.E.2d 792 (1984); *People ex rel. Hartigan v. Dynasty Sys. Corp.*, 128 Ill. App.3d 874, 471 N.E.2d 236 (1984)). It is a violation of the Act that triggers the prayer for an injunction. *Id.* On appellate review, this court determines whether the trial court's factual finding of a violation of the DTPA was clearly erroneous. *Id.* (citing Ark. R. Civ. P. 52(a); *Thompson v. Bank of America*, 356 Ark. 576, 157 S.W.3d 174 (2004)).

As stated above, Axley argues on appeal that the trial court enjoined him from engaging in activities which he is licensed to perform. He points out that he is a licensed acupuncturist; his license, dated January 10, 1998, provides the following:

> [The] Board of Acupuncture and Related Techniques hereby decrees that Gary Axley has fulfilled the requirements of Doctor of Oriental Medicine, D.O.M. and is hereby licensed to practice Acupuncture, herbal medicine and related techniques, under authority of the State of Arkansas.

He asserts that, for his activities to be illegal, those actions and activities must be outside the scope of practice of his acupuncture license.

It is not apparent from Axley's brief whether he is challenging the preliminary injunction, issued on May 15, 2003, or the permanent injunction, entered on May 3, 2004. He offers no citations or references to any Addendum page numbers that would indicate with which order he takes issue on appeal. We assume, however, that he is challenging the permanent injunction, because any appeal from the preliminary injunction would be moot. *See, e.g., Galloway v. Ark. State Hwy. & Transp. Dept.*, 318 Ark. 303, 885 S.W.2d 17 (1994) (where appellant never perfected an appeal from the lower court's preliminary injunction order, point on appeal challenging that order was moot).

In any event, as we assume that Axley is arguing about the permanent injunction, that order provided as follows:

> Pursuant to Ark. Code Ann. § 4-88-104 and the common law authority of the Attorney General, Defendants Southern College of

> Naturopathic Medicine and Gary Axley are permanently enjoined from: (a) facilitating or permitting unlicensed persons from engaging in clinical trials where medical techniques are performed, including, but not limited to, blood purification and detoxification, reflexology, acupressure, iridology, and chelation therapy; (b) engaging in clinical trials or procedures that involve invasive medical techniques outside of Defendant Gary Axley's scope of practice, as defined by Ark. Code Ann. §§ 17-102-101 *et seq.*, and any regulations promulgated thereunder; (c) disseminating documents or certificates stating that the holder is a naturopathic doctor or "N.D."; (d) facilitating or permitting unlicensed persons to hold themselves out as being able to suggest, recommend, prescribe, or administer forms of treatment or healing for the intended relief or cure of physical diseases, ailments, injuries, or conditions; (e) offering medical, healthcare, or healing arts services while using the title "Doctor of Naturopathy" or "Naturopathic Physician" or the use of the abbreviation "M.D.", "N.D.", or "N.M.D." in connection with Defendant Gary Axley's name or likeness, so as to indicate that he is a medical or naturopathic doctor; (f) selling any medical, healthcare, or healing art product or service while using the title "Doctor of Naturopathy" or "Naturopathic Physician" or the use of the abbreviation "M.D.", "N.D.", or "N.M.D." in connection with Defendant Gary Axley's name or likeness, so as to indicate that he is a medical or naturopathic doctor; and (g) entering into, forming, organizing, or reorganizing into any partnership, corporation, or other legal structure for the purpose of avoiding compliance with the terms of this Order.

Axley argues on appeal that the injunction "prohibits procedures that are specifically included in the acupuncture scope of practice." As *he* phrases the issue, the trial court enjoined him from engaging in the following: 1) the sale of any medical, healthcare, or healing art product or service; 2) acupressure; 3) iridology; 4) application of parasites and worms; 5) chelation; 6) reflexology; 7) blood purification and detoxification; 8) clinical trials; and 9) "the gratuitous offering of medical, healthcare or healing arts services while using the title doctor of naturopathy or naturopathic physician and the use of the abbreviations Dr., M.D. and N.D. in connection with the defendant's name or likenesses so as to indicate that said defendant is a medical or naturopathic doctor."

We address the most obvious point first. The language in the injunction pertaining to the "application of parasites and worms" was found only in the preliminary injunction, not in the

permanent injunction quoted above. Therefore, any reference to or argument about the topic of "parasites and worms" is moot. *See Galloway, supra.*

Next, we consider Axley's claim that he was enjoined from engaging in "acupressure, iridology, chelation, reflexology, blood purification and detoxification, and clinical trials."[3] An examination of the language of the injunction reveals that Axley himself is not enjoined from engaging in these activities. Rather, he is enjoined from "*facilitating or permitting unlicensed persons from engaging in clinical trials where medical techniques are performed*, including, but not limited to, blood purification and detoxification, reflexology, acupressure, iridology, and chelation therapy." (Emphasis added.) The plain language of the injunction does not bar Axley himself from engaging in acupressure or any of the other enumerated activities. Instead, he is barred from allowing unlicensed persons to engage in these activities. Facilitating and permitting persons to engage in activities that they are not licensed to perform simply does not fall within the scope of Axley's license to practice acupuncture. Therefore, there is no merit to his argument that the trial court improperly enjoined him from engaging in legal activities.

Next, Axley assigns error to the court's barring him from, as he phrases it, "the sale of any medical, healthcare, or healing art product or service." However, a complete reading of the injunction reveals that Axley has again quoted only a portion of the court's ruling, thereby distorting its true meaning. The actual language of the order prohibits Axley from "selling any medical, healthcare, or healing art product or service while using the title 'Doctor of Naturopathy' or 'Naturopathic Physician' or the use of the abbreviation 'M.D.', 'N.D.', or 'N.M.D.' in connection with Defendant Gary Axley's name or likeness, so as to indicate that he is a medical or naturopathic doctor."

The trial court did not enjoin Axley from engaging in legal, licensed activities. Arkansas does not recognize, license, or authorize the professional terms "Doctor of Naturopathy,"

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[3] "Iridology" involves the study of the iris of the eye, "especially as associated with disease." *The American Heritage College Dictionary* 717 (3d ed. 1997). Chelation involves the "remov[al] of heavy metals from the bloodstream by means of a chelate, such as EDTA." *Id.* at 239.

"Naturopathic Physician," "N.D.", or "N.M.D." Therefore, Arkansas cannot and does not recognize Axley as naturopathic doctor. In addition, Axley is not a licensed medical doctor, and therefore may not legally indicate that he is one, pursuant to Ark. Code Ann. § 17-80-113 (Repl. 2001), which provides as follows:

> [The medical licensing statutes] shall not be construed to authorize any person to use the title "Doctor," unless that title is authorized under § 17-1-101 *et seq.*, in which case that person shall use the title in accordance with the statutes and regulations governing the particular health care profession or unless that person has been granted a doctoral degree in any healing arts profession and is licensed in that profession under § 17-1-101 et seq.

Axley is, however, licensed as a Doctor of Oriental Medicine[4] pursuant to Ark. Code Ann. § 17-102-101 *et seq.* (Repl. 2001), and he is not enjoined from utilizing that title. Under these statutes, the Arkansas State Board of Acupuncture and Related Techniques is empowered to adopt, publish, and revise such rules and regulations as are necessary to enable it to carry into effect the provisions of § 17-102-101 *et seq.* *See* Ark. Code Ann. § 17-102-206(a)(5) (Repl. 2001). The Board's rules and regulations define a "Doctor of Oriental Medicine" as "an individual licensed to practice acupuncture and related techniques, including oriental medicine, pursuant to the Act and as such has responsibility for his or her patient as an independent specialty care provider." As noted above, the injunction does not preclude Axley from referring to himself as a Doctor of Oriental Medicine, or using the abbreviation "D.O.M." after his name, or performing any activities that lie within the scope of his practice as a Doctor of Oriental Medicine.

The Board's rules do not, however, mention, recognize, or authorize the issuance of a "Doctor of Naturopathy" title. Therefore, the court's order prohibiting Axley from selling medical, healthcare, or healing arts products or services *in such as way as to*

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[4] Oriental medicine is defined as a "distinct system of primary health care with the goal of prevention, cure, or correction of any illness, injury, pain, or other physical or mental condition by controlling and regulating the flow and balance of energy and functioning of the person to restore and maintain health. Oriental medicine includes all traditional and modern diagnostic, prescriptive and therapeutic methods utilized by practitioners of acupuncture and oriental medicine world wide." Rules and Regulations of the Arkansas State Board of Acupuncture & Related Techniques, Title I.B.

indicate that he is either a medical doctor or naturopathic doctor does not enjoin a legal activity, because under Arkansas law, Axley is neither a medical nor a naturopathic doctor.

Finally, Axley raises a brief argument to the effect that there was insufficient evidence to support the trial court's decision to issue the injunction. However, the testimony to which he refers — that is, the testimony of Dr. Scott Hathcott, Dr. Ray Jouett, and Dr. Cynthia Bye — was all offered in support of the State's motion for preliminary injunction. As mentioned above, Axley failed to pursue an interlocutory appeal from the issuance of the preliminary injunction, despite the fact that, under Ark. R. App. P.–Civ. 2(a)(6), he could have undertaken such an appeal. Thus, any arguments pertaining to the issuance of the preliminary injunction are moot. *See Galloway, supra.*

Axley's final point on appeal is that the trial court erred in entering a default judgment in the State's favor in response to the State's motion for discovery sanctions. Under Ark. R. Civ. P. 37(b)(2), if a party fails to obey an order to provide or permit discovery, the trial court may "make such orders in regard to the failure as are just," including an order "rendering a judgment by default against the disobedient party." *See* Ark. R. Civ. P. 37(b)(2)(C). The imposition of sanctions, including dismissal, for failure to provide discovery rests in the trial court's discretion; this court has repeatedly upheld the trial court's exercise of such discretion in fashioning severe sanctions for flagrant discovery violations. *Calandro v. Parkerson*, 333 Ark. 603, 970 S.W.2d 796 (1998). "There is no requirement under Rule 37, or any of our rules of civil procedure, that the trial court make a finding of willful or deliberate disregard under the circumstances before sanctions may be imposed for the failure to comply with the discovery requirements." *Id.* at 608, 970 S.W.2d at 799; *accord National Front Page, LLC v. State*, 350 Ark. 286, 86 S.W.3d 848 (2002); *Viking Ins. Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992); *see also Rodgers v. McRaven's Cherry Pickers, Inc.*, 302 Ark. 140, 788 S.W.2d 227 (1990).

As noted above, on September 9, 2003, the State filed a motion to compel discovery. In its motion, the State pointed out that it had sent its interrogatories and requests for production twice, but SCN claimed it had never received them. In response to this claim, the State faxed SCN's counsel another copy of the

Second Set of Interrogatories and Requests for Production. SCN responded to each request with the following:

> Objection: Southern College of Naturopathic Medicine is the educational branch of the Church of Natural Healing. As a result of the injunction, the Southern College of Naturopathic Medicine has been forced to close, thus all files and records are in the possession of the Church of Natural Healing. Since the Church of Natural Healing is not a party, any request for information would be outside the scope of this lawsuit and the discovery process.

After a hearing, the trial court entered an order granting the State's motion to compel discovery and finding that, under Ark. R. Civ. P. 33(b), SCN and Axley had "waived all objections not specifically pled." In addition, the order directed SCN and Axley to produce all information requested by the State by December 31, 2003. Following entry of this order, the parties entered into an agreed stipulation and protective order by which the State agreed to treat all "medical information" and "student records" as confidential. The stipulation stated that the parties "specifically agree not to disclose to any third party any of the information contained in the medical and/or student records[.]"

On February 12, 2004, the State filed a motion for discovery sanctions. In this motion, the State alleged that, despite the protective order, Axley and SCN had redacted "all personal identifying information, including the name, address, telephone number, and social security number of SCN's "students." The State pointed out that this was precisely the information that had been requested in several of its interrogatories and requests for production, and that the redactions appeared to have occurred on original copies of the records. This destruction of the documents, the State claimed, authorized the imposition of discovery sanctions. The State therefore sought a default judgment, pursuant to Ark. R. Civ. P. 37(b)(2)(C).

The trial court held a hearing on the State's motion for sanctions on March 12, 2004. At this hearing, Debbie Axley, the wife of appellant Gary Axley, testified that, as registrar of SCN, she could have created a list of students' names, addresses, telephone numbers, and social security numbers, and that she was aware that she was under a court order to provide that information. Nevertheless, Mrs. Axley stated, she redacted that information on the original copies of approximately 425 student files. At the conclusion of the hearing, the court found that Axley and SCN had

"willfully disobeyed the court's order" compelling discovery. The court also informed the parties that it would take that willful disobedience into consideration when it issued sanctions. The court stated that it would have to do more research before it would decide whether to grant the State's motion for default judgment.

On May 3, 2004, the trial court entered an order granting the State's motion for discovery sanctions and issuing a default judgment against SCN and Axley. In addition, the court's order made its injunction permanent, and found Debbie Axley in contempt for the redaction of the documents.

On appeal, Axley argues first that the trial court erred in denying its motion to dismiss, filed on April 30, 2003, in which Axley alleged that the State had failed to respond to Axley's discovery requests within thirty days. This motion was filed the same day as the hearing on the State's motion for preliminary injunction. The trial court held a hearing on Axley's motion prior to considering the merits of the petition for preliminary injunction. At that time, Axley argued that the State was "stonewalling" on discovery, and complained that the State had answered many of the interrogatories with a promise to provide information as it became available. The State responded that many of the questions asked in the interrogatories were ones to which Axley already knew the answers, and others involved information that was irrelevant to the issue of whether the injunction was warranted. After considering both parties' arguments, the trial court denied Axley's motion to dismiss without comment. The trial court's denial was not an abuse of discretion. When a party has in its own possession the information it seeks to discover, it is not an abuse of discretion on the part of the trial court to decline to impose discovery sanctions. *See Howard v. State*, 348 Ark. 471, 79 S.W.3d 273 (2002).

Next, Axley complains that it should not have been required to compile lists of information, such as lists of the names, addresses, and phone numbers of all students who have enrolled in classes at SCN, in response to the State's discovery requests. He argues that the rules governing discovery do not "contemplate that a party would be forced to compile any new documents." However, the rules themselves contemplate that interrogatories are to be "answered separately and fully in writing under oath." Ark. R. Civ. P. 33(b)(1). Nothing in Rule 33 prevents a request to a party to compile the information sought to be discovered. It is true that

Rule 33(d) gives a party the option of providing business records, but nothing in the plain language of the rule states that it is improper to request lists of information.

Finally, Axley appears to argue that the trial court erred in basing the decision to grant the State's motion for default judgment on the fact that Debbie Axley redacted the identifying information from the student records that the State had sought to discover. At a hearing on March 12, 2004, the State reminded the court that it had already granted the State's motion to compel discovery, and yet Axley had destroyed the very information that the State sought when he redacted the student files. The court informed Axley that it was going to take the request for sanctions under advisement, and that it was considering granting the State's motion for default judgment.

In *Viking Ins. Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992), this court upheld the imposition of a default judgment as a discovery sanction, holding that the trial court did not abuse its discretion in entering the sanctions when the "sanctions were imposed only after the trial court considered all of the circumstances surrounding the defendant's refusal to obey the court order to produce its 'entire claim file.' " *Viking Ins. Co.*, 310 Ark. at 325. In addition, this court affirmed the entry of a default judgment where the trial court was faced with a defendant that refused to answer any requests for discovery, failed to appear at a hearing on a motion to compel discovery, and refused to appear for trial. *See National Front Page*, 350 Ark. at 294.

In this case, as in all discovery cases, the trial court was in a superior position to judge the actions and motives of the parties, and this court will not second guess the trial court in the instant case. *See Calandro*, *supra*. We hold that the trial court did not abuse its discretion in imposing discovery sanctions against Axley and SCN.

Affirmed.

OLD REPUBLIC SURETY COMPANY *v.* Sharon McGHEE, Individually and on Behalf of a Class of Similarly Situated Persons

04-704 203 S.W.3d 94

Supreme Court of Arkansas
Opinion delivered February 10, 2005

Taylor & Janis, by: *Joel Taylor*, for appellant.

Turner & Turner, by: *Todd Turner*; and *Peel Law Firm, P.A.*, by: *John Peel*, for appellee.

DONALD L. CORBIN, Justice. Appellant Old Republic Surety Company appeals the order of the Pope County Circuit Court granting summary judgment to Appellee Sharon McGhee, individually and on behalf of a class of similarly situated persons, and ordering the release of surety bonds that Appellant issued for payday lender Russellville Check Express, Inc. Appellant argues that the trial court should have dismissed Appellee's claim because she failed to exhaust her administrative remedies before the Arkansas State Board of Collection Agencies. This case, along with the case of *Staton v. American Manufacturers Mut. Ins. Co.*, No. 04-56,[1] was certified to us from the Arkansas Court of Appeals as presenting an issue of substantial public interest. Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(b)(4). We reverse.

[1] The *Staton* case, which originated in the Pulaski County Circuit Court, has not yet been scheduled for submission.

The record reflects that Appellant provided a surety bond in the amount of $50,000 for Russellville Check Express ("RCE"), a payday lender licensed under Act 1216 of 1999, the Arkansas Check-Cashers Act, Ark. Code Ann. §§ 23-52-101 to -117 (Repl. 2000 and Supp. 2003). The bond was issued on August 1, 1999.

Appellee filed suit against Appellant on May 27, 2003, seeking release of the bond to satisfy a judgment that she had previously won against RCE. Appellee asserted that she had obtained a consent judgment from RCE on January 8, 2003, in the amount of $191,419.20, and she attached a copy of said consent judgment to her complaint.[2] She also asserted that the judgment entered against RCE was based upon "a violation of the Arkansas usury law and Arkansas Code Annotated §§ 4-51-102, 4-57-105, 4-57-106, 4-57-107 and 4-57-108," and that RCE is unable to satisfy the judgment against it. She asserted further that although she had made demand for the bond, Appellant had willfully failed and refused to comply with the terms of its bond. Finally, she averred that although she had a remedy available from the State Board of Collection Agencies, requiring her to go before the Board on this claim would be futile, because the Board had previously refused her request to release the surety bonds in another action involving Appellant.

Appellant filed a motion to dismiss[3] on June 24, 2003, asserting that the trial court lacked jurisdiction over Appellee's suit, because she had failed to exhaust her administrative remedies before the Board. It contended that Section XXX of the Board's Rules and Regulations specifically provides the procedure for securing release of surety bonds. It contended further that it would not be futile to require Appellee to exhaust her administrative remedies in this case, because the prior action brought by Appellee before the Board was still pending on appeal in the Pulaski County Circuit Court. Appellant argued that Appellee's actions in filing this suit without first obtaining a final ruling on the prior action amounted to forum shopping.

Appellee responded to the motion to dismiss by filing a motion for summary judgment, in which she asserted that she was

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[2] The copy of the consent judgment contained in this record bears no file mark.

[3] Appellant's motion was actually one for summary judgment. However, during the December 8, 2003, hearing, the parties agreed that Appellant's motion was better characterized as a motion to dismiss.

entitled by law to a release of the surety bond for RCE, because RCE had been found to have violated the usury laws of this state. She stated that she did not have to bring the current action before the Board, regardless of its Rules and Regulations, because the bond itself allowed her to proceed directly against Appellant in court. She also reiterated her position that to require her to go before the Board would be futile, because the Board had previously ruled against her.

A hearing on the motions was held in the circuit court on December 8, 2003. Counsel for Appellant argued that under the Board's rules, Appellee was required to make demand on the Board for release of the surety bond. Counsel also argued that requiring Appellee to exhaust her administrative remedies, even though she had lost on a similar action before the Board, would not be a futile act. Counsel argued that the concept of futility referred to an agency not being able to grant the type of relief sought, but that it did not refer to a situation where the agency had merely ruled against a party in a similar matter. Counsel suggested that not only was the Board specifically empowered to grant the relief requested by Appellee, its power in this matter was exclusive, as both the bond itself and the Boards' Rules and Regulations provide that the surety bond shall be paid over to the Board once it determines that a person has been harmed by the unlawful actions of a payday lender. Thus, to get release of the bond, Appellee must make demand on the Board.

At the conclusion of the hearing, the trial court stated that it would take the matter under advisement until it could review the pleadings and authority submitted by both sides. Thereafter, in an order entered on March 23, 2004, the trial court granted summary judgment to Appellee and denied Appellant's motion to dismiss. The order did not give any particular reason to support the rulings. However, the following statement from the bench reveals that the trial court may have agreed with Appellee's argument that requiring her to seek relief from the Board would be a futile act:

> I want to see what I can find on futile and see how that's addressed. I can certainly see where the plaintiffs don't want to waste time if they know what the outcome is going to be; but I can also see that it's an administrative procedure and even if you know the outcome, you've got to do it. Seems like that is a waste of time as a practical matter but —

For reversal, Appellant argues that the trial court erred in granting summary judgment to Appellee and thereby denying its motion to dismiss. As it argued below, Appellant maintains that the trial court lacked jurisdiction over the case because Appellee failed to exhaust her administrative remedies before the State Board of Collection Agencies. We agree.

The doctrine of exhaustion of administrative remedies provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed statutory administrative remedy has been exhausted. *Arkansas Prof'l Bail Bondsman Lic. Bd. v. Frawley*, 350 Ark. 444, 88 S.W.3d 418 (2002); *Cummings v. Big Mac Mobile Homes, Inc.*, 335 Ark. 216, 980 S.W.2d 550 (1998). A basic rule of administrative procedure requires that an agency be given the opportunity to address a question before a complainant resorts to the courts. *Id.* The failure to exhaust administrative remedies is grounds for dismissal. *Douglas v. City of Cabot*, 347 Ark. 1, 59 S.W.3d 430 (2001); *Romine v. Arkansas Dep't of Envtl. Quality*, 342 Ark. 380, 40 S.W.3d 731 (2000).

There are, however, exceptions to the exhaustion requirement. For instance, this court has recognized that exhaustion of administrative remedies is not required where no genuine opportunity for adequate relief exists, or where irreparable injury will result if the complaining party is compelled to pursue administrative remedies, or where an administrative appeal would be futile. *Cummings*, 335 Ark. 216, 980 S.W.2d 550; *Barr v. Arkansas Blue Cross & Blue Shield, Inc.*, 297 Ark. 262, 761 S.W.2d 174 (1988). In other words, inadequate or futile administrative remedies need not be exhausted before other remedies are pursued. *Cummings*, 335 Ark. 216, 980 S.W.2d 550.

This court has not heretofore specifically defined what is meant by the term "futile" in the context of the doctrine of exhaustion of administrative remedies. Appellant argues that what is meant by "futile," is something that is legally impractical, like where the agency has no power to grant the relief requested. To support this argument, Appellant relies on the holding in *Cummings*, 335 Ark. 216, 980 S.W.2d 550.

In *Cummings*, the appellants purchased a mobile home from the appellee. They had numerous problems with leaks, which the appellee, Big Mac Mobile Homes, had made several attempts to repair. Following the last unsuccessful attempt, the appellants revoked their acceptance of the mobile home, tendered the mobile

home to Big Mac, and demanded a return of their payments. Big Mac refused the tender, and the appellants filed suit for breach of contract. Big Mac moved to dismiss the suit on the ground that the appellants had failed to exhaust their administrative remedies before the Arkansas Manufactured Home Commission. The trial court granted the motion, but this court reversed on the ground that requiring the appellants to exhaust their administrative remedies before the Commission would be futile. This court explained that under this state's statutes and the Commission's rules, the Commission could only provide a remedy for damages for the actual cost of repairs, but that damages for repairs was not the remedy requested by the appellants. This court then held: "We conclude that when a plaintiff prays for relief that is clearly not available at the administrative level, exhaustion of other available administrative remedies is not required." *Id.* at 222, 980 S.W.2d at 553 (citations omitted).

Appellant also relies on the holding by the court of appeals in *McLane Southern, Inc. v. Davis*, 80 Ark. App. 30, 90 S.W.3d 16 (2002). There, the Arkansas Tobacco Control Board had notified McLane, a cigarette wholesaler, that it was being charged with violating the anti-rebating provisions of the Unfair Cigarette Sales Act. McLane requested a hearing before the Board; however, before the hearing was held, McLane filed suit in circuit court seeking an injunction to prevent the Board from enforcing the anti-rebating provisions of the act and a declaration that the act and the applicable Board regulations were unconstitutional. The trial court dismissed the case for McLane's failure to exhaust its administrative remedies. The court of appeals affirmed. In doing so, it rejected McLane's argument that any action before the Board on the constitutionality of the act's anti-rebating provisions would be futile because the Board's construction of the validity of those provisions was "a foregone conclusion." *Id.* at 41, 90 S.W.3d at 23. The court of appeals held:

> We do not, however, believe that McLane established the futility of its raising the constitutional issues in the administrative proceeding. *Whatever the Board's decision on the matter, McLane would have been able to appeal its decision to the circuit court.* Also, the Board might have interpreted the statute in a manner that favored McLane's position or it might have determined that McLane's conduct did not fall within the terms of the statute.

Id. (citation omitted) (emphasis added).

The facts in the present case are different from those in *McLane*, in that the litigant here has previously gone before the Board on a similar case and actually received an unfavorable ruling, as opposed to assuming that an unfavorable ruling would be rendered. However, the logic of *McLane*, that a litigant must pursue available remedies to their final conclusion, including the appeal process, is applicable to this case. Until a litigant pursues the administrative process to its end, it cannot be said that it is futile to exhaust those remedies before filing suit. Even the case relied upon by Appellee, *Zhou v. Guardian Life Ins. Co. of America*, 295 F.3d 677 (7th Cir. 2002), supports this conclusion.

In *Zhou*, the litigant started the administrative process, but did not follow it through to the end before filing suit. The district court dismissed the suit on the ground that he had failed to exhaust his administrative remedies. On appeal to the Seventh Circuit, Zhou argued that requiring him to exhaust his remaining administrative remedies would be futile. The appeals court disagreed, holding:

> [F]or a party to come within the futility exception, *he "must show that it is certain that [his] claim will be denied on appeal, not merely that he doubts that an appeal will result in a different decision."* Save for bald allegations and conclusory statements, Zhou has proffered no facts that would lead this court to find that it was a certainty that further administrative appeal would result in a denial of his claim. When a party has proffered no facts indicating that the review procedure that he initiated will not work, the futility exception does not apply.

Id. at 680 (citations omitted) (emphasis added). Under this holding, it is not enough for a litigant to begin the administrative process and then abandon it when he or she believes that the unfavorable decision reached by the agency will not be overturned on appeal. The litigant must either follow through to the final conclusion of the administrative process or present facts demonstrating that it is certain that the relief sought will be denied on appeal. *See also Ellingson & Assoc., Inc. v. Keefe*, 410 N.W.2d 857 (Minn. App. 1987) (holding that futility is demonstrated where the administrative agency has *unequivocally committed* itself to a position).

Similarly, the Supreme Court of Washington, in *Citizens for Clean Air v. City of Spokane*, 114 Wash. 2d 20, 785 P.2d 447 (1990), has held that the policies underlying the doctrine of exhaustion of administrative remedies "impose a substantial burden on a litigant

attempting to show futility." *Id.* at 30, 785 P.2d at 453 (citation omitted). There, Citizens sued the city because it had approved the building of a garbage incinerator. During public hearings on a proposed contract, a lawyer for Citizens argued against the proposal, challenging the adequacy of the environmental-impact statement obtained by the city. The city approved the contract. Thereafter, Citizens filed suit. The trial court entered judgment in favor of the city, and Citizens appealed. The Washington Supreme Court affirmed the judgment as to the group's challenge to the adequacy of the environmental-impact statement on the ground that Citizens had failed to exhaust their administrative remedies by appealing the city's decision. In so holding, the court discussed the underlying policies for requiring exhaustion:

> The exhaustion requirement (1) prevents premature interruption of the administrative process; (2) allows the agency to develop the factual background on which to base a decision; (3) allows the exercise of agency expertise; (4) provides a more efficient process and allows the agency to correct its own mistake; and (5) insures that individuals are not encouraged to ignore administrative procedures by resort to the courts.

Id. (citing *Estate of Friedman v. Pierce Cy.*, 112 Wash. 2d 68, 768 P.2d 462 (1989); *Orion Corp. v. State*, 103 Wash. 2d 441, 693 P.2d 1369 (1985)). Applying those policies, the court rejected the group's argument that exhaustion would be futile because their appeal of the city's decision would be to the very same body, the city council, that had previously rejected the group's complaints. The appellate court held that Citizens had the burden of proving futility, *i.e.*, that the city's decision would be the same. The court stated: "We will not assume that an appeal focused on specific issues might not have led to changes." *Id.* at 32, 785 P.2d at 454.

Based on the foregoing, we conclude that it is not futile to require Appellee to exhaust her administrative remedies before proceeding with her claim in circuit court, even though the State Board of Collection Agencies has ruled against her on a similar claim. As of the date that she filed this suit, Appellee had not pursued her prior claim before the Board to its final conclusion, as that claim was still pending on appeal to the Pulaski County Circuit Court. Thus, she has pursued this claim directly in the Pope County Circuit Court before receiving a final determination on her appeal of the Board's previous decision. Because she

has failed to follow through on her previous claim, and a final determination has not yet been made, it is not futile to require her to exhaust the administrative remedies on her present claim. There is no futility in requiring Appellee to pursue her administrative remedies to their full extent either in the prior case or the present one.

[redacted] Moreover, Appellee has failed to demonstrate with certainty that the Board's decision would be the same in the present case. We agree with the Washington Supreme Court and the Seventh Circuit that the burden is on the litigant to demonstrate futility. Here, Appellee only demonstrated that the Board had previously ruled against her on a similar claim. Like the Washington Supreme Court, we are not willing to assume that the Board would automatically reject Appellee's arguments were they brought again. As stated above, there are sound policy reasons for allowing the agency to correct any mistakes it may have made in prior decisions. By skipping the crucial step before the Board, Appellee has deprived the agency of the opportunity to correct any mistake it may have made in the previous case. In turn, she has deprived the circuit court of a fully developed record to review.

[redacted] Additionally, the particular circumstances of this case demonstrate that it is not futile to require Appellee to exhaust her administrative remedies, as it is the Board that is specifically empowered to grant the relief requested by her, *i.e.*, the release of the surety bond. Rule XXX of the Board's Rules and Regulations provides in pertinent part:

> A) Each licensee is required to maintain a fifty thousand dollar ($50,000.00) surety bond for the use and benefit of the State of Arkansas and/or for any injured party and to ensure that the licensee shall faithfully perform its duties and obligations pertaining to the business of check cashing and/or deferred presentment services.
>
> B) *If the Board determines, after due process, including proper notice and opportunity to be heard, that the licensee has violated any provision of Act 1216 of 1999 or these Rules and Regulations, it shall collect from the required Surety Bond any monies due and payable to satisfy* any loss or damages suffered by the State including civil penalties and/or *any loss or damages suffered by any persons of the State. Payment on the bond shall be upon the written demand of the State of*

Arkansas State Board of Collection Agencies. The above notwithstanding, no monies may be collected from the Bond and/or disbursed pending any administrative and/or judicial appeals.

C) In the event of any loss or damage suffered by any persons of the State, *the [Board] shall proceed to disburse the funds it has collected from the Surety company in accordance with these Rules.* [Emphasis added.]

The remainder of Rule XXX provides for notification to all potential persons harmed by the unlawful actions of the payday lender and for hearings to be held on their claims before the Board determines how to disburse the bond amounts.

In the present case, Appellee is a class representative of similarly situated persons harmed by the alleged unlawful actions of RCE. From the record before us, it cannot be discerned whether any potential class members have opted out of the class. Such persons, however, may also have a claim on the surety bond that Appellee seeks. It would be up to the Board to make a determination as to the amount of disbursement on each claim, after proper notice was given. As such, it was imperative for Appellee to bring her claim before the Board.

We find no merit to Appellee's argument that the bond itself specifically allows her to bring an action directly against the surety in circuit court. The bond provides in pertinent part that "the State of Arkansas State Board of Collection Agencies or any person(s) of this State suffering such loss or damages shall have the right to bring an action on this bond against the Principal or Surety." Notably absent from this provision are the words "in circuit court," or "in the courts of this state." Thus, Appellee's argument is misplaced. Indeed, when this provision is read in context with the remainder of the bond, it becomes clear that the "action" against the principal or surety must be brought before the Board, as the bond provides: "That this bond, upon written demand by the State of Arkansas State Board of Collection Agencies *shall be paid and turned over to the State of Arkansas State Board of Collection Agencies* in accordance with the Rules and Regulations promulgated thereunder." (Emphasis added.) Thus, under its own terms, the bond is payable to the Board, not to individual persons, and it is the Board who, under its rules and regulations, disburses the bond to any persons harmed by the unlawful actions of a payday lender.

Finally, we reject Appellee's assertion that the Board lacks jurisdiction to hear her claim, because the decision to release the surety bond turns on a determination that the payday lender, RCE, violated the laws and constitutional provisions pertaining to usury. Appellee supports her argument with a citation to this court's holding in *Luebbers v. Money Store, Inc.*, 344 Ark. 232, 40 S.W.3d 745 (2001). There, the appellant argued that section 23-52-104(b) of the Check-Cashers Act was unconstitutional. That section provided:

> The fee, when made and collected, shall not be deemed interest for any purpose of law, and a check-cashing transaction, including one (1) with a deferred presentment option, shall not be and shall not be deemed to be a loan, loan contract, or a contract for the payment of interest notwithstanding any disclosures required by this chapter.

This court characterized this provision as a declaration by the General Assembly that deferred presentment check-cashing transactions are excluded from the confines of the Arkansas Constitution's usury provisions. This court then concluded that the legislature could not make such a declaration, because the determination of whether a transaction is usurious is one that must be decided by the courts. Accordingly, this court struck down section 23-52-104(b) as violating the constitutional doctrine of separation of powers.

Appellee contends that our holding in *Luebbers* strips the Board of the ability to decide her claim because it touches upon the usury laws of this state. We disagree. The issue in that case was the power to determine whether a transaction was usurious, as between the courts and the legislature, not as between the courts and administrative agencies. Indeed, this court has consistently held that administrative agencies have the power to hear related constitutional issues, and that a litigant must raise such constitutional issues in the agency. *See AT&T Communs. of the S.W., Inc. v. Arkansas Pub. Serv. Comm'n*, 344 Ark. 188, 40 S.W.3d 273 (2001); *Romine*, 342 Ark. 380, 40 S.W.3d 731; *Ford v. Arkansas Game & Fish Comm'n*, 335 Ark. 245, 979 S.W.2d 897 (1998). This court has also recognized the value of allowing the agency to fully develop a record on such constitutional claims. *See AT&T*, 344 Ark. 188, 40 S.W.3d 273.

[redacted] In the present case, Appellee seeks the release of a surety bond issued by Appellant on behalf of payday lender RCE. Her claim is based upon an alleged order of summary judgment

entered by the circuit court, which contains findings that RCE violated the usury provisions of various state statutes and the Arkansas Constitution.[4] However, the fact that her underlying judgment involves an issue of usury does not alter the fact that the Board is the entity charged with the initial determination of whether to release the surety bond. Because she failed to bring her claim to the Board before filing suit in circuit court, she has failed to exhaust the administrative remedies available to her. Accordingly, we reverse the judgment of the trial court and remand for entry of an order consistent with this opinion.

ALLTEL CORPORATION and Alltel Communications, Inc. *v.* Paul SUMNER and Charles Miller, Individually and On Behalf of All Persons Similarly Situated

04-279 203 S.W.3d 77

Supreme Court of Arkansas
Opinion delivered February 10, 2005

[4] During the December 8, 2003, hearing, the trial court indicated that it had some misgivings about ordering the release of the surety bond based solely on the consent judgment between Appellee and RCE. The court observed that the consent judgment seemed incomplete in that it did not contain specific findings that RCE violated any particular usury laws. Appellee's counsel informed the court that there had also been an order of summary judgment granted against RCE. Counsel then stated that he would provide the court with a copy of that summary judgment. For whatever reason, however, that order does not appear in the record.

Friday, Eldredge & Clark, LLP, by: *Kevin A. Crass* and *Jamie Huffman Jones* for appellants.

Emerson Poynter LLP, by: *Scott E. Poynter* and *John G. Emerson, Jr.*; and *Terry M. Poynter, P.A.*, by: *Terry M. Poynter*, for appellees.

ANNABELLE CLINTON IMBER, Justice. The appellees, Paul Sumner and Charles Miller, individually and on behalf of all others similarly situated, filed a class-action complaint against the appellants, Alltel Corporation and Alltel Communications, Inc., (collectively hereinafter "Alltel"). In their complaint, Sumner and Miller assert one count of deceptive trade practices in violation of the Arkansas Deceptive Trade Practices Act. Ark. Code Ann. §§ 4-88-101, *et. seq.* (Repl. 1999). Specifically, they claim that

> [b]eginning sometime in the year 2000, Alltel falsely advertised and offered unlimited monthly wireless telephone services, subject to fixed roaming charges to [Sumner and Miller] and the Class Members for $49.95 for various terms and durations. Indeed, some of the ads even said the $49.95 rate would last for the life of the customer.

As a result of the advertising campaign, Sumner and Miller subscribed to Alltel's wireless telephone service in accordance with the terms set forth in the advertised rate plan. The class-action complaint further states that within months after signing up thousands of customers, including Sumner and Miller, Alltel sent letters to them announcing an increase in the monthly rate from $49.95 to $59.95, as well as an increase in the roaming rate, with the increases to be effective July 16, 2001. Alltel responded to the complaint by filing a motion to dismiss or stay pending resolution of the arbitration issue in another case[1], or, in the alternative, to compel arbitration. In its motion, Alltel stated

[1] A similar nationwide-class action complaint was filed against Alltel in Ohio in connection with the July 2001 rate increase. As in this case, Alltel sought to compel arbitration and that motion was still pending in the Ohio court as of the time Sumner and Miller filed their complaint.

Sumner and Miller signed a service contract that included an arbitration clause.[2] According to Alltel, the arbitration clause states:

> Any dispute arising out of this Agreement or relating to the Services and Equipment must be settled by arbitration administered by the American Arbitration Association. Each party will bear the cost of preparing and prosecuting its case. We will reimburse you for any filing or hearing fees to the extent they exceed what your court costs would have been if your claim had been resolved in a state court having jurisdiction. The arbitrator has no power or authority to alter or modify these Terms and Conditions, including the foregoing Limitation of Liability section. All claims must be arbitrated individually, and there will be no consolidation or class treatment of any claims. This provision is subject to the United States Arbitration Act.

Sumner and Miller filed a brief opposing Alltel's motion to dismiss or stay, and the circuit court denied Alltel's motion without a hearing.

Shortly thereafter, Alltel filed a motion for reconsideration, a hearing and amendment to order. The circuit court vacated its earlier order and held a hearing. At that point, Alltel submitted the affidavit of John Chapman, Director of Retail Sales for Alltel, which states in relevant part:

> 3. Based on my knowledge of Alltel's practices and procedures, the Agreement for Communications Services Terms and Conditions, which is attached hereto as Exhibit "A," would have been given to the Plaintiffs prior to the initiation of service.
>
> 4. No Alltel wireless customer would receive service until such time as an Agreement for Communications Services Terms and Conditions, or its predecessor, would have been in place.[3]

Ultimately, the court entered an order denying Alltel's motion, which order is the subject of this appeal by Alltel.

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[2] Alltel later conceded during a hearing that it mistakenly alleged the contracts were signed by Sumner and Miller; instead, Alltel claimed that Sumner and Miller were subject to the terms of the service contracts.

[3] No "Exhibit A" is attached to the affidavit. We must assume that the Exhibit A referred to in the affidavit is the same Exhibit A attached to Alltel's motion to dismiss and brief in support thereof.

In its order, the circuit court denied Alltel's motion to dismiss or stay, or, in the alternative, to compel arbitration and stated, "[Alltel] offered insufficient proof that the arbitration clause was communicated to the Plaintiffs or that the Plaintiffs should be bound by Defendants' asserted common clause. The affidavit of John Chapman, alone, is insufficient to prove that the Plaintiffs were given a contract which provided for the requirement of arbitration . . . ." An order denying a motion to compel arbitration is an immediately appealable order. Ark. R. App. P.–Civ. 2(a)(12); *The Money Place, LLC v. Barnes*, 349 Ark. 411, 78 S.W.3d 714 (2002); *E-Z Cash Advance, Inc. v. Harris*, 347 Ark. 132, 60 S.W.3d 436 (2001); *Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 27 S.W.3d 361 (2000). We review a circuit court's order denying a motion to compel arbitration *de novo* on the record. *Id.*

The same rules of construction and interpretation apply to arbitration agreements as apply to agreements in general. *Cash in a Flash Check Advance of Arkansas, LLC, v. Spencer*, 348 Ark. 459, 74 S.W.3d 600 (2002). Thus, the essential elements for an enforceable arbitration agreement are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligation. *Id.* Furthermore, the construction and legal effect of a written contract to arbitrate are to be determined by the court as a matter of law. *E-Z Cash Advance, Inc. v. Harris*, 347 Ark. 132, 60 S.W.3d 436 (2001).

A threshold inquiry is whether an agreement to arbitrate exists; that is, whether there has been mutual agreement, with notice as to the terms and subsequent assent. We keep in mind two legal principles when deciding whether a valid contract was entered into: (1) a court cannot make a contract for the parties but can only construe and enforce the contract that they have made; and if there is no meeting of the minds, there is no contract; and (2) it is well settled that in order to make a contract there must be a meeting of the minds as to all terms, using objective indicators. *Williamson v. Sanofi Winthrop Pharm., Inc.*, 347 Ark. 89, 60 S.W.3d 428 (2001). Both parties must manifest assent to the particular terms of the contract. *Van Camp v. Van Camp*, 333 Ark. 320, 969 S.W.2d 184 (1998). In this case, Alltel argues that "assent was indicated by the continued use and benefit of ALLTEL services." In support of this proposition, they cite *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). In *Hill*, the plaintiff ordered a computer over the telephone. The terms and conditions, which

contained an arbitration clause, were included in the box with the computer. The court determined that the arbitration clause was enforceable because the buyer, after being given notice of the terms, kept the computer. Similarly in *Stiles v. Home Cable Concepts*, 994 F.Supp. 1410 (M.D. Ala. 1998), the court enforced the amended terms of an agreement where the amended terms were mailed to the plaintiff, and he acknowledged receipt of the notice.

The above cases are distinguishable from the case at hand because, in each case, it was shown that the party had received the agreement. For a party to assent to a contract, the terms of the contract must be effectively communicated. *Crain Indus., Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991). Here, the only evidence introduced by Alltel that Sumner and Miller had received notice was the Chapman affidavit stating that Altell's practice and procedure is to provide copies of the terms and conditions prior to the initiation of service. We must decide if this affidavit is sufficient evidence to establish that Sumner and Miller, in fact, received the agreement. Another federal court decision cited by Alltel, *Tinder v. Pinkerton Security*, 305 F.3d 728 (7th Cir. 2002), assists us with the analysis of this question.

In *Tinder*, an at-will employee sued her employer for employment discrimination and retaliation. The employer moved to compel arbitration. The employee, Tinder, claimed she had no notice of the arbitration clause that was sent by a brochure to employees after the commencement of her employment. However, the employer provided two affidavits containing detailed information about how the information was distributed to its employees. *Id.*

According to the employer's director of employee relations, the central office distributed copies of the brochure to each of its district offices with instructions to insert it as a payroll stuffer in the envelope along with each employee's paycheck. The director further averred that the employer sent a memo to its district offices emphasizing the importance of the program and the need to promptly distribute the brochures, and the legal department issued a second memo confirming that the brochure had been distributed to all the district offices. *Id.* In the second affidavit, the manager of the employer's second office in Milwaukee asserted that the employee, Tinder, was paid through his office; that his office distributed the brochures to all employees along with their paychecks on the payday following the date the district offices had been instructed to circulate the brochure; and that Tinder received

her salary by check, not by direct bank deposit into a bank account. *Id.* In light of the specific information provided by the employer, Tinder's general denial that she did not receive notice was not enough to avoid arbitration. In sum, the court concluded that Tinder received notice of the arbitration clause. *Id.*

In this case, Sumner and Miller agree that they subscribed to Alltel's wireless telephone service, but submit no evidence of knowledge about the service agreement and its terms and conditions.[4] In response, Alltel relies on the Chapman affidavit to suggest that because its practice and procedure is to provide copies of the terms and conditions prior to the initiation of service, notice was established. However, unlike the detailed affidavits in *Tinder v. Pinkerton, supra,* the affidavit provided by Chapman solely confirms Alltel's practices and procedures without any information regarding whether those practices and procedures were followed at the time Sumner and Miller subscribed to Alltel's service. We have found no case law suggesting that notice can simply be inferred from a company's statement of its practices and procedures; rather, as in the *Tinder* case, there must be specific evidence that the company implemented those practices and procedures such that notice to the affected party can be reasonably inferred from the circumstances.

Moreover, Chapman also stated in his affidavit that "no Alltel wireless customer would receive service until such time as an Agreement for Communications Services Terms and Conditions, or *its predecessor*, would have been in place." Because we have no record of a predecessor contract, we are unable to conclude whether it even contained an arbitration clause. Furthermore, one of the arbitration clauses quoted in Alltel's brief in support of the

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[4] We reject Alltel's attempt during oral argument to interpret the following footnote in the brief submitted by Sumner and Miller as an admission that they had seen the terms and conditions of the agreement:

> Appellants' brief repeatedly states that Appellees took the position that they denied seeing the alleged written agreement, but that is not true. Appellees position has always been that Appellants erroneously contended that a signed contract existed between the parties, and had failed to meet its burden in proof by not producing the signed agreement.

The footnote merely reflects that Sumner and Miller dispute Alltel's statements attributing a particular position to them.

motion to dismiss does not contain the same language as the arbitration clause contained in the agreement submitted as "Exhibit A." According to the brief, the service agreement provides that "any disputes arising out of the Service Agreement must be resolved by binding arbitration." As noted earlier, the arbitration clause in the service agreement submitted as "Exhibit A" states in part, "Any dispute arising out of this Agreement or relating to the Services and Equipment must be settled by arbitration administered by the American Arbitration Association." Such an inconsistency also supports the conclusion that more than one service agreement may exist. Accordingly, we affirm the circuit court's finding that there is insufficient proof that Sumner and Miller were given a contract which provided for the requirement of arbitration. Because the additional issues argued by Sumner and Miller[5] presume the existence of a contract requiring arbitration, we need not address those issues.

Affirmed.

Special Justices ELDON F. COFFMAN, JIM H. BOYD, and ROBIN GREEN join.

BROWN, J., DICKEY, J., and GUNTER, J., not participating.

CORBIN, J., not participating in the final decision.

K.N. *v.* STATE of Arkansas

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[5] Sumner and Miller sought to have additional points addressed on appeal, arguing that the arbitration clause does not apply to the false-advertising claim, that the arbitration terms of the contract were procured by fraud, and that the arbitration clause is unenforceable because it lacks mutuality and is unconscionable.

[redacted]

[redacted]

[redacted]

[redacted]

John O. Russo, Rule XV Attorney; and *Michael Mullane*, Supervising Attorney, University of Arkansas — School of Law, for appellant.

Mike Beebe, Att'y Gen., by: *Susan Antley*, Ass't Att'y Gen., for appellee.

JIM GUNTER, Justice. Appellant, K.N., appeals the order of the Washington County Circuit Court, Juvenile Division, revoking her probation. For reversal, K.N. makes three allegations of error concerning the admissibility of evidence and the imposition of sanctions. We affirm the trial court's revocation order.

On May 25, 2004, K.N. entered a plea of guilty to possession of an instrument of crime, a violation of Ark. Code Ann. § 5-73-102 (Repl. 1997), a class A misdemeanor, and possession of a controlled substance, a violation of Ark. Code Ann. § 5-64-401 (Supp. 2003), a class A misdemeanor. On June 1, 2004, the Washington County Circuit Court adjudicated her delinquent, placed her on probation, and sentenced her to a twenty-day suspended sentence in the Juvenile Detention Center. The terms of K.N.'s probation included that she refrain from using illegal substances, that she submit to random drug tests, and that she meet with her probation officer.

On June 30, 2004, K.N. met with her juvenile probation officer, Renee McCown. During that meeting, K.N. was given a drug test. The results of the drug test were positive for the adulterant, Quick 45, which is intended to clean out the system for purposes of passing a drug test. When Ms. McCown questioned K.N. about the drug test, K.N. admitted to using Quick 45 and to smoking marijuana while on probation.

The State filed a petition to revoke probation on the basis that K.N. admitted to using an adulterant to pass the drug test and to marijuana use. After arraignment, the trial court ordered K.N. to be held in detention pending an adjudication hearing.

On July 12, 2004, an adjudication hearing was held to consider the petition to revoke probation. During the hearing, Ms. McCown testified about K.N.'s statements concerning her drug test over K.N.'s objection. The trial court found by a preponderance of the evidence that K.N. violated the conditions of her probation. The trial court ordered her to spend twenty days in detention with fourteen days suspended, placed her on probation

with certain conditions, and ordered that K.N. receive inpatient treatment for drug use. K.N. brings this appeal from the order of disposition.

We note that the Arkansas Juvenile Code and its provisions apply to proceedings in the juvenile court. *K.M. v. State*, 335 Ark. 85, 983 S.W.2d 93 (1998). Specifically, Ark. Code Ann. § 9-27-339 governs issues of probation revocation in juvenile court. *Bailey v. State*, 348 Ark. 524, 74 S.W.3d 622 (2002). A revocation hearing is held once the State files a petition seeking to revoke a juvenile's probation. *See* Ark. Code Ann. § 9-27-339(d). In juvenile-revocation cases, the trial court must find by a preponderance of the evidence that the juvenile violated the terms and conditions of probation. Ark. Code Ann. § 9-27-339(e). We have consistently held that a trial court's ruling in matters relating to the admission of evidence will not be reversed absent an abuse of discretion. *M.M. v. State*, 350 Ark. 328, 88 S.W.3d 406 (2002). With this standard of review in mind, we turn to the present case.

For her first point on appeal, K.N. argues that the trial court erred in admitting her statements to her probation officer, Ms. McCown, before her revocation hearing. K.N. contends that Ark. Code Ann. § 9-27-321 (Supp. 2003) prohibits the admissibility of her statements to her juvenile probation officer because those statements were made during an "intake process." *Id.* The State responds, arguing that K.N.'s statements were made during a meeting with her probation officer after she had been adjudicated delinquent in accordance with her own guilty plea.

This issue requires our interpretation of Ark. Code Ann. § 9-27-321. We recently articulated our rules regarding statutory construction in *Weiss v. American Honda Finance Corp.*, 360 Ark. 208, 200 S.W.3d 381 (2004):

> The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Raley v. Wagner*, 346 Ark. 234, 57 S.W.3d 683 (2001); *Dunklin v. Ramsay*, 328 Ark. 263, 944 S.W.2d 76 (1997). When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Stephens v. Arkansas Sch. for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000); *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997). Where the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accom-

> plished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Stephens v. Arkansas Sch. for the Blind, supra* (citing *State v. McLeod,* 318 Ark. 781, 888 S.W.2d 639 (1994)). Finally, the ultimate rule of statutory construction is to give effect to the intent of the General Assembly. *Ford v. Keith,* 338 Ark. 487, 996 S.W.2d 20 (1999); *Kildow v. Baldwin Piano & Organ,* 333 Ark. 335, 969 S.W.2d 190 (1998).

Weiss, supra.

With these principles in mind, we turn to Ark. Code Ann. § 9-27-321, which provides:

> Statements made by a juvenile to the intake officer or probation officer during the intake process before a hearing on the merits of the petition filed against the juvenile shall not be used or be admissible against the juvenile at any stage of any proceedings in circuit court or in any other court.

Id.

In *Manatt v. State,* 311 Ark. 17, 842 S.W.2d 845 (1992), we considered the issue at bar. However, in *Manatt,* we concluded that the juvenile's incriminating statements at issue were made to a police officer and not to an intake officer. Thus, Ark. Code Ann. § 9-27-321 was inapplicable to the circumstances in that case. Further, we note that the facts in *Manatt* did not involve issues of probation revocation.

Guided by our statutory-construction rules, we now examine the plain meaning of the statute. *Weiss, supra.* The definition section of the Juvenile Code, found at Ark. Code Ann. § 9-27-303 (Supp. 2003), does not contain a definition of "intake process." Here, we contemplate the phrase, "intake process," to include questioning a juvenile by an intake officer or by a probation officer before a hearing on the merits of a petition filed before the juvenile is adjudicated delinquent. Thus, we interpret Ark. Code Ann. § 9-27-321 to apply to pre-adjudication situations rather than pre-revocation scenarios.

Appellant argues that K.N.'s statements were made during a new intake process before a hearing on the merits of her revocation petition. *Id.* However, K.N.'s argument is misplaced. At trial, K.N.'s probation officer, Ms. McCown, testified that she met with

K.N. on June 9, 2004, to review the terms of her probation, which included a random drug screen. On June 30, 2004, K.N. submitted to a random drug test. Ms. McCown testified that K.N.'s urine was a "funny color," so it was tested for an adulterant, and the results were positive. Ms. McCown further testified that K.N. admitted to having smoked marijuana and to having taken the adulterant. Over K.N.'s objection, the trial court admitted the evidence. At trial, the following colloquy occurred:

> THE COURT: This states that the statement was made by the juvenile to the intake officer, probation officer during the intake process prior to hearing on the merits of the petition filed against the juvenile shall not be used or be admissible against the juvenile in any proceedings in juvenile court or any other court. This was not a statement made during the intake proceedings. This was a statement made by the juvenile to the [probation officer] after she was placed on probation and after she was adjudicated delinquent. The statute strictly applies to the intake process before the child is adjudicated delinquent. I still stand with overruling your objection.
>
> MR. RUSSO: The defense would contend that once the drug screen was back, the adulteration was present, the probation at that point in time began a new delinquency proceeding and was going to find this juvenile delinquent in the terms contained within the code. As such, that started a new intake process for the purposes of revocation and as such any statements made are strictly inadmissible.
>
> THE COURT: I do not agree with that summary of the law. I am going to overrule your objection and note your objection for the record. But I find that any statements that she made to her probation officer do not fall within 9-27-321 as it was not an intake process. She was already adjudicated delinquent[.]

[redacted] We agree with the trial court's interpretation of Ark. Code Ann. § 9-27-321. Here, K.N.'s statements were made in a pre-revocation context. During a required meeting with her probation officer, K.N. admitted to marijuana use and to taking the adulterant, Quick 45. The use of these substances violated the required conditions of her probation. *See* Ark. Code Ann. § 9-27-

347(c) (Supp. 2003). Thus, the statements were admitted to prove by a preponderance of the evidence that K.N. violated the terms and conditions of probation, pursuant to Ark. Code Ann. § 9-27-339(e).

The term, "probation officer," in the statute refers to those scenarios illustrated in *Fare v. Michael C.*, 442 U.S. 707 (1979), in which a sixteen-year-old juvenile, who was already on probation and had a record of prior offenses, was taken into custody on suspicion of murder, and he requested to see his probation officer. In *Fare, supra*, the United States Supreme Court reversed the California Supreme Court, holding that the California court erred in finding that the juvenile's request for his probation officer was a *per se* invocation of the juvenile's Fifth Amendment rights under *Miranda*. Although the issues in *Fare, supra*, are different than the present case, the juvenile requested to speak to his probation officer in a pre-adjudication context. Thus, we conclude that section 9-27-321 protects juveniles from *Miranda* violations in a pre-adjudication context, not at a revocation hearing.

Next, K.N. argues that her uncorroborated statements to the probation officer are inadmissible. Specifically, K.N. contends that her statements were not corroborated by either the urine sample or actual tests performed on the urine. In response, the State argues that appellant's statements to her probation officer were not used for the purpose of obtaining an adjudication, and the corroboration requirement does not apply.

We agree with the State's position. The corroboration requirement is found at Ark. Code Ann. § 16-89-111 (Supp. 2003), which provides that "[a] confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed." *Id.* Here, the admissibility of K.N.'s statements were admitted to prove that K.N. had violated the terms of her probation. For this reason, we hold that the trial court was correct in admitting these statements.

Based upon the foregoing conclusions, as well as our standard of review in probation-revocation hearings, we hold that the trial court did not abuse its discretion in admitting K.N's statements to her probation officer.

For her second point on appeal, K.N. argues that the trial court erred in admitting a letter written by K.N.'s counselor to her probation officer. Specifically, she contends that the letter is hearsay evidence and is inadmissible under Ark. Code Ann. § 9-27-325(e)(1) and the Arkansas Rules of Evidence.

Over defense counsel's objections, the trial court admitted a letter written by Lewis Chambliss to Ms. McCown on July 1, 2004, stating that K.N. received counseling services for the past three months. Mr. Chambliss wrote, "[K.N.'s] present diagnosis is mood disturbance not otherwise specified with secondary substance abuse. However, this diagnosis is being formally changed today to a primary diagnosis of polysubstance abuse." In his letter, Mr. Chambliss recommended that K.N. seek treatment at a residential substance abuse treatment facility. At trial, defense counsel objected to the admissibility of this letter, and the following colloquy occurred:

> THE COURT: Any objection, counsel?
>
> MR. RUSSO: Yes, your honor, defense would still object as to hearsay basis because obviously this not the best evidence. The State could have had Mr. Chambliss here and/or better record as to substance for his diagnosis.
>
> THE COURT: I understand your objection. However, I do believe it sounds like the letter refers to what the court's recommendations would be if I find that she violated her probation and not to whether or not she violated her probation. So if you are objecting.
>
> * * *
>
> THE COURT: I am going to allow it in over your objection.

In the present case, K.N.'s argument for reversal fails because the rules of evidence, including the hearsay rule, do not apply to proceedings for granting or revoking probation. As a general rule, the Arkansas Juvenile Code requires the application of the Arkansas Rules of Evidence. *See* Ark. Code Ann. § 9-25-325(e)(1) (Supp. 2003). However, Ark. R. Evid. 1101(b)(3) of the Arkansas Rules of Evidence provides:

> (b) Rules Inapplicable. The rules other than those with respect to privileges do not apply in the following situations:
>
> * * *
>
> (3) Miscellaneous proceedings. Proceedings for extradition or rendition; [preliminary examination] detention hearing in criminal cases; *sentencing, or granting or revoking probation;* issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

Id. (emphasis added). *See also Redman v. State*, 265 Ark. 774, 580 S.W.2d 945 (1979).

We note that the rules of evidence do not apply to probation-revocation hearings, even in a juvenile proceeding, particularly in light of Rule 1101(b)(3). Therefore, because the rules of evidence did not apply at K.N.'s probation-revocation hearing, we find no merit in her argument that the letter written by Mr. Chambliss was inadmissible.

For her third point on appeal, K.N. argues that the trial court erred in ordering incarceration and additional terms of her probation after finding that she had revoked the terms of her probation. Specifically, she contends that her second order of disposition, dated July 12, 2004, includes inpatient drug treatment that was not a part of the original order dated May 25, 2004, which adjudicated her delinquent. In response, the State argues that the trial court's disposition order on the revocation did not exceed the disposition that could have been ordered at the time K.N.'s probation was imposed.

Arkansas Code Annotated § 9-27-339(e) governs issues of probation revocation in juvenile court. The statute governing revocation proceedings in juvenile court is both clear and specific. *Avery v. State*, 311 Ark. 391, 844 S.W.2d 364 (1993). Arkansas Code Annotated § 9-27-339 provides that upon finding by a preponderance of the evidence that a juvenile violated his terms of probation, a trial court may:

> (1) Extend probation;
>
> (2) Impose additional conditions of probation;
>
> (3) Make any disposition that could have been made at the time probation was imposed; or

> (4)(A) Commit the juvenile to a juvenile detention facility for an indeterminate period not to exceed ninety (90) days.

Id. Under Ark. Code Ann. § 9-27-339(e)(3), the trial court had the authority upon revocation to make any disposition that could have been made at the time probation was imposed, which under Ark. Code Ann. § 9-27-330(a) could include probation and detention in a juvenile facility for an indeterminate period not to exceed ninety days.

Without a great deal of analysis, appellant relies upon *Bailey v. State,* 348 Ark. 524, 74 S.W.3d 622 (2002), for the proposition that the trial court erred when it sentenced her to twenty days of detention in addition to an imposed inpatient drug treatment and electronic monitoring. In *Bailey,* the appellant pled guilty to the charges of residential burglary and theft of property and was placed on probation for twelve months. The trial court also ordered appellant to pay restitution in an amount to be determined within ninety days of the date of the adjudication hearing. The record did not contain an order of restitution, but the parties agreed that appellant was ordered to pay $500 in restitution. The State filed a petition to revoke appellant's probation based on an allegation of possession of a controlled substance, and the State moved to resentence appellant to make the restitution correct. Appellant pleaded guilty to the possession charge, and the trial court revoked his probation and sentenced him to serve ninety days in a juvenile-detention facility, with thirty days to be served and sixty days deferred. The trial court held a subsequent hearing to address the issue of restitution, where appellant argued that the trial court was without jurisdiction pursuant to Ark. R. Civ. P. 60 to revise the amount of restitution after the original ninety-day time period had elapsed. The trial court entered an amended order of revocation requiring appellant to pay $6,785.60 in restitution.

In *Bailey,* we reversed, holding that Ark. Code Ann. § 9-27-339 provides four alternatives for disposition upon finding a juvenile in violation of probation. We recognized that, while the trial court had the authority to make any disposition that it could have at the time probation was imposed, the trial court chose to sentence appellant to serve ninety days. Over two months later, the trial court held a second hearing stemming from the *same* petition, and found that appellant's failure to pay restitution was grounds to revoke, and entered an amended order increasing restitution. We concluded that the trial court was without jurisdiction to enter a second disposition from the same order in which the trial court

revoked probation and set restitution. *See also Avery, supra* (stating that after the juvenile court's denial of the State's petition for revocation, the juvenile code requires the State to file another petition for revocation and give notice to the juvenile that revocation is again being pursued before probation can be revoked).

Appellant's reliance on *Bailey, supra,* is misplaced. Here, the trial court did not amend its revocation order, but rather entered an order of disposition on the revocation after finding that K.N. violated the terms of her probation. At the time that K.N. entered a plea of guilty, the trial court could have ordered detention under Ark. Code Ann. § 9-27-330(a)(11) (Supp. 2003) and probation with the condition of receiving inpatient drug treatment pursuant to Ark. Code Ann. § 9-27-330(a)(4) (Supp. 2003). Based upon this statutory authority, the trial court did not err in ordering both detention and inpatient drug treatment in the revocation order. Accordingly, we affirm on this point.

Affirmed.

Patrick ROBERTSON *v.* Larry NORRIS, Director Arkansas Department of Correction; and C. Sumner, Arkansas Department of Correction Records Coordinator Centralized Records

03-1205 203 S.W.3d 82

Supreme Court of Arkansas
Opinion delivered February 10, 2005

Appellant, *pro se.*

Mike Beebe, Att'y Gen., by: *Joseph V. Svoboda*, Ass't Att'y Gen., for appellee.

JIM GUNTER, Justice. Appellant Patrick Robertson, a state prisoner, appeals a decision of the Jefferson County Circuit Court denying his petition for writ of mandamus against officials of the Arkansas Department of Correction (ADC), the appellees in this case. Robertson contends that the ADC has improperly classified him for parole-eligibility purposes as a third offender. In a petition for a writ of mandamus, he asked the circuit court to order the ADC officials to reclassify him as a second offender. The circuit court denied Robertson's petition for mandamus, and we affirm.

Parole eligibility for Arkansas prisoners is determined by statute. Ark. Code Ann. § 16-93-607 (1987). Under section 607(c), third offenders are not eligible for parole until they have served a minimum of three-fourths of their sentence, while second offenders are eligible for parole when they have served one-half of their sentence. *Id.* A mandamus is not a writ of right, but is within the discretion of the court, and the party applying for it must show a specific legal right and the absence of any other adequate remedy. *Eason v. Erwin,* 300 Ark. 384, 781 S.W.2d 1 (1989). Therefore, the question in this case is whether Robertson has established that he has a legal right to be classified as a second offender rather than a third offender.

Arkansas Code Annotated § 16-93-606 sets forth how to determine an inmate's classification for purposes of parole eligibility. Section 16-93-606(b) defines second and third offenders as follows:

> (2) Second offenders shall be inmates convicted of two (2) or more felonies and who have been once incarcerated in some correctional institution in the United States, whether local, state, or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which they are being classified.
>
> (3) Third offenders shall be inmates convicted of three (3) or more felonies and who have been twice incarcerated in some correctional institution in the United States, whether local, state, or

> federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this state for the offense or offenses for which they are being classified.

Arkansas Code Annotated §§ 16-93-606 and 607 define "felonies" to be "those crimes classified as Class Y, Class A, or Class B by the laws of this state." Ark. Code Ann. §§ 16-93-606 and 607 (1987).

The parties do not dispute that appellant has been "twice incarcerated" within the meaning of Ark. Code Ann. § 16-93-606(b)(3); nor do they dispute that he has been convicted of two felonies that have a determinative effect on his parole-eligibility classification under Ark. Code Ann. § 16-93-606(b)(3).[1] At issue is a 1989 conviction for possession of a controlled substance, specifically crack cocaine, in violation of Ark. Code Ann. § 5-64-401 (1987). The parties agree that Robertson pleaded guilty to the charge and was put on probation. His probation was revoked in 1990 for violation of the conditions of his probation, and he was sentenced to six years for that conviction. The information under which Robertson was charged, the ADC Admission Summary, and the order revoking probation on this conviction designate this felony as unclassified. Appellant argues that since this conviction is an unclassified felony, it is not a felony for purposes of Ark. Code Ann. § 16-93-606. To ~~be a~~ felony for purposes of this statute, the crime must be "classified as Class Y, Class A, or Class B." Ark. Code Ann. § 16-93-606(a)(1). Appellant argues that since his crime did not fit within any of these classifications, the 1989 conviction does not count for purposes of parole-eligibility classification. Consequently, he concludes that he has been convicted of only two or more "felonies" and is a second offender under Ark. Code Ann. § 16-93-606(b).

Appellees argue that Robertson was convicted under Ark. Code Ann. § 5-64-401(a)(1)(i) for possession of crack cocaine, and, therefore, the 1989 conviction is a Class Y felony for purposes of the parole-eligibility statutes. Arkansas Code Annotated § 5-64-

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[1] Robertson is currently serving a sixty-year sentence following a 1994 conviction for delivery of a controlled substance, specifically crack cocaine, in violation of Ark. Code Ann. § 5-64-401(a)(1). Ark. Code Ann. § 5-64-401(a)(1) defines this as a Class Y felony. This conviction is also designated in the Judgment and Commitment Order and in the ADC Admission Summary as a Class Y felony. The other undisputed felony is a conviction for burglary in 1990, a Class B felony.

401(a)(1)(i) classifies the violation as follows: "[f]or all purposes other than disposition, this offense is a Class Y felony." Appellees appear to be arguing that while appellant's felony classification under Ark. Code Ann. § 5-64-401(a)(1)(i) may have been unclassified for purposes of disposition, it is clearly a Class Y felony "[f]or all purposes other than disposition." Ark. Code Ann. § 5-64-401(a)(1)(i). Disposition is the imposition of a sentence. Appellees argument implies that parole — and an inmate's eligibility therefor — is a purpose other than disposition.

Whatever the merits of the parties' arguments, we cannot reach them. The record before us is insufficient. The record does not contain the original judgment and commitment order sentencing appellant for the 1989 conviction at issue. Both the information initially charging appellant with this crime and the order revoking probation state only that appellant was charged and pleaded guilty to possession, an unclassified felony, under Ark. Code Ann. § 5-64-401. *Possession* of crack in 1989 was not an unclassified felony. It was a Class C felony. *See* Ark. Code Ann. § 5-64-401(c) (1987). *Possession with intent to deliver or manufacture* crack under Ark. Code Ann. § 5-64-401(a) might have been considered unclassified for purposes of disposition, but would constitute a Class Y felony for all other purposes, including parole eligibility. We have found nothing in the record which specifies whether appellant was convicted under subsection (a) or subsection (c) of that statute. The felony classification, and hence the precise subsection under which appellant was convicted, is a critical component in determining his status under Ark. Code Ann. § 16-93-606 (1987).

[redacted] The purpose of a mandamus action is to enforce the performance of a legal right after it has been established; its purpose is not to establish a right. *Springdale Bd. of Education v. Bowman,* 294 Ark. 66, 740 S.W.2d 909 (1987); *Buttolph Trust v. Jarnagan,* 302 Ark. 393, 789 S.W.2d 466 (1990). Furthermore, it is the appellant's burden to produce a record establishing that he indeed has a legal right. *Rothbaum v. Arkansas Local Police & Fire Ret. Sys.,* 346 Ark. 171, 55 S.W.3d 760 (2001); *Eason, supra.* He has not done that here. Accordingly, we affirm the circuit court's denial of the petition.

Rodell AVERY, Jr. *v.* STATE of Arkansas

CR 04-395 203 S.W.3d 109

Supreme Court of Arkansas
Opinion delivered February 10, 2005

Clay Law Firm, by: *Alvin D. Clay*, for appellant.

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

PER CURIAM. On September 16, 2003, judgment was entered reflecting that Rodell Avery, Jr., had been found guilty by a jury of aggravated robbery and three counts of kidnapping in the Circuit Court of Calhoun County in CR 2002-35. An aggregate term of 360 months' imprisonment was imposed.

Also on September 16, 2003, judgment was entered reflecting that Avery had been found guilty by a jury of escape in the second degree in Calhoun County in CR 2002-38 for which a term of 120 months' imprisonment was imposed to be served consecutively to the term of imprisonment imposed in CR 2003-35. Avery was found to be a habitual offender with respect to all charges in both CR 2002-35 and CR 2002-38.

Alvin D. Clay, the retained attorney who represented Avery at both trials, filed a motion on October 14, 2003, to vacate the judgments in CR 2002-35 and CR 2002-38 pursuant to Criminal Procedure Rule 37.1. Clay also filed a motion to dismiss the charge of escape in CR 2002-38 on jurisdictional grounds.

On November 6, 2003, the court signed an order that denied the motion to vacate the sentence and the motion to dismiss the escape charge. The order was entered of record on

November 13, 2003. On November 20, 2003, Clay filed a notice of appeal from the "judgement (sic) entered against defendant on or about November 6, 2003." Arkansas Rule of Appellate Procedure–Criminal (2)(a) (2004) provides in pertinent part:

> [T]he 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.* [emphasis added]

A notice of appeal from the judgments of conviction entered September 16, 2003, was not filed. As of the date of this opinion, appellant has not sought to proceed with a motion for belated appeal of the judgments under Rule 2(e) of the Rules of Appellate Procedure–Criminal.

When Clay tendered the record on appeal to this court, it was correctly lodged as an appeal of the order entered November 13, 2003, inasmuch as it was that order to which the notice of appeal made reference, and there was no notice of appeal in the record pertaining to the judgments of conviction.

Clay filed the appellant's brief with three points for reversal pertaining to the judgments of conviction and one point involving the merit of the motion to vacate the judgment filed pursuant to Ark. R. Crim. P. 37.1. The State subsequently filed a petition for writ of *certiorari* to complete the record with respect to one of the points for reversal that concerned the judgments of conviction, although the attempted appeal is from a Rule 37.1 order. The petition was granted, and upon receipt of the supplemental record, appellant was directed to file a substituted brief no later than December 8, 2004.

The substituted brief was not filed by that date, and the appellee opted nevertheless to file a brief on January 5, 2005. In the brief, the appellee noted that only one point for reversal pertained to an issue cognizable in this appeal, *i.e.*, the issue on the Rule 37.1 motion.

We first note that the State's brief should not have been accepted since no appellant's brief had been filed. It having been brought to this court's attention by the filing of the State's brief that the appellant in this post-conviction appeal, which is civil in nature, has failed to file the substituted brief as directed, the appeal is dismissed pursuant to Ark. Sup. Ct. R. 4-5.

A copy of this opinion shall be forwarded to the Committee on Professional Conduct.

Appeal dismissed.

Raye Lynn HARRISON *v.* STATE of Arkansas

CR 05-64 203 S.W.3d 122

Supreme Court of Arkansas
Opinion delivered February 10, 2005

Kara Bideler Moore, for appellant.

No response.

PER CURIAM. Appellant Raye Lynn Harrison, by and through her attorney, has filed a motion for rule on the clerk. Her attorney, Kara Bideler Moore, states in the motion that the record was tendered late due to a mistake on her 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.

Keela McGAHEY *v.* STATE of Arkansas

CR 04-1041 203 S.W.3d 123

Supreme Court of Arkansas
Opinion delivered February 10, 2005

Hubert W. Alexander for appellant.

No response.

PER CURIAM. Attorney Jimmy E. Doyle was ordered to appear before this court to show cause as to why he should not be held in contempt for failing to timely lodge the record on appeal for his client, Appellant Keela McGahey. The procedural history of this matter is set out in three *per curiam* opinions. *See McGahey v. State*, 360 Ark. 380, 201 S.W.3d 416 (2005); *McGahey v. State*, 360 Ark. 94, 199 S.W.3d 682 (2004); *McGahey v. State*, 359 Ark. 252, 195 S.W.3d 922 (2004).

On January 27, 2005, Mr. Doyle appeared as ordered and entered a plea of guilty to the contempt charge. In mitigation, he stated that he has not taken any new clients in the past year and that he has now closed his law practice. He explained that he got in over his head, taking too many cases at once, and not being able to turn down any potential clients. He also admitted that he had failed to timely lodge the records on appeal for two other clients, for which this court has already relieved him as counsel of record. *See Fairfield v. State*, CR 04-1095 (Ark. December 9, 2004) (*per curiam*); *Garcia v. State*, CR 04-1111 (Ark. December 9, 2004) (*per curiam*).[1] At the conclusion of his statement in open court, Mr. Doyle

[1] In both of those cases, this court noted that it would have ordered Mr. Doyle to remain as attorney of record, but for the fact that he had been suspended from the practice of law for failing to comply with continuing legal education requirements.

indicated that the only thing he had to offer to atone for his failings was his law license, and he offered to voluntarily surrender it to this court.

Based on the foregoing, we accept Mr. Doyle's guilty plea and find him in contempt. We impose a fine of $250, to be paid within thirty days from the date of this order. A copy of this *per curiam* will be forwarded to our Supreme Court Committee on Professional Conduct to take any appropriate action the Committee deems necessary.

It is so ordered.

[redacted]

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