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Ricky REESE *v.* STATE of Arkansas

CR 07-112 262 S.W.3d 604

Supreme Court of Arkansas
Opinion delivered September 20, 2007

William H. Howard, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Ricky Reese appeals the order of the Chicot County Circuit Court convicting him of capital murder and being a felon in possession of a firearm. On appeal, Reese argues that it was error for the trial court to deny (1) his motion for directed verdict as there was insufficient evidence to prove that he acted with premeditation and deliberation; and (2) his motion to suppress his custodial statement because he was impaired by drug and alcohol use at the time he made the statement. As Reese was sentenced to life imprisonment without the possibility of parole, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). We find no error and affirm.

The record reflects that on the evening of July 17, 2005, Reese was with his friend James Matthews Jr. and Matthews's minor son in Matthews's car. After Reese showed Matthews's son a gun he had on him, Reese and Matthews got into an argument, and Matthews ordered Reese to get out of his car. When Reese refused to get out of Matthews's car, Matthews began to take Reese home. During this time, Reese pulled a gun on Matthews, shooting him at least five times, including four times in the head.

After shooting Matthews, Reese fled. He went to the home of Katie Jordan and reported to her that he had shot Matthews and that he had intended to kill him. Reese was arrested later that evening. He was charged with one count of capital murder and one count of being a felon in possession of a firearm. Reese was tried before a jury on June 21-22, 2006, and found guilty on both charges. He was subsequently sentenced to a term of life imprisonment. The instant appeal followed.

As his first point on appeal, Reese argues that the trial court erred in denying his motion for a directed verdict because the State presented insufficient evidence that he acted with premeditation and deliberation. The State argues to the contrary that it presented sufficient evidence of premeditation and deliberation and, thus, it was proper for the trial court to deny Reese's motion and submit the charge of capital murder to the jury. We agree with the State.

This court treats a motion for directed verdict as a challenge to the sufficiency of the evidence. *Boyd v. State*, 369 Ark. 259, 253 S.W.3d 456 (2007); *Woolbright v. State*, 357 Ark. 63, 160 S.W.3d 315 (2004). In reviewing a challenge to the sufficiency of the evidence, this court determines whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* This court views the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *Id.*

Pursuant to Ark. Code Ann. § 5-10-101(a)(4) (Repl. 2006), a person commits capital murder if "[w]ith the premeditated and deliberated purpose of causing the death of another person, the person causes the death of any person." The necessary premeditation and deliberation is not required to exist for a particular length of time and may be formed in an instant. *Boyd*, 369 Ark. 259, 253 S.W.3d 456; *Weston v. State*, 366 Ark. 265, 234 S.W.3d 848(2006). This court has long acknowledged that intent can rarely be proven by direct evidence. *Id.* We have further held that a jury may infer premeditation and deliberation from circumstantial evidence, such as the type and character of the weapon used, the nature, extent, and location of the wounds inflicted, and the conduct of the accused. *Id.*

In the present case, there was testimony from Dr. Dan Konzelmann, an associate medical examiner, regarding the nature and extent of Matthews's injuries. Specifically, Dr. Konzelmann testified that Matthews died of four gunshot wounds to his head. In addition, there was another gunshot wound on Matthews's left lower arm.

Katie Jordan also testified that she knew Reese and Matthews from her time as a substitute teacher at Dermott High School. According to Jordan, Reese showed up at her house on the evening of July 17, 2005, and told her that he had shot Matthews. When Jordan asked if Matthews was dead, Reese replied, "I don't know, but I meant to kill him." Reese then told Jordan that he shot Matthews twice in the head and twice in either the chest or stomach because Matthews was hitting him and would not let him out of the car. According to Jordan, Reese stated at least three times that he "meant" to kill Matthews.

Matthews's mother, Barbara Matthews, testified that Reese and her son grew up together and were best friends. On the evening of the shooting, she went looking for her son and

grandson because it was too late for her grandson to be out. She found them not far from her house and noticed Reese sitting in the back seat of Matthews's car. Barbara asked to take her grandson home, but the boy wanted to stay with his father. He then got into his father's car, at which time Reese showed the child a gun that he had on him. Matthews confronted Reese and told him to get out of the car. When Reese refused to get out of the car, Matthews stated that he would have to "kidnap" him. Barbara told her son to take Reese home and that she and her grandson would follow them. While following Matthews's car, Barbara noticed his brake lights go on and then heard gunshots. She pulled over and as she approached the car, Reese got out and stated that Matthews was dead and that he had shot him. Reese then fled the scene. As he walked away, Barbara noticed the handle of a gun sticking out of Reese's pants pocket.

[redacted] Clearly, the evidence was sufficient to establish that Reese killed Matthews with premeditation and deliberation. Reese refused to get out of Matthews's vehicle and then as Matthews attempted to drive Reese home, Reese shot him four times, including three shots to the head. As we previously stated, the nature and location of gunshot wounds are evidence that the jury could have relied on to infer that Reese acted with premeditation and deliberation. *See Boyd*, 369 Ark. 259, 253 S.W.3d 456. Moreover, the jury heard direct evidence from Katie Jordan that Reese stated repeatedly that he intended to kill Matthews. Thus, we cannot say that the trial court erred in denying Reese's motion for directed verdict.

As his second point on appeal, Reese argues that the trial court erred in failing to suppress his custodial statement because at the time he made the statement he was impaired by drug and alcohol use. The State counters that a determination of voluntariness of a statement is one for the trial court and in this instance the trial court was in the superior position of observing the witnesses who testified regarding Reese's condition at the time he made the statement, as well as having the benefit of hearing the tape recording of Reese's statement.

We note at the outset that a statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. *Flanagan v. State*, 368 Ark. 143, 243 S.W.3d 866 (2006);

Williams v. State, 363 Ark. 395, 214 S.W.3d 829 (2005). In order to determine whether a waiver of *Miranda* rights is voluntary, we look to see if the confession was the product of free and deliberate choice rather than intimidation, coercion, or deception. *Id.* When we review a trial court's ruling on the voluntariness of a confession, we make an independent determination based on the totality of the circumstances. *Id.*

Moreover, when an appellant claims that his confession was rendered involuntary because of drug or alcohol consumption, the level of his comprehension is a factual matter to be resolved by the circuit court. *Harper v. State*, 359 Ark. 142, 194 S.W.3d 730 (2004). In testing the voluntariness of one who claims intoxication at the time of waiving his rights and making a statement, this court determines whether the individual was of sufficient mental capacity to know what he was saying, in other words capable of realizing the meaning of his statement, and that he was not suffering from any hallucinations or delusions. *Id.*

Here, Captain Marvin Esters of the Dermott Police Department testified that when he was placing Reese under arrest, Reese asked him if it was true that Matthews was dead. At that time, as he read him his *Miranda* rights, Esters noticed that Reese smelled of alcohol. Esters stated that he interviewed Reese a short time later at the police department. That interview began at approximately 1:13 a.m. and concluded at 1:30 a.m. Esters admitted that even though he smelled alcohol on Reese, he did not appear to be overly intoxicated and that he did not believe Reese was unaware of what was going on around him. According to Esters, Reese appeared responsive to his questioning.

Also testifying was Leonard Charles Richardson, Dermott's Chief of Police. Richardson witnessed Esters inform Reese of his *Miranda* rights. According to Richardson, Reese appeared to understand those rights. Richardson also stated that he did not smell alcohol on Reese.

Reese testified that he had been drinking all day leading up to his arrest and that he also had some powder cocaine in his system. Reese testified that he was in no condition to make any kind of statement and that he did not understand his rights, and if he had maybe he would not have said anything.

The trial court concluded that Reese's statement was voluntary and that he waived his rights after being advised of them. Clearly, the trial court's determination in this regard turned on his

evaluation of the credibility of the witnesses. This court has held that the evaluation of the credibility of witnesses who testify at a suppression hearing about the circumstances surrounding an appellant's custodial confession is for the trial judge to determine, and this court defers to the position of the trial judge in matters of credibility. *Flanagan*, 368 Ark. 143, 243 S.W.3d 866. Conflicts in the testimony are for the trial judge to resolve, and the judge is not required to believe the testimony of any witness, especially that of the accused, since he or she is the person most interested in the outcome of the proceedings. *Id.* So long as there is no evidence of coercion, a statement made voluntarily may be admissible against the accused. *Id.* Finally, just because Reese may have been intoxicated at the time he gave the statement does not automatically render that statement inadmissible. *See Kennedy v. State*, 255 Ark. 163, 499 S.W.2d 842 (1973).

In addition, the trial judge himself listened to the tape of the interview, and so was able to hear for himself whether or not Reese sounded as if he were impaired. *See Jones v. State*, 344 Ark. 682, 42 S.W.3d 536 (2001). Under the totality of the circumstances, the circuit court did not err in finding that Reese knowingly, voluntarily, and intelligently waived his rights prior to making a statement to police.

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. *Winston v. State*, 368 Ark. 105, 243 S.W.3d 304 (2006).

Affirmed.

Sheldrick Jerome HERROD *v.* STATE of Arkansas

CR 07-219 262 S.W.3d 609

Supreme Court of Arkansas
Opinion delivered September 20, 2007

William R. Simpson, Jr., Public Defender, *Bret Qualls*, Deputy Public Defender, by: *Erin Vinett*, Deputy Public Defender, for appellant.

Dustin McDaniel, Att'y Gen., by: *Leaann J. Irvin*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Sheldrick Jerome Herrod was convicted of capital murder, attempted capital murder, two counts of aggravated robbery, and one count of theft of property. He was sentenced to life without parole for capital murder, life imprisonment for attempted capital murder, forty years for each count of aggravated robbery, and one year in the county jail plus a $1000 fine for misdemeanor theft of property. All sentences except the sentence for theft of property are to run consecutively. Herrod's sole point on appeal is that the circuit court erred in refusing to disqualify Deputy Prosecutor John Johnson as the prosecutor at his jury trial. We conclude there was no abuse of discretion by the circuit court, and we affirm.

The facts, according to the witnesses at trial, are these. In the early hours of the morning on March 2, 2006, Herrod was with Tinika Wakwe at her apartment in southwest Little Rock. Also at the apartment were Tony Mayo, Cortez Bone, and Kathy Owens. Wakwe, Mayo, Bone, and Owens were drinking alcohol and taking cocaine. Later, the group left Wakwe's apartment and went to Legends bar on Rodney Parham in a Nissan X-Terra. In the

parking lot of the bar, Herrod began talking to the victims, Kari Evans and James Cody Dobbins. According to Evans, Dobbins wanted to buy some cocaine, and Herrod said that he would sell it to him. Herrod and his acquaintances left Legends and drove a few blocks away to the parking lot of a Chinese restaurant. There, they met Dobbins and Evans, who arrived in Evans's black BMW. Herrod took a gun from the X-Terra, got into the back seat of the BMW, and rode with the couple to southwest Little Rock. Herrod's acquaintances accompanied them in the X-Terra.

While Evans was driving the BMW to southwest Little Rock, Herrod shot Dobbins in the back of the head. Evans pulled up to a stop and exited the car, followed by Herrod, who got out of the back seat. At the same time, Bone got out of the X-Terra, looked inside the passenger side of the BMW, and then went back to the X-Terra. Herrod approached Evans, took money from her, and shot her three times. Dobbins died from a single gunshot wound to the head. Evans survived the shooting with serious injuries. Herrod and his four acquaintances left the scene in the X-Terra, leaving Evans and Dobbins in the BMW.

Suzanne Chapman, who lived in a nearby apartment, was awakened by the first gunshot.[1] When she heard a second gunshot, she got up and looked out her window, which was on the second floor of her apartment building. She saw Herrod shooting at the occupants of the car. She called 911, and Little Rock police officers arrived shortly thereafter.

Herrod and his four acquaintances returned to Wakwe's apartment. Herrod became a suspect in the case after Mayo gave a statement to the police concerning the night's events. On April 5, 2006, Herrod was charged with the offenses for which he was ultimately convicted.

On July 10, 2006, Deputy Prosecutor John Johnson and Victim Witness Coordinator Susie Barnes went to Suzanne Chapman's apartment to interview her concerning the events on the night of the shooting. After speaking to Chapman for several minutes, Johnson showed her a photo spread prepared by the Little Rock Police Department, which included Herrod. Chapman identified Herrod as the shooter. Subsequently, Herrod moved to

[1] At times in the record, Suzanne Chapman is erroneously referred to as "Suzanne Chandler."

suppress the photo identification because of what he contended were the "impermissibly suggestive photos" used.

On July 31, 2006, the circuit court held a hearing on Herrod's motion to suppress Chapman's identification of Herrod. Herrod argued that Chapman should be barred from identifying Herrod in court because of the lateness of her photo spread identification. In the alternative, he requested a hearing on his written motion that the photo spread was unconstitutionally suggestive. The circuit court denied his motion to bar Chapman from testifying but granted the request for a hearing.

At the hearing, John Johnson testified about the events surrounding Chapman's identification of Herrod from the photo spread. He added that he had interviewed many witnesses during his time as a prosecutor and that this was not the first time he had shown a witness a photo spread. Barnes and Chapman also testified about the events surrounding the photo identification. At the end of the hearing, Herrod moved to disqualify John Johnson as the prosecutor because he had testified at the suppression hearing on contested matters. The circuit court declined to disqualify Johnson as trial prosecutor. The court reasoned that the State had said it was not going to use the photo-spread identification at trial but only an in-court identification by Chapman. The court concluded that there was no necessity for Johnson to testify and that he had only participated in a "routine investigation" of Chapman.

At the beginning of the trial on August 1, 2006, Herrod raised the question to the court of whether he was barred from calling Johnson as a witness to attack the credibility of Suzanne Chapman's in-court identification. Herrod added that he was not certain that he would call Johnson but wanted to have that option, depending on Chapman's testimony. The court did not bar him from calling Johnson as a witness, but said that it would consider the materiality of Johnson's testimony only when Herrod had made a definite decision to call Johnson as a witness.

During the State's case, Suzanne Chapman testified as to the events of the evening and made an in-court identification of Herrod as the shooter. At the time of Chapman's testimony, Herrod objected to her in-court identification, citing the "tainted photo spread." No mention of Johnson was made as part of Herrod's objection. On cross-examination, defense counsel questioned Chapman about her ability to see the events on the night of the killing. He did not, however, ask to call Johnson as a witness. The defense rested without calling any witnesses.

Herrod argues on appeal that by conducting the photo spread for Suzanne Chapman, John Johnson exceeded his role as prosecutor and became an active investigator for the State. As an active investigator, he contends, Johnson was a material witness and was barred, both under Arkansas case law and by Rule 3.7 of the Model Rules of Professional Conduct from prosecuting the case for the State. He contends that the material matter for which Johnson was a witness was Chapman's in-court identification of himself. He also asserts that this identification was strongly influenced by and based on the photo spread, because Chapman could not have had ample opportunity to observe the shooter on the night of the shooting. He points out that Johnson's actions in interviewing Chapman and showing her the photo spread led to his testimony at a pretrial suppression hearing. Arkansas case law, he maintains, does not require that the prosecutor actually be called as a witness in the trial in order to require disqualification but only that he be a potential witness.

It is clear to this court that Herrod has not appealed the circuit court's admission of Chapman's in-court identification. Rather, his issue is that, regardless of the circuit court's ruling on the admissibility of Chapman's in-court identification, the prosecutor should have been disqualified because he was a potential witness to Chapman's identification of the defendant from the photo spread and that identification raised material issues regarding (1) the admissibility of Chapman's in-court identification and (2) the weight the jury should have given to that identification.

Before addressing whether or not the circuit court erred in refusing to disqualify Johnson, it is necessary to address a threshold issue raised by the State. The State claims that Herrod's issue became moot when the State decided not to introduce evidence of the photo spread at trial. We disagree. Herrod alleged, at the preliminary hearing and at trial, that Chapman's in-court identification was based on the allegedly suggestive or "tainted" photo spread, rather than on what Chapman observed on the night of the shooting. This issue was not extinguished by the fact that the State chose not to introduce evidence of Chapman's photo-spread identification at trial. Rather, the continuing issue is whether Johnson was a material witness on the point of whether the photo spread influenced Chapman's in-court identification.

We turn then to the merits of whether the circuit court erred in failing to disqualify Johnson. We initially note that "[t]his court reviews a trial court's decision to disqualify an attorney under an

abuse-of-discretion standard." *Weigel v. Farmers Ins. Co., Inc.*, 356 Ark. 617, 621, 158 S.W.3d 147, 150 (2004). This court has addressed the issue of the disqualification of a prosecutor on three occasions in the last twenty years. *See Chellette v. State*, 308 Ark. 364, 824 S.W.2d 389 (1992); *Scherrer v. State*, 294 Ark. 227, 742 S.W.2d 877 (1988); *Duncan v. State*, 291 Ark. 521, 726 S.W.2d 653 (1987).

In *Duncan v. State*, the prosecuting attorney interrogated the defendant before trial, and a motion was made, again before trial, to disqualify the prosecutor as the State's advocate because of the probability of his being called as a witness by either the State or defendant at trial. The circuit court denied the motion. The prosecutor did testify as a witness at the pretrial suppression hearing and was called as a witness by the defense during the penalty phase of the trial to testify on unrelated matters. However, in closing argument, the prosecutor expressed his opinion on a crucial element of the case, which was whether the defendant was isolated when in jail. Because of this, we held that he had become a witness for the State and that his representation as counsel was reversible error. 291 Ark. at 532-33, 726 S.W.2d at 659.

As part of our analysis in *Duncan*, we set out the law on prosecutor disqualification: "We do agree that when a prosecutor undertakes an active role in the investigation of a crime to the extent that he becomes potentially a material witness for either the state or the defense he can no longer serve as an advocate for the state in that case." *Id.*

In *Scherrer v. State*, the prosecutor took a statement from a witness before trial who implicated the defendant, and the prosecutor also made an offer of immunity to that witness. The defense called the prosecutor to testify at trial about this statement and the immunity offer. We held that the prosecutor's actions were routine preparation for trial and that he had not taken "such an active role that he potentially became a material witness in the case." 294 Ark. at 233, 742 S.W.2d at 880.

Finally, in *Chelette v. State*, the prosecutor was called as a defense witness to discuss how he assisted the defendant and a third party in signing a probable-cause affidavit against another individual. We held that the prosecutor had performed a routine, ministerial duty. We held, further, that the prosecutor's closing argument simply described his theory of the case and did not contain testimony on pertinent, contested facts, as was the situation in *Duncan*. 308 Ark. at 369-70, 824 S.W.2d at 389, 392.

We have also emphasized that disqualification motions should not be a ploy to remove the prosecutor: "[T]he rule against a prosecuting attorney acting both as an advocate and a witness was not designed to permit defense counsel to call the prosecuting attorney as a witness and thereby disqualify him as the state's advocate." *Williams v. State*, 300 Ark. 84, 88, 776 S.W.2d 359, 361 (1989). We went on to say that a prosecutor should be disqualified only when the prosecutor's "active part in investigating the crime or in interrogating the appellant" render his or her testimony necessary. *Id.*

We conclude that the circuit court did not abuse its discretion in declining to disqualify Johnson because Herrod has failed to convince either the circuit court or this court why Johnson was a material witness at trial. Under this court's precedent, Johnson's decision to conduct a photo spread with Suzanne Chapman was insufficient to qualify as an active role in the investigation. *See Scherrer*, 294 Ark. at 233, 742 S.W.2d at 880 (holding that a prosecutor's involvement in taking a statement from a witness did not require his disqualification). In this regard, Herrod is not persuasive on why this court should distinguish between an interview in which a photo spread is shown to a witness and questioning a witness where no such spread is used but questions are asked of the witness about the suspect. In either case, the interviewer is eliciting information from the witness regarding the crime, and in *Scherrer*, we said the latter circumstances did not warrant disqualification.

The situation here is also like *Chellette* in that Johnson's testimony at the pretrial hearing was related to his duties in the scope of his role as prosecutor. Mere performance of those duties did not warrant disqualification. 308 Ark. at 369, 824 S.W.2d at 392. The only contested matter that Johnson testified to at the suppression hearing had to do with the contents of the photo spread. Those contents were available for the court and, had the issue been raised at trial, for the jury to see and evaluate independently of what Johnson did. Therefore, Johnson's testimony was not related to contested "facts favorable to the State." *Id.* At most, his testimony would have been a vehicle for authenticating and introducing the photo spread at trial. But neither the State nor Herrod chose to present the photo spread evidence.

Moreover, Herrod failed to develop the issue at trial of how Johnson's involvement with the photo spread influenced Chap-

man's in-court identification. He did not cross-examine Chapman on this point or attempt to call Johnson to shore up his argument that the photo spread entrenched Herrod's face in Chapman's mind for purposes of the in-court identification. Without this showing of why Johnson's testimony was material at trial, there was no basis for the circuit court to rule that he should be disqualified.

An examination of the record has been made in accordance with Ark. Sup. Ct. R. 4-3(h) and Ark. R. App. P.–Crim. 14, and it has been determined that there were no rulings adverse to Herrod which constituted prejudicial error.

Affirmed.

CITY of DARDANELLE, Arkansas *v.* CITY of RUSSELLVILLE, Arkansas, City Corporation, and Arkansas Department of Environmental Quality

07-195 262 S.W.3d 615

Supreme Court of Arkansas
Opinion delivered September 20, 2007

PER CURIAM. Appellant City of Dardanelle, Arkansas, appeals from an order of the Pope County Circuit Court dismissing its complaint against Appellees City of Russellville, City Corporation, and Arkansas Department of Environmental Quality. Because Appellant has submitted a brief without a proper abstract in violation of Ark. Sup. Ct. R. 4-2(a)(5), we order rebriefing.

Rule 4-2(a)(5) provides, in pertinent part:

> The appellant's abstract or abridgment of the transcript should consist of an impartial condensation, without comment or emphasis, of only such material parts of the testimony of the witnesses and colloquies between the court and counsel and other parties as are necessary to an understanding of all questions presented to the Court for decision.

Furthermore, the procedure to be followed when an appellant has submitted an insufficient abstract or addendum is set forth in Ark. Sup. Ct. R. 4-2(b)(3):

> Whether or not the appellee has called attention to deficiencies in the appellant's abstract or Addendum, the Court may address the question at any time. If the Court finds the abstract or Addendum to be deficient such that the Court cannot reach the merits of the case, or such as to cause an unreasonable or unjust delay in the disposition of the appeal, the Court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, Addendum, and brief, at his or her own expense, to conform to Rule 4-2(a)(5) and (8). Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the Court may direct. If after the opportunity to cure the deficiencies, the appellant fails to file a complying abstract, Addendum and brief within the prescribed time, the judgment or decree may be affirmed for noncompliance with the Rule.

In the instant case, a hearing was held on October 24, 2006, in which counsel for all parties argued the merits of the motions to dismiss filed by Appellees. Rather than abstracting the transcript of this hearing as required by Rule 4-2(a)(5), Appellant simply reproduces the transcript in the Addendum. Appellant notes, on a page labeled "Abstract," that the transcript of the arguments can be found in the Addendum but is not abstracted. Because Appellant has failed to comply with Rule 4-2(a)(5), we order Appellant to abstract the transcript of the October 24 hearing and to file a substituted abstract, addendum, and brief within fifteen days from the date of entry of this order. If Appellant fails to

do so within the prescribed time, the order appealed from may be affirmed for noncompliance with Rule 4-2.

After service of the substituted abstract, addendum, and brief, Appellees shall have an opportunity to revise or supplement their briefs in the time prescribed by the Court.

Rebriefing ordered.

GLAZE, J., not participating.

Todd HALL *v.* ARKANSAS DEPARTMENT of HEALTH & HUMAN SERVICES and M.H. & R.H

07-911 262 S.W.3d 601

Supreme Court of Arkansas
Opinion delivered September 20, 2007

Lisa Lundeen-Gaddy, for appellant.

Linda Scribner and *Keith L. Chrestman*, attorneys ad litem.

PER CURIAM. Appellant Todd Hall, by and through his attorney, Lisa Lundeen-Gaddy, has filed a motion for rule on clerk. However, when Appellant filed the motion for rule on clerk on August 30, 2007, the record was refused because Appellant did not sign the notice of appeal as required by Rule 6-9(b)(2)(D) of the Arkansas Supreme Court Rules. Appellant seeks to appeal an order,

dated June 12, 2007, terminating his parental rights. Ms. Lundeen-Gaddy now submits Appellant's signature with the motion and admits fault for failing to have Appellant sign the notice of appeal as required by our new rules for dependency-neglect appellate procedures. For these reasons, we treat Appellant's motion for rule on clerk as a motion for belated appeal. We grant Appellant's motion.

We clarified our treatment of motions for rule on clerk and motions for belated appeal in *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). There, we said:

> Where an appeal is not timely perfected, either the party or attorney filing the appeal is at fault, or there is good reason that the appeal was not timely perfected. The party or attorney filing the appeal is therefore faced with two options. First, where the party or attorney filing the appeal is at fault, fault should be admitted by affidavit filed with the motion or in the motion itself. There is no advantage in declining to admit fault where fault exists. Second, where the party or attorney believes that there is good reason the appeal was not perfected, the case for good reason can be made in the motion, and this court will decide whether good reason is present.

Id. at 116, 146 S.W.3d at 891 (footnote omitted). While this court no longer requires an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where he has erred and is responsible for the failure to perfect the appeal. *See id.* However, where a motion seeking relief from failure to perfect an appeal is filed and it is not plain from the motion, affidavits, and record whether there is attorney error, the clerk of this court will be ordered to accept the notice of appeal or record, and the appeal will proceed without delay. *See id.* At that time, the matter of attorney error will be remanded to the trial court to make findings of fact. *See id.* Upon receipt of the findings by this court, it will render a decision on attorney error. *See id.*

Further, while the instant case is not a criminal case, we have afforded indigent parents appealing from a termination of parental rights similar protections as those afforded indigent criminal defendants. *See, e.g., Flannery v. Ark. Dep't of Health & Human Servs.*, 368 Ark. 31, 242 S.W.3d 619 (2006) (per curiam).

In this case, it is plain from the instant motion that there was error on the part of Ms. Lundeen-Gaddy. The language of Ark. Sup. Ct. R. 6-9(b)(2)(D) is clear:

> The notice of appeal and designation of the record shall be signed by the appellant, if an adult, and appellant's counsel. The notice shall set forth the party or parties initiating the appeal, the address of the party or parties, and specify the order from which the appeal is taken.

Id. Because Appellant's notice of appeal lacked his signature, it was deficient. Pursuant to *McDonald*, *supra*, we grant Appellant's motion for belated appeal. A complete record should be filed with our clerk within thirty days from the date of this per curiam order. At that time, a briefing schedule will be set. *See Miller v. State*, 367 Ark. 187, 238 S.W.3d 608 (2006).

Additionally, Linda Scribner, the court-appointed attorney ad litem, and Keith L. Chrestman, a qualified part-time attorney ad litem, filed a joint motion for substitution of appellate counsel to allow Ms. Scribner to withdraw as counsel and to appoint Mr. Chrestman as the attorney ad litem on appeal. Pursuant to Rule 6-10 of the Arkansas Supreme Court Rules, "[a]fter the notice of the appeal has been filed with the Circuit Clerk, the appellate court shall have exclusive jurisdiction to relieve counsel and appoint new counsel." Thus, we grant the motion to substitute Mr. Chrestman as the attorney ad litem in this case.

Motions granted.

GLAZE, J., would refer the matter to the Committee on Professional Conduct.

LANDSNPULASKI, LLC *v.*
ARKANSAS DEPARTMENT of CORRECTION

06-1334 262 S.W.3d 603

Supreme Court of Arkansas
Opinion delivered September 20, 2007

Stephen E. Whitwell, for appellant.

No response.

PER CURIAM. Appellant LandsnPulaski, LLC, appeals the Pulaski County Circuit Court's order granting judgment on the pleadings in favor of Appellee Arkansas Department of Correction (DOC). Because Appellant has submitted a brief without a proper abstract in violation of Ark. Sup. Ct. R. 4-2(a)(5), we order rebriefing.

Rule 4-2(b)(3) explains the procedure to be followed when an appellant has failed to supply this court with a sufficient brief and states:

> Whether or not the appellee has called attention to deficiencies in the appellant's abstract or Addendum, the Court may address the question at any time. If the Court finds the abstract or Addendum to be deficient such that the Court cannot reach the merits of the case, or such as to cause an unreasonable or unjust delay in the disposition of the appeal, the Court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, Addendum, and brief, at his or her own expense, to conform to Rule 4-2(a)(5) and (8). Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the

> Court may direct. If after the opportunity to cure the deficiencies, the appellant fails to file a complying abstract, Addendum and brief within the prescribed time, the judgment or decree may be affirmed for noncompliance with the Rule.

Id. Further, Rule 4-2(a)(5) provides, in pertinent part:

> In the abstracting of testimony, the first person (i.e., "I") rather than the third person (i.e., "He, She") shall be used.

Id.

In the case at bar, a hearing was held on July 14, 2006, in which counsel for both parties argued the merits of Appellee's motion for judgment on the pleadings. Instead of abstracting the transcript of the hearing as required by Rule 4-2(a)(5), Appellant summarized the arguments made to the trial court by both parties. Here, as Appellant has failed to comply with this Rule, we order Appellant to abstract the transcript of the July 14 hearing and to file a substituted brief within fifteen days from the date of entry of this order. According to Rule 4-2(b)(3), if Appellant fails to file a complying brief within the prescribed time, the order appealed from may be affirmed for noncompliance with the Rule.

After service of the substituted brief, the DOC shall have an opportunity to file a responsive brief in the time prescribed by the Supreme Court Clerk, or to rely on the brief that it has previously filed in this appeal.

Rebriefing ordered.

R.S. McCULLOUGH *v.*
SELECT PORTFOLIO SERVICES, INC., et al.

CA 07-115 262 S.W.3d 600

Supreme Court of Arkansas
Opinion delivered September 20, 2007

Appellant, pro se.

No response.

PER CURIAM. During the course of an appeal before the court of appeals, R.S. McCullough filed a pro se motion for emergency relief on February 27, 2007, requesting the court of appeals to restore a previously-issued supersedeas which had been lifted by the circuit court's clerk. That motion was certified to this court on February 28, 2007, and, on March 15, 2007, we ordered that it be submitted to our court as a case. In addition, this court granted a temporary stay. A briefing schedule was set and petitioner's brief on the emergency-relief matter was due by April 24, 2007. While briefs regarding the merits in the underlying case were filed with the court of appeals, no brief was filed by petitioner in the emergency-relief matter.

Instead, Mr. McCullough filed the current motion, a motion for belated brief, adoption, recusal, and transfer, on June 20, 2007, urging this court to rely on his opening brief from the underlying appeal in the emergency-relief matter. However, our review of the briefs filed in the court of appeals' case reveals that

the briefs do not address the issue presented in the emergency relief matter. Thus, we cannot use the briefs from the direct appeal on the merits in support of his motion for emergency relief, as the two cases involve separate issues.

Therefore, the motion for belated brief, adoption, recusal, and transfer is denied; the emergency-relief matter is dismissed; and, the previously-granted temporary stay is lifted.

RYLWELL, LLC & Pulaski Lands, LLC *v.*
ARKANSAS DEVELOPMENT FINANCE AUTHORITY

07-334 262 S.W.3d 617

Supreme Court of Arkansas
Opinion delivered September 20, 2007

PER CURIAM. Appellants Rylwell, LLC, and Pulaski Lands, LLC, appeal the Pulaski County Circuit Court's order granting judgment in favor of Appellee Arkansas Development Finance Authority (ADFA). Because Appellants have submitted a brief without a proper abstract in violation of Ark. Sup. Ct. R. 4-2(a)(5), we order rebriefing.

Rule 4-2(b)(3) explains the procedure to be followed when an appellant has failed to supply this court with a sufficient brief and states:

> Whether or not the appellee has called attention to deficiencies in the appellant's abstract or Addendum, the Court may address the question at any time. If the Court finds the abstract or Addendum to be deficient such that the Court cannot reach the merits of the case, or such as to cause an unreasonable or unjust delay in the disposition of the appeal, the Court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, Addendum, and brief, at his or her own expense, to conform to Rule 4-2(a)(5) and (8). Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the Court may direct. If after the opportunity to cure the deficiencies, the appellant fails to file a complying abstract, Addendum and brief within the prescribed time, the judgment or decree may be affirmed for noncompliance with the Rule.

Id. Further, Rule 4-2(a)(5) provides, in pertinent part:

> In the abstracting of testimony, the first person (i.e., "I") rather than the third person (i.e., "He, She") shall be used.

Id.

In the case at bar, a hearing was held on October 26, 2006, in which counsel for both parties discussed with the trial court the possibility of stipulating to the facts. A hearing was held on December 18, 2006, in which counsel for both parties argued the merits of Appellee's complaint and Appellant Rylwell's counterclaim. Instead of abstracting the transcripts of the hearings as required by Rule 4-2(a)(5), Appellants summarized the arguments and requests made to the trial court by both parties. Here, as Appellants have failed to comply with this Rule, we order Appellants to abstract the transcripts of the October 26 and December 18 hearings and to file a substituted brief within fifteen days from the date of entry of this order. According to Rule 4-2(b)(3), if Appellants fail to file a complying brief within the prescribed time, the order appealed from may be affirmed for noncompliance with the Rule.

After service of the substituted brief, ADFA shall have an opportunity to file a responsive brief in the time prescribed by the Supreme Court Clerk, or to rely on the brief that it has previously filed in this appeal.

Rebriefing ordered.

Victoria S. WILLIFORD *v.* STATE of Arkansas

CR 07-904 262 S.W.3d 614

Supreme Court of Arkansas
Opinion delivered September 20, 2007

James D. Burns, for appellant.

No response.

PER CURIAM. Victoria S. Williford, by and through her attorney James D. Burns, filed a motion for rule on clerk asking this court to order the clerk to docket the appeal. The clerk refused to docket the appeal because the record was untimely. The notice of appeal was filed on March 8, 2007, making the record due by June 6, 2007. Williford attempted to docket the case on August 3, 2007. It is apparent that the record was presented after the 90 days permitted under Ark. R. App. P.–Civ. 5(a).

Williford argues that her record was not due until 90 days after entry of the order on her "Motion For Belated Appeal" filed in the circuit court entered on May 7, 2007. That motion sought relief for the alleged failure of the circuit clerk to file stamp and enter the notice of appeal on March 8, 2007, the day on which it was faxed and mailed to the circuit court. The circuit court entered

an order "that the Notice of Appeal was properly and timely filed on March 8, 2007, and should be file stamped accordingly." The Notice of Appeal and Designation of Record contained in the record bears a file stamp of March 8, 2007. Thus, the notice of appeal was filed on March 8, 2007, and the record had to be filed by June 6, 2007.

We note that although Williford characterized her motion in the circuit court as a "Motion for Belated Appeal," it was actually a motion for an order nunc pro tunc entering the Notice of Appeal on March 8, 2007. A nunc pro tunc order may be entered to make the court's record speak the truth or to show that which actually occurred. *Miles v. State*, 348 Ark. 544, 75 S.W.3d 677 (2002). In *Miles,* just as in the present case, the trial court's entry of the order nunc pro tunc, corrected the record to reflect the date action was taken in the circuit court.

We will treat the motion as a motion for belated appeal. This court clarified its treatment of a motion for belated appeals in *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). There we stated 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." *Id.* at 116, 146 S.W.3d at 891. We explained why this is so:

> 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. (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.]

When it is plain from the motion, affidavits, and record that relief is proper under either error or good reason, the relief will be granted. *Id.* If there is attorney error, a copy of the opinion will be forwarded to the Committee on Professional Conduct. *Id.*

It is plain from the motion that there was error on Mr. Burns's part. Burns obtained an order of the circuit court finding that the Notice of Appeal was filed on March 8, 2007, requiring it to be filed within 90 days of that date under Rule 5(a). He failed to do so. Pursuant to *McDonald*, *supra*, we treat this motion as a motion for belated appeal and grant it. We also forward a copy of this opinion to the Committee on Professional Conduct.

Ronald Ray TRYON *v.* STATE of Arkansas

CR 06-801 263 S.W.3d 475

Supreme Court of Arkansas
Opinion delivered September 27, 2007

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Knutson Law Firm, by: *Gregg A. Knutson*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Leaann J. Irvin* and *Farhan A. Khan*, Ass't Att'ys Gen., for appellee.

JIM HANNAH, Chief Justice. A Sebastian County jury convicted appellant Ronald Tryon of possession of a controlled substance (methamphetamine) with intent to deliver, possession of drug paraphernalia, and theft by receiving, for which he was sentenced, as a habitual offender, to life imprisonment, fifteen years, and thirty years, respectively, in the Arkansas Department of Correction. On appeal, he challenges the circuit court's denial of his motion for directed verdict regarding all three counts, the circuit court's denial of his motion to suppress evidence, the circuit court's denial of his motion to suppress his custodial statement, and the circuit court's failure to grant a mistrial or curative instruction regarding the State's closing argument during sentencing. As this is a criminal appeal in which a sentence of life imprisonment has been imposed, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). We find no error and, accordingly, we affirm.

At trial, Alvin Trusty testified that, on March 16, 2004, he observed a man driving a small, white pickup truck pull up to the home of his neighbor, Louis Wofford. Trusty testified that he saw the man going around to all the doors of the Wofford residence and barn building. He stated that when the truck arrived, the truck bed appeared to be empty, but that when it left, it "[h]ad quite a bit in it." Trusty described the driver of the truck as a "white male, short, dirty looking, wearing a ball cap."

Wofford testified that on March 16, while he and his wife were at work, his wife received a phone call from Mrs. Trusty, stating that something suspicious was going on at the Wofford

home. When Wofford got home, he found the back door to his barn kicked in and discovered that most of the items of value had been taken out. Wofford made a list of items taken, including a Craftsman air compressor, a 75-foot air hose, a Lincoln 225 arc welder, a Delta electric compound miter saw, and various other items valued at a total of approximately $1,615.

Deputy Ron Morris of the Sebastian County Sheriff's Office testified that he responded to Wofford's residence in March 2004 regarding a break in. Deputy Morris stated that he was familiar with the description of the driver and of the truck given by Trusty, so he contacted Deputy Chandler Garrett to ask him to check Tryon's residence.

Deputy Garrett testified that as he pulled up to Tryon's residence, he saw a white truck, matching the description given by Morris, in the backyard. Further, Garrett stated that he saw an air compressor in the back of the truck. As he participated in a search of the truck and residence, Garrett saw several items matching the description of the stolen items. He noticed that there was a license plate clipped over the license plate belonging to the vehicle, and he said that when he ran the VIN number of the truck, it registered as belonging to Tryon.

Claude Ridge, Tryon's neighbor, testified that he saw Tryon leaving his residence alone on the morning of March 16, 2004, in his white Mazda truck. Ridge said that the bed of the truck appeared to be empty when Tryon left, but, when Tryon returned, the truck "had a lot of stuff in the back."

Suzanne Bobbitt, a parole officer with the Department of Community Corrections, conducted a search of Tryon's truck and residence on March 16, 2004. Bobbitt searched Tryon's truck and found a black coat in the passenger seat. She located a match box containing a blue baggy with methamphetamine inside the pocket of the coat. Bobbitt then searched Tryon's residence and found, in plain view in the southeast bedroom, a spoon with grayish residue, a set of scales on a table, a light bulb altered for smoking methamphetamine, plastic baggies with the corners cut out, and a razor blade. Bobbitt stated that these items would have been noticeable to someone who lived in the residence.

Benjamin Peacock, a forensic chemist with the Arkansas State Crime Laboratory, testified that he tested the items seized by Bobbitt in the search of Tryon's residence and truck. The off-white substance in the plastic baggy weighed 1.6512 grams and

tested to be 17.4% methamphetamine. Peacock testified that the dilution of methamphetamine with cutting agents was a common practice used so the methamphetamine could be distributed for more money. He also stated that sometimes cutting agents are used so that the methamphetamine will not be as potent when users shoot it into their veins.

Sergeant Brandon McCaslin, with the Sebastian County Sheriff's Office, testified that he arrived at Tryon's residence on March 16, 2004, after Deputies Garrett and Morris had arrived. After Tryon waived his *Miranda* rights, McCaslin conducted a taped interview with Tryon during which Tryon stated that he received the tools found at his residence from Wes Bradley. Tryon stated that Bradley borrowed his truck to get a compressor that Tryon was thinking about buying. Tryon said that when Bradley returned in the truck, he had a compressor, a welder, a crate with hand tools, and a skill saw. Tryon stated that Bradley wanted $275 for these items. Tryon admitted that he knew that the property "either had to be stolen or traded for drugs." He told McCaslin that the property was "illegal" and that paying $275 for all the property "was a heck of a buy." Tryon denied any knowledge of the methamphetamine found in his truck or items of paraphernalia found in his residence.

Tryon argues that the circuit court erred in denying his motions for directed verdict regarding the charges of possession of a controlled substance (methamphetamine) with intent to deliver, possession of drug paraphernalia, and theft by receiving. We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). When reviewing the sufficiency of the evidence, we determine whether there is substantial evidence to support the verdict, viewing the evidence in a light most favorable to the State. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Tillman v. State*, 364 Ark. 143, 217 S.W.3d 773 (2005).

Possession of Methamphetamine and Drug Paraphernalia

Except as authorized by law, "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance." Ark. Code Ann. § 5-64-401(a) (Supp. 2003). "Any person who violates this subsection with

respect to [a] controlled substance classified in Schedules I or Schedule II, which is a narcotic drug or methamphetamine, and by aggregate weight, including an adulterants or diluents, is less than twenty-eight grams (28 g.), is guilty of a felony and shall be imprisoned for not less than ten (10) years nor more than forty (40) years, or life, and shall be fined an amount not exceeding twenty-five thousand dollars ($25,000)." Ark. Code Ann. § 5-64-401(a)(1)(i) (Supp. 2003).

"It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance" in violation of statutory law. Ark. Code Ann. § 5-64-403(c)(1)(A)(i) (Supp. 2003).

Tryon first argues that the circuit court erred in denying his motion for directed verdict for possession of a controlled substance (methamphetamine)[1] and possession of drug paraphernalia, when the items were found in a place jointly occupied or accessible by others, and there were not other factors to link him to the items found. Tryon claims that he was not in possession of the methamphetamine that was found in the truck on his property. He states that he was not in the truck when the methamphetamine was discovered. Further, Tryon refers to his custodial statement that he loaned his truck to Wes Bradley the day that the methamphetamine was found. Tryon states that it is possible that Bradley left the coat containing methamphetamine in the truck. In addition, he points out that he shared his house with his wife; thus, he did not have exclusive control over the items in the house and vehicle.

The State argues that, although it appears that Tryon makes a joint-occupancy claim regarding the methamphetamine found in the truck, the argument must fail because there is simply no evidence, other than Tryon's own statement, that anyone, other than Tryon, had possession or control of the truck. Further, the State contends that Tryon and Bradley were not found in the truck together, hence, there was a lack of joint occupancy. The State's argument is well taken. *See Malone v. State*, 364 Ark. 256, 217

[1] While Tryon was convicted of possession of a controlled substance (methamphetamine) with intent to deliver, he argues the intent-to-deliver element of the conviction in a separate point on appeal.

S.W.3d 810 (2005) (factors to be considered in cases involving vehicles *occupied by more than one person*); *see also Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004) (factors to be considered when the contraband is in the *joint control* of the accused and another).

The State also contends that there is substantial evidence that Tryon possessed the methamphetamine found in the truck. It is not necessary for the State to prove an accused physically held the contraband in order to sustain a conviction if the location of the contraband was such that it can be said to be under the dominion and control of the accused. *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994). Possession may be implied when the contraband is found in a place that is immediately and exclusively accessible to the accused and subject to his dominion and control. *Jones, supra.* We must determine whether there is substantial evidence to show that Tryon was in constructive possession of the contraband found in the truck and residence.

In the present case, Deputies Morris and Garrett both testified that Tryon was the registered owner of the white truck found in his backyard and that no other person was found at Tryon's residence or in his yard. Trusty testified that he observed a white male matching Tryon's description at Wofford's residence. Trusty also stated that the man was driving a white truck. Tryon's neighbor, Claude Ridge, testified that he saw Tryon leave his residence in the white truck. Ridge stated that when Tryon left, the bed of the truck was empty, but when Tryon returned, the bed of the truck was full. Bobbitt testified that she found the coat with methamphetamine in Tryon's truck in Tryon's backyard. As the State points out, when the truck was searched, it was immediately and exclusively accessible to Tryon, and he was in close proximity to the methamphetamine.

As previously noted, the only evidence submitted by Tryon to refute any ownership or possessory interest in the truck was Tryon's own statement that Bradley had borrowed his truck. Clearly, the jury rejected Tryon's explanation. This court does not attempt to weigh evidence or assess the credibility of the witnesses, as that determination lies within the province of the trier of fact. *See, e.g., Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999). 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. *Ross v. State*, 346

Ark. 225, 57 S.W.3d 152 (2001). Based on the foregoing, we believe there is substantial evidence that Tryon was in possession of methamphetamine.

As to his conviction for possession of drug paraphernalia, Tryon contends that there was an absence of evidence for the jury to infer that he had joint possession and control over the drug paraphernalia discovered in his home. Neither exclusive nor actual physical possession is necessary to sustain a charge of possessing contraband. *See Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001). Here, Tryon relies upon *Ravellette v. State*, 264 Ark. 344, 571 S.W.2d 433 (1978), and like cases, for the rule that where there is joint occupancy of the premises there must be some factor in addition to the joint control to link the accused with the controlled substance. In *Ravelette*, there was no such evidence. There the co-defendant admitted that the marijuana found in the residence was his and exonerated the appellant of any knowledge of its presence or control. In this case, Tryon's wife, with whom he shared the residence, did not testify.

Here, there are facts connecting Tryon with the drug paraphernalia. Tryon lived in the residence, and at no point did he deny an ownership or possessory interest in the residence. Tryon was home alone when officers searched the residence. Testimony established that items of paraphernalia, the spoon with residue, the light bulb, the scales, and the plastic baggies were found in plain view in the southeast bedroom and that the items would have been noticeable to anyone who lived in the residence.

Still, Tryon contends that in his own recorded statement to police, he expressed surprise that methamphetamine was found in his house or in his truck. The record reveals that, at trial, Tryon's statement was read aloud by the deputy prosecuting attorney; thus, the jury had an opportunity to hear Tryon's contention that he had no knowledge of the methamphetamine or drug paraphernalia. The jury was free to determine the credibility of Tryon's statement and disregard Tryon's account of the events. *See Ross, supra.* We hold that there is substantial evidence to sustain a conviction for possession of drug paraphernalia.

Intent to Deliver

For his second point for reversal, Tryon argues that the circuit court erred in denying his motion for directed verdict when there was insufficient evidence of his intent to deliver metham-

phetamine. Tryon moved for a directed verdict at the close of the State's case, claiming that there was insufficient evidence to establish the element of intent to deliver, notwithstanding Detective Darrell Miner's testimony.[2] The circuit court denied Tryon's motion for a directed verdict. Tryon renewed his motion at the close of all evidence, arguing that there was no evidence, in the absence of Detective Miner's testimony, of any trafficking. The circuit court again denied the directed-verdict motion, noting that the question of whether the 1.6512 grams of methamphetamine was for personal use or distribution was for the jury to determine, at which time Tryon argued that the statutory presumptive quantity would unconstitutionally shift the burden of proof and violate his right to due process.[3] This argument was also rejected by the circuit court.

On appeal, Tryon argues that there was no proof, even assuming that the methamphetamine was his, of his intent to distribute it. Specifically, Tryon argues that there was no evidence presented that the scales found in his home were for weighing methamphetamine and that there was evidence presented that the methamphetamine was cut with agents so it would be less potent for personal use.

The State argues that Tryon's arguments are not preserved for appellate review. We agree. Tryon moved for directed verdict, making a general claim that the State had not met its burden to prove intent to deliver, notwithstanding Detective Miner's testimony. However, Tryon did not explain how Miner's testimony failed to establish Tryon's intent to deliver. A directed-verdict motion is a challenge to the sufficiency of the evidence and requires the movant to apprise the trial court of the specific basis on which the motion is made. *See, e.g.*, *Campbell v. State*, 319 Ark. 332, 891 S.W.2d 55 (1995). Arguments not raised at trial will not be addressed for the first time on appeal, and parties cannot change the grounds for an objection on appeal, but are bound by the scope and nature of the objections and arguments presented at trial. *See id.* Here, Tryon's motion for directed verdict, while timely, did not identify particular or specific elements of proof. Moreover, Tryon's arguments on appeal relating to the scales and the cutting

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[2] Detective Miner of the Greenwood Police Department testified regarding his knowledge of narcotics and how methamphetamine is used and distributed.

[3] Tryon does not renew his constitutional challenge on appeal.

agents used in the methamphetamine were not part of Tryon's directed-verdict motion at trial. Consequently, Tryon's arguments are not preserved for review.

Theft by Receiving

Tryon next argues that the circuit court erred in denying his motion for directed verdict on the charge of theft by receiving when there was no evidence that he knew or had reason to know that the tools purchased from Wes Bradley were stolen. A person commits the offense of theft by receiving if he or she receives, retains, or disposes of stolen property of another person, knowing that the property was stolen or having good reason to believe that the property was stolen. Ark. Code Ann. § 5-36-106(a) (Supp. 2003). The acquisition by a person of property for a consideration known to be far below its reasonable value shall give rise to a presumption that a person knows or believes that the property was stolen. Ark. Code Ann. § 5-36-106(c) (Supp. 2003).

In his statement to Sergeant McCaslin, Tryon stated that Bradley wanted $275 for several items, including an air compressor, a welder, a crate with several hand tools, and a saw. Tryon also admitted that he knew that the property "either had to be stolen or traded for drugs." He stated that the property was likely "[o]btained in illegal ways." He also agreed that buying all of the property for $275 was a "heck of a buy." Wofford, the victim of the theft, testified that the items taken from his home and found at Tryon's residence were valued at approximately $1615. Tryon's own statement that he knew the property was stolen or obtained illegally and that he paid $275 for the property, which was valued at $1615, is substantial proof that Tryon knew the items purchased from Bradley were stolen. As such, the circuit court did not err in denying Tryon's motion for directed verdict regarding the charge of theft by receiving.

Motion to Suppress Evidence

Tryon argues that the circuit court erred in denying his motion to suppress evidence found in his backyard and residence because the evidence was found during an illegal search located in a place that was afforded protection by the Fourth Amendment and Article 2, § 15 of the Arkansas Constitution. He also argues that the evidence seized should be suppressed as fruit of the poisonous tree. In reviewing the denial of a motion to suppress, we

conduct a de novo review based on the totality of the circumstances, giving respectful consideration to the findings of the trial judge. *Blanchett v. State*, 368 Ark. 492, 247 S.W.3d 477 (2007). We will reverse a circuit court's ruling denying a motion to suppress only if the ruling is against the preponderance of the evidence. *See Hart v. State*, 368 Ark. 237, 244 S.W.3d 670 (2006).

At the suppression hearing, Deputy Garrett testified that he was the first to arrive at Tryon's residence. Garrett stated that Deputy Morris called him and told him that a large air compressor and some other tools had been taken from Wofford's residence. Morris related to Garrett that a witness had observed a white male in a small, white pickup truck taking the property. Because they had "dealt with [Tryon] in incidents past," and because Garrett knew that Tryon drove a small, white pickup, they decided that Garrett should go to Tryon's residence. Garrett testified that he drove to Tryon's house, and that from the road, and when he first pulled onto the driveway, he had a view of the backyard. In the backyard, Garrett saw a white truck with an air compressor in the truck bed that matched the description he had gotten from Morris. Next, Garrett observed a short, white male with shaggy hair appear from the back of the residence. Garrett said the man looked at him and then took off running. Garrett then got out of his car and went behind the house. Later, the man, identified as Tryon, approached Garrett. Garrett testified that Tryon told him he did not break into anything and that Garrett could look at anything he wanted. Garrett also testified that, while in the backyard, he saw, in plain view through an open door, tools in a shed on Tryon's property. After the air compressor and other tools were discovered, Tryon was placed under arrest. Bobbitt, the parole officer, was contacted; she came to Tryon's residence and conducted a search of his truck and residence. Bobbitt's search resulted in the seizure of methamphetamine and drug paraphernalia.

At the suppression hearing, Tryon argued that, based on Garrett's testimony, the air compressor was not in plain view because Garrett said that he had to go into the backyard to look inside the bed of the truck to verify what type of air compressor was located there. Tryon contended that Garrett's entry into the backyard constituted a search and that Garrett never informed Tryon that he had a right to refuse consent. Further, Tryon argued that, even if Bobbitt's search was authorized because he was on parole, the search would still be fruit of the poisonous tree because it was so linked in time to the initial illegal intrusion. The circuit

court concluded that the stolen items were in plain view. Further, the circuit court found that the search of Tryon's truck and residence, conducted by parole officer Bobbitt, was constitutional. Accordingly, the circuit court denied Tryon's motion to suppress evidence. One's dwelling and curtilage have consistently been held to be areas that may normally be considered free from government intrusion. *McDonald v. State*, 354 Ark. 216, 119 S.W.3d 41 (2003). Driveways and walkways used to approach a residence are portions of the curtilage as traditionally defined; however, the expectation of privacy in such areas is not generally considered reasonable. *Id.* Whether an area outside of one's home is private as opposed to public, for purposes of the Fourth Amendment, is not controlled by the common law of property. *Id.* Indeed, what a person knowingly exposes to the public is not a subject of Fourth Amendment protection. *Id.*

Deputy Garrett testified that he could see Tryon's truck, with an air compressor in the truck bed, from the road. He made these observations from a lawful vantage point. Tryon had no reasonable expectation of privacy in the road leading to his residence, nor did he have a reasonable expectation of privacy in his driveway. Deputy Garrett's observation of the truck and air compressor did not amount to a search because those items were in plain view. Consequently, there was no violation of the Fourth Amendment, nor was there a violation of Article 2, § 15 of the Arkansas Constitution. Further, Deputy Garrett did not violate Tryon's constitutional rights by merely walking into the backyard after he saw Tryon take off running. *See, e.g.*, *Vidos v. State*, 367 Ark. 296, 312, 239 S.W.3d 467, 479 (2006) (concluding that a police officer did not violate appellant's Fourth Amendment right to be free from searches and seizures when, after knocking at the residence and discovering that no one was home, he walked around the house to see if someone was in the backyard). In addition, Deputy Garrett's actions do not invoke the protections of Article 2, § 15 of the Arkansas Constitution. While in the backyard, Deputy Garrett observed, in plain view through an open door, tools in Tryon's shed. In this case, it is clear that the circuit court found credible testimony that the truck, air compressor, and tools were in plain view. We defer to the superior position of the trial court to pass upon the credibility of witnesses. *See, e.g.*, *Holsombach v. State*, 368 Ark. 415, 246 S.W.3d 871 (2007).

Our determination that Deputy Garrett did not conduct a search because the evidence at issue was in plain view makes it unnecessary to address Tryon's claim that evidence seized by parole officer Bobbitt should have been suppressed as fruits of an illegal search. Bobbitt, who searched the interior of the truck and inside Tryon's house, conducted a warrantless parole search. Tryon does not contest the advance-consent terms to his release.

As a parolee, Tryon was required to sign and initial a Conditions of Release form. Among the terms to which Tryon was required to consent was the following provision:

> *Search and Seizure.* You must submit your person, place of residence, and motor vehicles to search and seizure at any time, day or night, with or without a search warrant, whenever requested to do so by any Department of Community Punishment officer.

The record reveals that Tryon signed and initialed the form upon his parole.

The United States Supreme Court has held that parolees are subject to suspicionless, warrantless searches at any time. *See Samson v. California*, 547 U.S. 843 (2006) (holding that suspicionless searches permitted by consent conditions of California parolees do not violate the Fourth Amendment). This court has recognized that "[t]he special needs of the parole process call for intensive supervision of the parolee making the warrant requirement impractical." *Cherry v. State*, 302 Ark. 462, 467, 791 S.W.2d 354, 357 (1990). When the consent to the terms of release is valid, the only remaining question is whether the search was carried out under those terms. *Id.* at 467, 791 S.W.2d at 357. In this case, Tryon does not argue that the searches conducted by Bobbitt were carried out in violation of the terms of his release. The evidence seized prior to Bobbitt's arrival was in plain view, and the evidence seized by Bobbitt resulted from a valid search of a parolee. We hold that the circuit court did not err in denying Tryon's motion to suppress.

Motion to Suppress Custodial Statement

Tryon argues that the circuit court erred in denying his motion to suppress his custodial statement as "fruit of the poisonous tree" because it was obtained as a result of the primary illegal search without a warrant or valid consent. In his motion to

suppress statement, Tryon argued that his statement was given in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution. He did not raise his fruit-of-the-poisonous-tree argument in his motion. After a suppression hearing, the circuit court denied Tryon's motion to suppress statement. The State argues that Tryon's argument is not preserved for review because the circuit court did not rule on, or apparently even consider, the claim that Tryon now makes on appeal — that his statements were fruit of an illegal search under the Fourth Amendment. We agree. It is well settled that an appellant must raise and make an argument at trial in order to preserve it on appeal. *See, e.g.*, *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003). This is true even when the issue raised is constitutional in nature. *See id.* If a particular theory was not presented at trial, the theory will not be reached on appeal. *See id.*

We add that, because we have concluded that there was no illegal search, there is no merit to Tryon's argument that his custodial statement should be suppressed as fruit of an illegal search. This court has noted that, where the tree is not "poisonous," neither is the fruit. *See Langford v. State*, 332 Ark. 54, 65, 962 S.W.2d 358, 364 (1998).

Closing Argument

Tryon argues that the circuit court erred in denying his motion for mistrial or refusing to offer a curative instruction to the jury when the prosecutor made improper closing arguments during sentencing that included references to matters that were not in evidence and matters that inflamed the passions of the jury. Tryon's counsel objected to several remarks made by the deputy prosecuting attorney during sentencing. Following are the remarks at issue, as well as a colloquy between the circuit court, defense counsel, and the deputy prosecuting attorney:

> DEPUTY PROSECUTING ATTORNEY: I want to talk you to you also about one of your Instructions. On the possession of meth with intent, you're told that the sentence is ten to life in prison. I want you to know that it's your decision on that. You can sentence the Defendant to any number of years, anywhere from ten up to life and that can be thirty, forty, fifty, seventy, eighty. I just want you to be aware of that and consider that. There are several reasons to give a person consideration

on sentencing, but I don't know that this Defendant is deserving of that. You read his statement and it is on the statement to Brandon McCaslin of the Sheriff's Office, he told him he was not employed but he basically made his living by being a career criminal stealing from other people.

It is not just stealing that I want you to take into consideration. It's the violation of a person's safety and their feeling of well being in their own home. It's inconvenient to this victim, to Mr. Wofford, who had to take time off work the day this happened. He and his wife both, they had to leave work. They had to go home. They had to go in and take their own time to talk to the Sheriff's Office and give a statement about what happened. Mr. Wofford had to take off from work yesterday and he had to take off work again today to come to Court. He's not paid to be here to give his time and to give his testimony.

So, I ask you, how many crimes does this Defendant have to commit before he is sent off for the maximum amount of time allowed by law? Is eleven not enough in this case? I urge you to give this Defendant the maximum amount of time on each charge that you've convicted him of and I also urge you to recommend that his sentences be run consecutive.

I will also let you know that in my years as a Prosecutor and in my career as a Prosecutor, I have never stood before a Jury and I have never asked —

DEFENSE COUNSEL: Your Honor, we would object.

THE COURT: Overruled. I'm going to permit the argument.

DEPUTY PROSECUTING ATTORNEY: Okay. As I was saying, I have never stood before a Jury and I have never asked a Jury to sentence a Defendant to the maximum time and I have never asked the Jury to run a sentence consecutively; but I truly feel that in this case, that sentence is warranted. I've never seen a person with such a total disregard for —

DEFENSE COUNSEL: Your Honor, may we approach?

THE COURT: Sure.

DEFENSE COUNSEL: I am going to object and, Your Honor, we would ask for a mistrial and if the Court doesn't grant a mistrial, then probably we would ask the Court to tell the Jury to disregard the last statement.

THE COURT: State your specific objections.

DEFENSE COUNSEL: Because Ms. Houston, she said she had never seen a Defendant with a total disregard for these things that would be erroneous because we could have some people that she's seen that could be worse.

DEPUTY PROSECUTING ATTORNEY: Your Honor, that's just argument.

THE COURT: I am going to deny your motion for mistrial and I'm not going to instruct the Jury, but your exceptions are certainly — you're on the record.

DEFENSE COUNSEL: Thank you, Your Honor.

THE COURT: Go ahead.

DEPUTY PROSECUTING ATTORNEY: So I can go ahead with that?

THE COURT: Yes.

DEPUTY PROSECUTING ATTORNEY: As I was saying, the reason why I said, that is, that the statute in this case is warranted and with this Defendant, that particular sentence is warranted and, as I said, I have never seen a person with a total disregard for the law as Ronald Tryon. And we thank you very much for your deliberations.

Specifically, Tryon objects to the deputy prosecuting attorney's remark that she never saw a defendant with such disregard for the law and that she felt Tryon deserved the maximum sentence

available under the law. Tryon also objects to counsel's statement that he told Brandon McCaslin that he made his living by being a career criminal stealing from other people.

We have stated many times that the trial court is given broad discretion to control counsel in closing arguments, and we do not interfere with that discretion absent a manifest abuse of discretion. *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999); *Noel v. State*, 331 Ark. 79, 960 S.W.2d 439 (1998); *Lee v. State*, 326 Ark. 529, 932 S.W.2d 756 (1996). Closing remarks that require reversal are rare and require an appeal to the jurors' passions. *Leaks, supra*; *Lee, supra.* Furthermore, the trial court is in the best position to evaluate the potential for prejudice based on the prosecutor's remarks. *Leaks, supra*; *Noel, supra.*

Closing arguments must be confined to questions in issue, the evidence introduced during trial, and all reasonable inferences and deductions which can be drawn therefrom. *Leaks, supra.* It is the trial court's duty to maintain control of the trial and to prohibit counsel from making improper arguments. *Id.*

The decision to grant or deny a motion for 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. *Johnson v. State*, 366 Ark. 8, 233 S.W.3d 123 (2006). A mistrial is a drastic remedy and should only be declared when there is error so prejudicial that justice cannot be served by continuing the trial, and when it cannot be cured by an instruction to the jury. *See Holsombach, supra.* We have also stated that an argument is not objectionable merely because it expresses an opinion. *See, e.g., Neff v. State*, 287 Ark. 88, 696 S.W.2d 736 (1985).

The State argues that the prosecutor's statement of opinion that she had never "seen a person with a total disregard for the law" is not reversible error. Further, the State argues that, to the extent the prosecutor's opinion encapsulated a sentencing recommendation, it was proper as a permissible call for the jury to enforce the law.

This court has affirmed rulings allowing prosecutors to convey "send a message" themes during closing arguments. *See, e.g., Lee, supra*; *Muldrew v. State*, 331 Ark. 519, 963 S.W.2d 580 (1998); *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996); *Hill v. State*, 253 Ark. 512, 487 S.W.2d 624 (1972). Further, we have stated that it is not improper for the State's attorney to argue for the maximum punishment. *See, e.g., Holloway v. State*, 268 Ark. 24,

594 S.W.2d 2 (1980); *House v. State*, 192 Ark. 476, 92 S.W.2d 868 (1936). While the circuit court did not provide a curative instruction to the jury, the court had, of course, already instructed the jury that closing arguments were not evidence. The circuit court did not abuse its discretion in denying Tryon's motion for mistrial or in failing to admonish the jury upon Tryon's objection.

We do not reach Tryon's argument that it was improper for the deputy prosecuting attorney to state that Tryon had told Brandon McCaslin that he made his living by being a career criminal stealing from other people. Tryon did not make this argument below; thus, it is not preserved for appellate review.

4-3(h) Review

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

Affirmed.

RYAN & COMPANY AR, INC. *v.* Richard WEISS, Director, Department of Finance and Administration

06-1266 263 S.W.3d 489

Supreme Court of Arkansas
Opinion delivered September 27, 2007

Dover Dixon Horne, PLLC, by: *Michael O. Parker* and *Nona M. Robinson*, for appellant.

Martha G. Hunt and *William E. Keadle*, Revenue Legal Counsel, for appellee.

JIM HANNAH, Chief Justice. Ryan & Company AR, Inc., appeals a judgment of the Pulaski County Circuit Court

finding that legal opinions issued by the Arkansas Department of Finance and Administration under Gross Receipts Tax Rule G-75, 006-05-009 Ark. Code R. § GR-75 (B) (Weil 2007) are exempt from disclosure under the Arkansas Freedom of Information Act.[1] The circuit court concluded that the Rule GR-75 legal opinions were exempted from disclosure under the FOIA based on Ark. Code Ann. § 26-18-303(a)(2)(A) (Supp. 2005), and that redaction of some or all of the requested opinion letters would require a qualitative analysis for each document as opposed to a mechanical redaction, thus requiring the creation of a new record in violation of Ark. Code Ann. § 25-19-105(d)(3)(C) (Supp. 2005). We reverse the circuit court's decision and hold that the Rule GR-75 legal opinions are "otherwise kept" public records that must be disclosed under Ark. Code Ann. § 25-19-103(5)(A) (Supp. 2005) with any and all facts and information identifying any person or entity fully redacted.

Facts

On October 4, 2005, Ryan submitted a request under the FOIA for disclosure of certain "regulation GR-75 letter opinions" issued during 2004. Ryan asked only for redacted portions of the legal opinions so that no taxpayer would be identified. On October 7, 2005, DF&A rejected the request, alleging that the legal opinions were exempted and protected from disclosure. Ryan then filed a complaint for declaratory judgment in the circuit court. The circuit court found that the legal opinions were not subject to disclosure under the FOIA. Ryan appeals.

Standard of Review

We are asked to determine whether Ark. Code Ann. §§ 26-18-303(a)(2)(A) and 25-19-107(a) exempt the Rule GR-75 legal opinions from disclosure under the FOIA. We are also asked to interpret Ark. Code Ann. § 25-19-105(f)(1-3) (Supp. 2005). Therefore, our analysis is one of statutory interpretation. This court reviews issues of statutory construction de novo. *Nolan v. Little*, 359 Ark.161, 196 S.W.3d 1 (2004). It is for this court to decide what a statute means, and we are not bound by the circuit court's interpretation. *Id.* The basic rule of statutory construction is to give effect to the intent of the General Assembly. *Id.* In determining the meaning of a statute, the first rule is to construe it

[1] Ark. Code Ann. § 25-19-101 – 109 (Supp. 2005).

just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* This court construes the statute so that no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible. *Id.* When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to resort to rules of statutory construction. *Id.* However, this court will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. *Id.* This court will accept a circuit court's interpretation of the law unless it is shown that the court's interpretation was in error. *Id.* This court seeks to reconcile statutory provisions to make them consistent, harmonious, and sensible. *Id.*

Public Record

We first address the question of whether the Rule GR-75 legal opinions are public records subject to the FOIA. Rule GR-75(A) provides that the "propriety of the taxation or exemption of a sale may be substantiated by having a legal opinion rendered" by DF&A. The seller to whom the legal opinion is addressed may then rely on the opinion for a period of three years. Rule GR-75(B).

The definition of a "public record" includes writings required by law to be kept or otherwise kept that constitute a record of official action by a governmental agency. Ark. Code Ann. § 25-19-103(5)(A). No statute requires that the Rule GR-75 legal opinions be kept as records; however, they are "otherwise kept" under the statute because DF&A maintains past Rule GR-75 legal opinions in its records. Thus, the Rule GR-75 legal opinions constitute a record of official action by a governmental agency that are "otherwise kept."[2] They are thus public records under the FOIA.

The FOIA provides that "any citizen of the State of Arkansas" shall have the right to inspect and copy all public records. Ark. Code Ann. § 25-19-105(a) (Supp. 2005). *See Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998). Exemptions to disclosure are provided in the FOIA or by other laws specifically enacted to

[2] Testimony at the hearing on this matter revealed that the Arkansas Department of Finance and Administration has created an information database that includes the Rule GR-75 legal opinions. They are indexed and searchable.

exempt a public record from disclosure. Ark. Code Ann. § 25-19-105(a); *Troutt Bros., Inc. v. Emison*, 311 Ark. 27, 841 S.W.2d 604 (1992). The records are presumptively open to the public; however, the circuit court concluded that the Rule GR-75 legal opinions were exempt from disclosure under the FOIA and other statutes.

FOIA and Ark. Code Ann. § 25-19-105(d)(3)(C)

DF&A objected to the request on several bases. One was that under Ark. Code Ann. § 25-19-105(d)(3)(C) (Supp. 2005), the "custodian is not required to compile information or create a record in response to a request made under this section." This section concerns making public records available for examination and copying. The Rule GR-75 legal opinions are addressed to specific taxpayers and provide answers to tax questions specific to that taxpayer. Ryan asserts it is requesting nothing that would violate the confidentiality of taxpayer information; however, it asserts that it is entitled to that portion of the legal opinions containing tax policy and interpretations of law. It further alleges that this information may be disclosed under the FOIA, which provides that any reasonably segregable portion of a public record shall be provided after deletion of exempt information. Ark. Code Ann. § 25-19-105(f)(1)-(3) provides:

> (f)(1) No request to inspect, copy, or obtain copies of public records shall be denied on the ground that information exempt from disclosure is commingled with nonexempt information.
>
> (2) Any reasonably segregable portion of a record shall be provided after deletion of the exempt information.
>
> (3) The amount of information deleted shall be indicated on the released portion of the record and, if technically feasible, at the place in the record where the deletion was made.

Considering the statute just as it reads, we conclude that under Ark. Code Ann. § 25-19-105(f)(1)-(3), the legal opinions can be disclosed once confidential information is redacted of any information that identifies a taxpayer or other individual or entity. That includes not only the name, address, and any other identifying information or numbers, such as taxpayer ID numbers, but also any facts that would reveal identity. DF&A is not obligated to compile or otherwise

manage the information sought; however, it is required to redact any and all identifying information of any form.

Ark. Code Ann. § 26-18-303

Ryan next argues that the circuit court erred in finding that under Ark. Code Ann. § 26-18-303, the legal opinions are confidential and privileged in total. Section 26-18-303(a) provides:

> (a)(1) The Director of the Department of Finance and Administration is the official custodian of all records and files required by any state tax law to be filed with the director and is required to take all steps necessary to maintain their confidentiality.
>
> (2)(A)(i) Except as otherwise provided by this chapter, the records and files of the director concerning the administration of any state tax law are confidential and privileged.
>
> (ii) These records and files and any information obtained from these records or files or from any examination or inspection of the premises or property of any taxpayer shall not be divulged or disclosed by the director or any other person who may have obtained these records and files.
>
> (B) It is the specific intent of this chapter that all tax returns, audit reports, and information pertaining to any tax returns, whether filed by individuals, corporations, partnerships, or fiduciaries, shall not be subject to the provisions of the Freedom of Information Act of 1967, § 25-19-101 et seq.

DF&A relies upon subsection (a)(2)(A)(i), that "[e]xcept as otherwise provided by this chapter, the records and files of the director concerning the administration of any state tax law are confidential and privileged." DF&A asserts that this statute exempts the Rule GR-75 legal opinions from disclosure in any form; however, (a)(1) refers to "all records and files required by any state tax law to be filed with the director." Section (a)(1) would not cover the legal opinions because they are not required by any state law to be kept by or filed with the director. While under section 26-18-303(a)(1), the director is "required to take all steps necessary to maintain their confidentiality," this again is a reference to matters required by any state tax law to be filed with the director. The Rule GR-75 legal opinions do not meet this requirement.

Arkansas Code Annotated § 26-18-303(a)(2)(B) (Supp. 2005) provides: "It is the specific intent of this chapter that all tax returns, audit reports, and information pertaining to any tax returns, whether filed by individuals, corporations, partnerships, or fiduciaries, shall not be subject to the provisions of the Arkansas Freedom of Information Act." Further, section 26-18-303(c) provides that there is protection for taxpayer information:

> The provisions of this section shall be strictly interpreted and shall not permit any other disclosure of tax information concerning a taxpayer, whether the taxpayer is an individual, a corporation, a partnership, or a fiduciary, that is contained in the records and files of the director relating to income tax or any other state tax administered under this chapter.

However, the Rule GR-75 legal opinions are not required by state law to be filed with the director. While the taxpayer information is certainly protected as already discussed above, the legal opinions in total are not protected under section 26-18-303. Even assuming that section 26-18-303 applies to the Rule GR-75 legal opinions, any concern that might arise from the obligation to keep tax information confidential under subparagraph (c) would be satisfied by the redaction of any and all facts and information that might identify any person or entity referenced in the legal opinions.

Administrative Procedure Act

Ryan also argues that the Administrative Procedure Act, codified at Ark. Code Ann. §§ 25-15-201 to -217 (Repl. 2002 & Supp. 2005), provides for disclosure of the legal opinions. The APA "has two purposes, (1) to require certain designated State agencies to adopt and publish procedural rules, including methods whereby the public can make submissions or requests; and (2) to afford adjudication rights in matters over which the agencies have jurisdiction." *Harber v. Rhodes*, 248 Ark. 1188, 1191, 455 S.W.2d 926, 927 (1970). Requests for disclosure of public documents are handled under the FOIA. *See* Ark. Code Ann. § 25-19-105 (Supp. 2005). A request for disclosure of the Rule GR-75 legal opinions is a request for public records, not agency action subject to the APA.

Constitutionality

[redacted] Ryan also alleges that DF&A's refusal to disclose the Rule GR-75 legal opinions violated its constitutional rights to equal protection and due process. The circuit court denied relief on these grounds. We have already held that the Rule GR-75 legal opinions are subject to disclosure after redaction, the relief that Ryan sought below. This renders this issue moot. We do not address moot issues. *Davis v. Williamson*, 359 Ark. 33, 194 S.W.3d 197 (2004).

Reversed.

[redacted]

Pamela Kaye TERRY *v.* STATE of Arkansas

CR 06-688 263 S.W.3d 528

Supreme Court of Arkansas
Opinion delivered September 27, 2007

[redacted]

The Blagg Law Firm, by: *Ralph J. Blagg*, for appellant.

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

TOM GLAZE, Justice. Appellant Pamela Kaye Terry was convicted of capital murder in the death of her estranged husband James "Michael" Terry. She was also convicted of robbery and theft of property. Pamela was sentenced to life without parole for the capital-murder conviction, thirty years' imprisonment for the robbery conviction, and twenty years' imprisonment for the theft-of-property conviction. From the circuit court's judgment and commitment order, this appeal arises, wherein Pamela argues four points for reversal. We affirm her convictions.

On July 16, 2004, Pamela was arrested at a Little Rock bus station for public intoxication. After she was transported to the city jail, she subsequently told the arresting police officer that she had killed her husband in their home outside of Clinton. After being read her rights and waiving those rights, Pamela confessed that she had shot Michael in their home about two weeks earlier, because he was abusing her and would not allow her to leave. She stated that he was asleep in his chair when she shot him. In her confession, Pamela claimed lack of memory and mental illness, but she was able to explain that, after shooting him, she placed a blanket over him, took $300 and his Visa card from his wallet, fled

in his car, and, later, drove to Little Rock with an ex-boyfriend. In addition, she admitted that she had used his Visa card at local ATMs on three occasions.

The Little Rock Police Department contacted the Van Buren County Sheriff's Department, and, upon arriving at the home in Dennard, police found Michael's body in a chair covered by a red blanket. Evidence revealed that Michael had sustained a gunshot wound to the head and had been dead for some time.

The State initially charged Pamela with capital murder under the felony-murder provision; she was also charged with three counts of theft of property. During discovery, the Van Buren County Circuit Court ordered a mental health evaluation for Pamela pursuant to Ark. Code Ann. § 5-2-305 (Repl. 1997). William Cochran, Ph.D., performed a forensic evaluation on Pamela, and he gave her an Axis-I diagnosis of bipolar disorder and alcohol abuse. Dr. Cochran recommended that Pamela be placed in the Forensic Unit of the Arkansas State Hospital "to resolve complex diagnostic issues." The circuit court then entered an order sending her to the State Hospital for additional testing. At the State Hospital, Michael Simon, Ph.D., issued an evaluation of Pamela, diagnosing her only with alcohol dependence. It was Dr. Simon's opinion that Pamela did not have a mental disease or defect.

Five days prior to trial, the State filed an amended information, adding an additional element for capital murder — the premeditated and deliberated provision — and amending one of the three theft-of-property charges to aggravated robbery. The State also filed second and third felony informations, wherein the State dropped one theft-of-property charge. In short, the State proceeded to trial, charging Pamela with (1) capital murder under the felony-murder *and* premeditated and deliberated provisions, (2) aggravated robbery, and (3) one count of theft of property. On the day of trial, in a pre-trial hearing, Pamela filed an oral motion to prohibit the State from filing its amended informations changing the theft-of-property charge to aggravated robbery; however, the circuit court denied her oral motion.

Pamela stood trial in Van Buren County on November 15, 16, 17, and 18, 2005. At trial, she raised the affirmative defense of mental disease or defect, contending that she lacked the capacity to appreciate the criminality of her conduct. In the State's case in chief, Pamela disputed the circuit court's decision to allow certain

photos into evidence, arguing that the photos were cumulative and were only being used by the State to incite the jury. Moreover, at the close of the State's case, Pamela filed motions for directed verdict on the capital murder and aggravated robbery charges, which were denied by the circuit court. She then rested without presenting any additional witnesses. Before the case was submitted to the jury, Pamela argued that the circuit court should not allow the "premeditated and deliberated purpose" instruction to be included in the capital murder jury instruction, but the circuit court allowed it. As stated earlier, the jury returned a guilty verdict on the capital murder, robbery,[1] and theft of property charges. Pamela was sentenced the same day, wherein the circuit court imposed a life sentence without parole for the capital murder conviction, thirty years' imprisonment for the robbery conviction, and twenty years' imprisonment for the theft-of-property conviction. From this judgment and commitment order, Pamela appeals.

Pamela first contends that the circuit court erred in denying her motion for directed verdict on the capital-murder charge because there was insufficient evidence to prove, in accordance with Ark. Code Ann. § 5-10-101(a) (Repl. 1997), that Michael's killing was in the furtherance of a felony, specifically a robbery. While this argument is not the first argument presented by Pamela, for double-jeopardy purposes, we will review this issue first to be consistent with our case law. *Wright v. State*, 368 Ark. 629, 249 S.W.3d 133 (2007). Our standard of review on this issue is familiar. We treat a denial of a directed verdict motion as a challenge to the sufficiency of the evidence. *Gaye v. State*, 368 Ark. 39, 243 S.W.3d 275 (2006). When reviewing a challenge to the sufficiency of the evidence, this court assesses the evidence in a light most favorable to the State and considers only the evidence that supports the verdict. *Id.* We affirm a judgment of conviction if substantial evidence exists to support it. *Id.*

Substantial evidence is evidence which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* Circumstantial evidence may constitute substantial evidence to support a conviction. *Id.* The longstanding rule in the use of circumstantial evidence is that, to be substantial, the evidence must exclude every other reasonable hypothesis than that

[1] The State charged Pamela with aggravated robbery, but the jury was instructed and convicted her of the lesser-included offense of robbery.

of the guilt of the accused. *Id.* The question of whether the circumstantial evidence excludes every other reasonable hypothesis consistent with innocence is for the jury to decide. *Id.* Upon review, this court must determine whether the jury resorted to speculation and conjecture in reaching its verdict. *Id.*

Section 5-10-101 states in pertinent part:

> (a) A person commits capital murder if:
>
> (1) Acting alone or with one (1) or more other persons:
>
> (A) The person commits or attempts to commit:
>
> . . . .
>
> (v) Robbery, § 5-12-102;
>
> (vi) Aggravated robbery, § 5-12-103;
>
> . . . .
>
> and
>
> (B) In the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life[.]
>
> . . . .
>
> (4) With the premeditated and deliberate purpose of causing the death of another person, the person causes the death of any person.

At trial, the following jury instruction was submitted:

> Capital Murder. Pamela Kaye Terry is charged with the offence of capital murder. To sustain this charge, the State must prove the following things beyond reasonable doubt:
>
> First, that Pamela Kaye Terry committed the crime of aggravated robbery or robbery; *and*,

> Second, that in the course of and in the furtherance of that crime, Pamela Kaye Terry caused the death of Michael — James Michael Terry under circumstances manifesting an extreme indifference to the value of human life; *or*,
>
> Third, that with the premeditated and deliberated purpose of causing the death of another person, Pamela Kaye Terry caused the death of James Michael Terry.

(Emphasis added.)

On appeal, Pamela submits that there is insufficient evidence to prove that she committed the underlying felony, and, thus, the circuit court should have granted her motion for directed verdict on the capital-murder charge. In reply, the State argues that, because the jury entered a general verdict on the capital-murder conviction, there is no way to discern whether the jury convicted Pamela under the felony-murder provision of the above-quoted statute *or* the latter provision of that same statute, which instructs a jury to convict if they found that Pamela caused Michael's death with premeditation and deliberation.

In *Griffin v. United States*, 502 U.S. 46 (1991), the jury rendered a general verdict of guilty on a multiple-object conspiracy charge. In challenging the sufficiency of the evidence, the question before the Court was whether there was sufficient evidence to sustain a guilty verdict when there was insufficient evidence to support one of the objects of conspiracy. The Supreme Court held that the general verdict of guilty was valid so long as it was legally supportable by one ground. *See also Bunch v. State*, 94 Ark. App. 247, 228 S.W.3d 534 (2006).

Here, the jury was instructed pursuant to § 5-10-101(a)(1) & (a)(4), and the jury rendered a general verdict of guilty on capital murder. On appeal, however, Pamela's only challenge to the capital-murder conviction is that there was insufficient proof of her underlying felony (robbery) pursuant to § 5-10-101(a)(1). However, because the jury was also instructed pursuant to § 5-10-101(a)(4), the jury could have convicted on either capital-felony murder or premeditated-and-deliberated murder. Given the general guilty verdict, we must conclude that there is sufficient evidence under one of the instructed elements for either subsections (a)(1) or (a)(4).

Our conclusion is based in part on the fact that, as will be discussed in greater depth in point two, there was sufficient

evidence to support the underlying felony of robbery in Pamela's capital-murder conviction. In addition, Pamela, by her own admission, indicated that Michael had been mean to her, and she had wanted to leave him for some time. She shot Michael in the head after he fell asleep in his chair, taking his cash, Visa card, and car. Because there is sufficient evidence to support her conviction for capital-felony murder, we affirm.

Pamela next argues that the circuit court erred when it denied her motion for directed verdict on the robbery charge. Arkansas Code Annotated section 5-12-102(a) states:

> A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, he employs or threatens to immediately employ physical force upon another person.

Pamela contends that there was no evidence presented to the jury to conclude that she employed or threatened to immediately employ physical force upon Michael with the purpose of committing a felony or misdemeanor theft. Keeping in mind the standard of review on a sufficiency review, we must affirm. Evidence at trial revealed that, after shooting Michael in the head, Pamela took Michael's cash and Visa card from his wallet. She took the money and traveled in Michael's car to an ex-boyfriend's apartment. The two traveled to Little Rock and withdrew the maximum amount of money, using Michael's Visa card on three separate occasions. The following colloquy took place in Pamela's taped confession:

> OFFICER: When you went up there and got the money out of his billfold what were your intentions.
>
> PAMELA: Getting away.
>
> OFFICER: Why did you want.
>
> PAMELA: Cause I have been wanting to leave for a long time.

The record reveals that Pamela, who was angry at Michael, had wanted to leave Michael for a long time. She waited until Michael was asleep, shot him in the head, and took his cash, credit card, and car.

Clearly, this is substantial evidence to indicate that with the purpose of "committing a felony or misdemeanor theft," Pamela employed physical force on Michael by shooting him. The State's proof clearly supported the robbery conviction.

Pamela next argues that the circuit court erred in admitting certain crime scene photos into evidence. Our standard when reviewing the admission of photographs is well settled. As with other matters pertaining to the admissibility of evidence, the admission of photographs is a matter left to the sound discretion of the trial court, and we will not reverse absent an abuse of that discretion. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006). When photographs are helpful to explain testimony, they are ordinarily admissible. *Id.* Moreover, the mere fact that a photograph is inflammatory or is cumulative is not, standing alone, sufficient reason to exclude it. *Id.* Even the most gruesome photographs may be admissible if they assist the trier of fact in any of the following ways: by shedding light on some issue, by proving a necessary element of the case, by enabling a witness to testify more effectively, by corroborating testimony, or by enabling jurors to better understand the testimony. *Id.* Additional acceptable purposes are to show the condition of the victim's body, the probable type or location of the injuries, and the position in which the bodies were discovered. *Id.* Lastly, an inflammatory or gruesome photograph should only be excluded if it is without any valid purpose. *Id.*

The circuit court did not abuse its discretion in admitting these photographs. At trial, Pamela challenged the admissibility of State exhibits 48, 49, 50, 52 and 53. These photographs illustrate the state of the body, as it was found at the crime scene. The circuit court, after excluding some photos, admitted these photos because they were helpful to the jury in explaining the testimony. Moreover, despite Pamela's argument otherwise, the circuit court concluded that the pictures were not cumulative. Instead, the circuit court ruled that the photos depicted the condition of the body, the type and location of the injuries, and the location of the evidence in the room. Consequently, we must affirm the circuit court's decision as it did not abuse its discretion.

Finally, Pamela argues that the circuit court erred in allowing the "premeditated and deliberated purpose" language from § 5-10-101(a)(4) to be included in the capital-murder jury instruction. The facts reveal that the original felony information charged Pamela with capital murder, alleging that, pursuant to § 5-10-

101(a)(1), Pamela committed felony murder. However, five days before trial, the State filed an amended felony information, and two others following, charging Pamela with capital murder pursuant to § 5-10-101(a)(1) *and* (a)(4), adding the premeditated-and-deliberated provision. Pamela now contends that the alteration in the language did not inform her of the specific crime with which she was charged, and, thus, she was unable to effectively prepare her defense. This argument is without merit.

In *Nance v. State,* 323 Ark. 583, 918 S.W.2d 114 (1996), we said that a pretrial amendment of an information that charged capital murder on the basis of felony murder to add, as an alternative, the charge of capital murder on the basis of premeditated and deliberated purpose, does not change the nature of the crime charged in violation of Ark. Code Ann. § 16-85-407(b). In *Hoover v. State*, 353 Ark. 424, 108 S.W.3d 618 (2003), Hoover alleged that the State's felony information was amended too late to provide him with sufficient notice, and, therefore, he was prejudiced as a result. In that case, the original felony information charged Hoover with capital felony murder and robbery. The felony underlying capital murder in the original felony information was robbery. Four days before trial, the State filed an amended felony information substituting the charge of aggravated robbery for robbery as the felony underlying the capital-murder charge. The amended felony information also substituted aggravated robbery for the separate charge of robbery in the original information. We stated in the *Hoover* case the following:

> [W]ith respect to allegations of improper amendments under the terms of section 16-85-407, this court has stated that section 16-85-407 relates to matters of notice and prejudice. *Abernathy v. State*, 278 Ark. 250, 644 S.W.2d 590 (1983). Section 16-85-407 provides a criminal defendant with protection against being prejudiced through surprise. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997). Where an amendment misleads or impedes a criminal defendant in making a defense, a motion to quash under Section 16-85-407 may be proper. *Underdown v. State*, 220 Ark. 834, 250 S.W.2d 131 (1952).

In sum, we concluded that there was no prejudice or surprise in *Hoover, supra,* noting that "it would be difficult to imagine that Hoover would be surprised [by the amended felony information] in this case. Hoover confessed to planning and then stabbing [the victim] to death to obtain money. Obviously, where a robbery results in death, deadly force was used." *Id.* at 428, 108 S.W.3d at 620.

As was the situation in *Hoover, supra*, here, it would be difficult to imagine that Pamela was "surprised" by the State's change in the amendments. Pamela admitted Michael would not allow her to leave him, so she shot him in the head when he was asleep in a chair at home and then fled the crime scene with Michael's cash, Visa card, and car. From her admission and description of why and how she killed Michael, her actions reflected her premeditation and deliberation employed when she murdered him. Accordingly, Pamela cannot claim that she did not have "notice" of the addition of the premeditation-and-deliberation subsection of the capital-murder statute in the information. Pamela simply failed to show that she was prejudiced by the State's amendment of this information.

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 Pamela, and no prejudicial error has been found. *Doss v. State*, 351 Ark. 667, 97 S.W.3d 413 (2003).

Affirmed.

Adawna DEVINE *v.* Linda R. MARTENS
and Tim Martens

06-859 263 S.W.3d 515

Supreme Court of Arkansas
Opinion delivered September 27, 2007
[Rehearing denied November 1, 2007.*]

* GUNTER, J., would grant rehearing.

White & Greenaway Law Office, by: *Karen Pope Greenaway*, for appellant.

Taylor Law Firm, by: *John Mikesch*, for appellees.

DONALD L. CORBIN, Justice. Appellant Adawna Devine appeals the Washington County Circuit Court's order granting permanent guardianship of the minor child Syris Norelli to Appellees Linda R. and Tim Martens. On appeal, Devine raises three arguments for reversal: the circuit court erred in (1) exercising jurisdiction created solely by the Martenses' unjustifiable conduct; (2) granting the Martenses' petition for an emergency temporary guardianship because there was no imminent danger to the life or health of Syris if he was removed from the Martenses' home and returned to his home with his natural mother; and (3) appointing the Martenses as Syris's permanent guardians where there was a fit natural mother seeking to retain custody of her child. This case was originally before the Arkansas Court of Appeals; however, it was certified to this court pursuant to Ark. Sup. Ct. R. 1-2(b)(1), (4), and (5) as it involves an issue of first impression, an issue of substantial public interest, and an

issue needing clarification or development of the law. We reverse and hold that the circuit court erred in granting permanent guardianship to the Martenses.

Syris was born on September 17, 1998, in San Francisco, California, to Devine and Jason Norelli. Syris was the subject of two California custody actions, with the last order being entered on February 13, 2002, granting sole legal and physical custody to Devine. Prior to this order, in December 2001, Devine moved with Syris to Elkins, Arkansas, where they lived with the Martenses. Following this, Devine moved to New Orleans, Louisiana. There is some dispute as to when and for how long Syris lived in Louisiana with his mother prior to April 2003, but there is no doubt that he lived there with Devine in April and May 2003. In May 2003, Devine moved to New York City, New York, without Syris, to set up house as she had in Louisiana. During this time, Syris stayed with the Martenses. In November 2003, Devine returned to Arkansas to get Syris and together they moved to Austin, Texas. While living in Texas, Syris was enrolled in school during the 2003-2004 and 2004-2005 school years.[1]

While Devine and Syris were living in Texas, the Martenses visited them on three separate occasions. Specifically, Mr. Martens testified that: (1) in March 2004, he and his wife visited and stayed with Syris in his room; (2) in December 2004, he and his wife went to Texas and picked up Syris for a two-week period, at the end of which they returned Syris to Texas; and (3) in May 2005, they picked up Syris this most recent time. This May pick-up was scheduled in the spring of 2005 when Devine and Mrs. Martens agreed that Syris could visit with the Martenses during the summer with the understanding that Syris would return to Texas for the 2005-2006 school year. Toward the end of the summer, Syris's visit was extended so that he could attend the Feast of the Tabernacles, a religious festival, with the Martenses in October 2006. Rather than interrupting his schooling, both Devine and the Martenses agreed that he should be enrolled in school in Arkansas. It was understood that Syris would return to Texas on December 31, 2005, so that he could continue school there for the spring semester.

Despite their agreement, the Martenses failed to return Syris to Texas. Initially, they told Devine that the return had been

[1] Devine had also enrolled Syris for the January 2006 semester.

delayed from Saturday to Tuesday or Wednesday, during which Devine expressed her concern over Syris missing school and insisted that they return Syris before January 6, 2006, because Norelli was flying in from California to visit his son. When Syris was not returned, Devine e-mailed and made multiple calls to the Martenses in an effort to find and retrieve her son. On January 8, 2006, after receiving no response, Devine and Norelli drove to Arkansas to pick up their son. Upon arriving, on January 9, 2006, Devine contacted the local police chief who phoned Mr. Martens and told him that Devine was there to pick up Syris.

That same day, on January 9, 2006, the Martenses filed a petition for appointment of guardian of the person and for emergency temporary guardianship. The circuit court entered an ex parte emergency order for temporary guardianship that same day, and scheduled an emergency hearing on the petition for January 12, 2006. Following this hearing, the trial court entered an order granting emergency temporary guardianship to the Martenses. On March 17, 2006, a hearing was held on the petition for permanent guardianship.

On April 7, 2006, the circuit court entered an order giving permanent guardianship of Syris to the Martenses. In this order, the circuit court determined that California no longer had continuing, exclusive jurisdiction of matters involving Syris, and found that it had jurisdiction to determine matters involving his care, custody, and control.[2] Furthermore, the circuit court found that both biological parents were unfit to have custody of Syris, the Martenses were duly qualified and thus the proper persons to have guardianship of Syris, and it was in the best interests of Syris that guardianship be granted to the Martenses. Specifically, in finding that Devine was an unfit parent, the circuit court cited to the multiple occasions in which Devine turned over responsibility of Syris to the Martenses as well as the court's finding that:

> she has not provided a stable home environment, has exposed him to a home with "art" not suitable for viewing for a young child and nude pictures of herself, has been guilty of educational neglect in

[2] On April 7, 2006, prior to issuing its order, the circuit court held a teleconference hearing with Judge Appel of the Superior Court of California, County of Alameda, as well as the parties involved in this case. During that hearing, Judge Appel concluded that, under these circumstances and with his focus being on the best interests of the child, it was appropriate for his court to decline to exercise jurisdiction.

> that there is conclusive evidence that the child has suffered startlingly excessive absences and tardies from school resulting in criminal action; also she has had an Internet presence for herself which would be inappropriate for her young child to see; she has not given any consideration to the thought that her son or his friend might see her pictures on the Internet or the appropriateness of that result. She has provided a home environment that, while the child was there, was dirty and smelled of urine and was open to public view; the child developed bladder and bowel problems living with her.

Lastly, the April 7 order set out a visitation and child support plan for both Devine and Norelli.

On May 5, 2006, Devine filed a notice of appeal from the April 7 order. On May 26, 2006, the circuit court entered an amended order for guardianship. The amended order was virtually the same as the original order with most of the amendments being made to the visitation plans. In addition, the circuit court reiterated its belief that Devine was unfit to be Syris's primary custodian but should have unsupervised visitation with the child. On August 30, 2006, Devine filed an amended notice of appeal appealing the May 26 amended order for guardianship and the April 7 order for guardianship. She also sought and was granted an order allowing her to file a supplemental notice of appeal to include the amended order for guardianship. Her appeal is now properly before this court.

Standard of Review

We review probate proceedings de novo, but we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *See Thomas v. Avant*, 370 Ark. 377, 260 S.W.3d 266 (2007); *Freeman v. Rushton*, 360 Ark. 445, 202 S.W.3d 485 (2005). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *See Artman v. Hoy*, 370 Ark. 131, 257 S.W.3d 864 (2007). When reviewing the proceedings, we give due regard to the opportunity and superior position of the probate judge to determine the credibility of the witnesses. *See Freeman*, 360 Ark. 445, 202 S.W.3d 485.

Jurisdiction

Devine's first argument for reversal is that the circuit court erred in exercising jurisdiction created solely by the Martenses'

unjustifiable conduct. Specifically, Devine claims that the circuit court should have declined to exercise its jurisdiction as required by Ark. Code Ann. § 9-19-208(a) (Repl. 2002). Moreover, Devine challenges the emergency temporary guardianship order because the circuit court's exercise of jurisdiction in this case did not fall within the exceptions set out in Ark. Code Ann. § 9-19-204 (Repl. 2002). Specifically, Devine argues that the circuit court clearly erred both in finding that she had abandoned Syris and that an emergency existed which created an unreasonable risk of harm or illness to Syris. Thus, Devine's jurisdictional argument hinges upon whether the circuit court had jurisdiction to enter a temporary emergency guardianship under section 9-19-204 of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA).

We have recognized that the UCCJEA is the exclusive method for determining the proper state for jurisdictional purposes in proceedings involving matters of child custody that involve other jurisdictions. *See Thomas*, 370 Ark. 377, 260 S.W.3d 266. A stated purpose of the UCCJEA is to avoid relitigation of child-custody determinations in other states. *Id.* The UCCJEA sets forth jurisdictional requirements for four types of situations: (1) initial child-custody determinations; (2) continuing jurisdiction; (3) jurisdiction to modify a prior determination; and (4) temporary emergency jurisdiction. Ark. Code Ann. §§ 9-19-201 to -204 (Repl. 2002). Moreover, a trial court has the discretion to decide whether it should exercise or decline to exercise its jurisdiction when there is another appropriate forum under the UCCJEA. *See* Ark. Code Ann. § 9-19-207 (Repl. 2002). However, if this court concludes that the lower court was without jurisdiction, dismissal is an appropriate disposition of the case. *See Koonce v. Mitchell*, 341 Ark. 716, 19 S.W.3d 603 (2000).

In the present case, the Martenses sought emergency temporary guardianship and permanent guardianship of Syris. Previously, in 2002, a California court had granted custody of Syris to Devine. Section 9-19-203 sets forth the requirements for jurisdiction to modify a child-custody determination and states:

> Except as otherwise provided in § 9-19-204, a court of this state may not modify a child-custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under § 9-19-201(a)(1) or (2) and:

(1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under § 9-19-202 or that a court of this state would be a more convenient forum under § 9-19-207; or

(2) a court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

Section 9-19-201(a)(1) provides:

(a) Except as otherwise provided in § 9-19-204, a court of this state has jurisdiction to make an initial child-custody determination only if:

(1) this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

Here, the circuit court determined that it had jurisdiction for the purposes of the temporary emergency guardianship hearing based upon the facts that (1) Syris had lived in Arkansas for at least seven and a half months prior to the filing of the petition; (2) Arkansas is his home state; (3) there had been a prior order regarding custody from California but neither Devine, Syris, nor a person acting as a parent had lived in California since 2001; and (4) Syris has had no significant contacts with California since leaving there in 2001. However, in determining jurisdiction as to the emergency temporary guardianship the circuit court should have been guided by section 9-19-204. Thus, the issue is whether the circuit court had jurisdiction to enter an order of temporary emergency guardianship.

Section 9-19-204 provides, in pertinent part:

(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been *abandoned* or it is necessary in an *emergency* to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

. . . .

> (c) If there is a previous child-custody determination that is entitled to be enforced under this chapter . . . any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under §§ 9-19-201 – 9-19-203. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.
>
> (d) A court of this state which has been asked to make a child-custody determination under this section, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of a state having jurisdiction under §§ 9-19-201 – 9-19-203, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to §§ 9-19-201 – 9-19-203, upon being informed that a child-custody proceeding has been commenced in, or a child-custody determination has been made by, a court of another state under a statute similar to this section shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. [Emphasis added.]

For the purposes of this statute, " '[a]bandoned' means left without provision for reasonable and necessary care or supervision." Ark. Code Ann. § 9-19-102(1) (Repl. 2002).

■ In the present case, Devine challenges the circuit court's order granting emergency temporary guardianship to the Martenses because the circuit court clearly erred both in finding that she had abandoned Syris and that an emergency existed which created an unreasonable risk of harm or illness to Syris. As stated above, a court has temporary emergency jurisdiction pursuant to section 9-19-204 if the child is present in Arkansas and has been abandoned *or* an emergency exists to protect the child because the child is subjected to or threatened with mistreatment or abuse. Here, there is no dispute that Syris was present in Arkansas. Also, the circuit court found that Syris had been abandoned *and* that an emergency existed which created an imminent danger to the safety and health of Syris. Because we hold that an emergency existed forming the basis for jurisdiction under section 9-19-204, it is unnecessary to address whether Devine abandoned Syris.

Moreover, Ark. Code Ann. § 28-65-218(a) (Repl. 2004) authorizes a circuit court to award temporary guardianship if there is imminent danger to the life or health of the incapacitated person. These two statutes can be read in harmony; thus, the issue of whether an emergency exists hinges upon whether there is an immediate danger to the life or health of the child, including actual or threatened mistreatment or abuse. *See Weiss v. Maples*, 369 Ark. 282, 253 S.W.3d 907 (2007) (explaining that statutes relating to the same subject are said to be *in pari materia* and should be read in a harmonious manner, if possible).

In the instant case, the circuit court concluded that it had jurisdiction for the purpose of determining matters of Syris's custody, and granted emergency temporary guardianship pursuant to section 28-65-218. In addition to finding that Devine's lifestyle created a risk of imminent danger to Syris's life or health, the circuit court reasoned that an emergency existed because Devine had "abandoned care of the child on a number of occasions during [Devine's] lifetime, and most recently in May of this last year, to [her] mother and to the step-grandfather" which created an imminent danger to Syris's health and safety. In the present case, we cannot say that the circuit court clearly erred in finding that an emergency existed that warranted the circuit court's exercise of jurisdiction over the temporary emergency guardianship petition.

Lastly, the circuit court had jurisdiction, pursuant to section 9-19-203, to determine permanent guardianship. As stated above, Arkansas is Syris's home state, neither Syris, Devine, nor the Martenses have significant connection to California, and there is no substantial evidence in California concerning Syris's care, protection, training, and personal relationships. Thus, the circuit court correctly concluded that it had jurisdiction to determine matters involving Syris's care, custody, and control. Moreover, prior to rendering its final decision on permanent guardianship of Syris, the circuit court contacted the California court and Judge Appel declined to exercise continuing jurisdiction. As such, the circuit court had jurisdiction to determine both the temporary and permanent guardianship.[3]

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[3] Because an emergency existed as a basis for temporary emergency jurisdiction and because the circuit court contacted the California court, which declined to exercise jurisdiction, prior to issuing its order of permanent guardianship, Devine's argument regarding the

Temporary Emergency Guardianship

Devine's second argument for reversal is that the trial court erred in granting the Martenses' petition for an emergency temporary guardianship because there was no imminent danger to the life or health of Syris if he was removed from the Martenses' home and returned to his home with his natural mother. Specifically, Devine claims that the circuit court's findings that she had abandoned her son and that her current lifestyle constituted an emergency which created imminent danger to the life or health of Syris are clearly erroneous.

Again, we cannot say that the circuit court clearly erred in finding that an emergency existed which warranted the grant of temporary emergency guardianship to the Martenses. The circuit court heard testimony about Devine's lifestyle and Syris's health that caused concern, as well as testimony that Devine had left Syris with his grandparents for the last seven and a half months. Thus, the circuit court felt it was in Syris's best interest to remain with his grandparents until these issues could be further examined. As such, it is unnecessary to readdress Devine's argument.

Permanent Guardianship

Devine's final argument for reversal is that the trial court clearly erred in appointing the Martenses as Syris's permanent guardians where there was a fit natural mother seeking to retain custody of her child. Specifically, she claims that the circuit court erred in finding her to be an unfit parent because her actions as a mother did not rise to the level of manifest indifference to Syris's welfare. Therefore, she argues, the circuit court erred in failing to follow the natural-parent presumption, and that it is in Syris's best interests to return home to Texas with her.

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

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alleged unjustifiable conduct of the Martenses is moot. *See* Ark. Code Ann. § 9-19-208(a). Additionally, her argument that Texas would have had jurisdiction, pursuant to section 9-19-201(a)(1), is without merit as that section deals with establishing jurisdiction in Arkansas, not Texas. Moreover, Texas is not now, nor has it ever been since this petition was filed, a state that would have jurisdiction in this case.

guardian is qualified and suitable to act as such. Ark. Code Ann. § 28-65-210 (Repl. 2004). Where the incapacitated person is a minor, the key factor in determining guardianship is the best interests of the child. *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001); *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000). However, preferential status may be given to the natural parents of the child under Ark. Code Ann. § 28-65-204(a) (Repl. 2004). *Freeman*, 360 Ark. 445, 202 S.W.3d 485; *Blunt*, 342 Ark. 662, 30 S.W.3d 737. The law prefers a parent over a grandparent or other third person unless the parent is proved to be incompetent or unfit. *Schuh v. Roberson*, 302 Ark. 305, 788 S.W.2d 740 (1990); *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988). The rights of parents are not proprietary and are subject to their related duty to care for and protect the child; thus, the law secures their preferential rights only as long as they discharge their obligations. *Lloyd*, 343 Ark. 620, 37 S.W.3d 603. 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. *Freeman*, 360 Ark. 445, 202 S.W.3d 485; *Blunt*, 342 Ark. 662, 30 S.W.3d 737. Nevertheless, it is well settled that:

> *Courts are very reluctant to take from the natural parents the custody of their child*, and will not do so unless the parents have manifested such indifference to its welfare as indicates a lack of intention to discharge the duties imposed by the laws of nature and of the state to their offspring suitable to their station in life. *When, however, the natural parents so far fail to discharge these obligations as to manifest an abandonment of the child and the renunciation of their duties to it, it then becomes the policy of the law to induce some good man or woman to take the waif into the bosom of their home*[.]

Lloyd, 343 Ark. at 624, 37 S.W.3d at 606 (quoting *Holmes v. Coleman*, 195 Ark. 196, 198-99, 111 S.W.2d 474, 476 (1937)). *See also Hancock v. Hancock*, 198 Ark. 652, 130 S.W.2d 1 (1939).

In the present case, the circuit court found Devine to be an unfit parent because of (1) environmental neglect, (2) educational neglect, (3) questionable moral guidance, and (4) abandonment.[4] The circuit court's decision was based primarily upon the Mar-

[4] Our review of the record reveals that Devine did not abandon her son to the Martenses' care. In regards to guardianship cases, abandonment is the act of leaving a child willfully and *without an intent to return*. *Black's Law Dictionary* 2 (8th ed. 2004) (emphasis

tenses' testimony as to Devine's failures as a parent in providing a suitable home and proper care for Syris. While we give great deference to the circuit court's credibility determinations, we conclude that the circuit court clearly erred in finding Devine to be an unfit mother and removing Syris from her care. Specifically, the issues presented here are more akin to issues that typically arise in dependency-neglect cases. In such cases, our State's policy strongly favors reunification with the natural parents above all other alternatives for dependent-neglected juveniles. *See* Ark. Code Ann. §§ 9-27-102 – 9-28-1003 (Repl. 2002 & Supp. 2007). Parents whose children are adjudicated dependent-neglected are generally offered family services and an opportunity to prove they have made improvements that are in keeping with their children's best interests. Additionally, parents who make improvements are, almost without exception, reunited with their children.

In this case, Devine was put on notice that multiple issues existed which the circuit court found to be a basis for removing her son from her care. These issues included: (1) Devine's home being dirty and smelling of urine; (2) Syris developing bladder and bowel problems; (3) Syris having fleas and flea bites when the Martenses picked him up in May 2005; (4) Syris's excessive absences and tardies from school resulting in a Texas truancy action; and (5) Devine's questionable moral guidance, specifically her display of inappropriate wall art and nude pictures of herself and others, as well as her Internet presence. In response, Devine testified that all of these issues never existed or had been corrected.

In regards to the environmental neglect, Devine presented photographs of her home depicting a neat, clean, and appropriately

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added). While there is no dispute that: (1) Syris had lived with the Martenses from May 2005 until the beginning of this lawsuit in January 2006; (2) the initial length of time for Syris's visit was the summer of 2005, but it was mutually agreed that Syris would continue to stay with the Martenses through the fall semester of school so that he could attend an October religious festival with the Martenses; (3) the Martenses were supposed to bring Syris back to Texas on December 31, 2005, and they did not; and (4) Devine, along with Norelli, drove to Arkansas with her custody papers and contacted the chief of police in an effort to retrieve Syris and bring him back to Texas. Additionally, Devine had enrolled her son in a school closer to their Texas home and Syris's Arkansas teacher commented, on his report card at the end of the third quarter, that she would miss him. A review of the evidence clearly indicates that Devine intended to return, or have Syris returned to her, following his visit with his grandparents. As such, for the purposes of permanent guardianship and the fitness of a natural parent, Devine did not abandon Syris and the circuit court clearly erred in finding this and using it as a basis to remove Syris from her care.

furnished home. Lenell Ripley, Syris's friend's mother, testified that she had been to Devine's home and that it was nice, well kept and did not smell of urine. Devine also testified that Syris had not had a bed-wetting problem or feces in his underwear in over a year, as well as that there had never been an incident where Syris had fleas or was covered by flea bites. Devine also presented evidence of Syris's immunization records and testified that he did not have any medical issues that she was aware of.

As to educational neglect, Devine testified that she was aware that Syris had thirty-seven unexcused tardies and thirty-four unexcused absences, and admitted that she had received a complaint from the truancy court concerning Syris's attendance at school. In regards to this attendance issue, Devine stated that she did not think it was in Syris's best interest to miss so much school, but explained that they had gone through some sicknesses, car problems, and that, at times, she was working three jobs including a night job which sometimes caused them to run late in the morning. She also testified that the school had a one-minute policy for tardiness, and this combined with the school being farther away added to the issue; however, she stated that she had taken steps to rectify the problem. Specifically, on December 16, 2005, in anticipation of Syris's return, Devine applied for entry into an elementary school closer to home in an effort to alleviate some of these concerns with Syris being tardy or absent from school. Devine also explained that she would no longer be working at night and that she would be on a similar schedule to Syris's since she would be going to school full-time, thus remedying most of the absence and tardiness issues.

Similarly, regarding her questionable moral guidance, Devine made significant changes to alleviate the circuit court's concerns.[5] Devine testified, with regards to the wall art, that immediately upon being served notice that the pictures could be deemed inappropriate and were an issue regarding her ability to care for Syris, she had the pictures permanently removed. As to the naked pictures in her bedroom, Devine testified that not now nor has there ever been naked pictures of herself or anyone else in her

[5] It is important to note that it is clear to us that the circuit court based its judgment as to Devine's guidance of Syris, in part, upon its own morals and viewpoint of how a child should be raised. This court has made it clear that the state cannot interfere with a natural parents' right to custody simply to better the moral and temporal welfare of the child as against an unoffending parent. *Payne v. Jones*, 242 Ark. 686, 415 S.W.2d 57 (1967).

room, and that all pictures in her room depict her fully clothed. Furthermore, her Internet presence has been decreased as most of the pictures raising concern have been removed from the offending websites.

Furthermore, the attorney ad litem in this case testified that Devine's home was not inappropriate in any way. She testified that the objectionable artwork had been removed and that she believed Devine's assurances that it would not return. The attorney ad litem did not focus her testimony on the problems that allegedly existed before the Martenses filed their petition for temporary and permanent guardianship. She testified as to her opinion of the home at the time that she visited in the course of her representation of Syris. Her opinion was that the home was appropriate and suitable. Lastly, the Martenses did not present any further evidence that any of the prior offending conditions continued or existed at the time of the final guardianship hearing.

In our review, it is clear that Devine took significant action toward rectifying any issues that would keep her from retaining custody of her son. These are the very types of improvements that parents are encouraged to make in the best interests of their child or children, and Devine should not be disparaged for her efforts to improve her home and her parenting skills. Specifically, if, instead of the Martenses filing for guardianship of Syris, a dependency-neglect action had been instituted in this case, Devine would now be reunited with her son. She has already done everything that would have been asked of her. She has corrected every problem about which the circuit court expressed concern. It is true that she has done so because of the threat that her child might be removed from her custody, but such a motive is entirely appropriate when a parent is working toward reunification with his or her child.

This state's courts should not be in the business of permanently removing children from their parents' custody simply because the parents have exercised poor judgment in caring for their children. Just as the Arkansas Juvenile Code recognizes the efforts of parents in dependency-neglect actions to improve their homes and parenting skills, we should encourage and recognize such improvements by parents in guardianship actions. Frankly, it is not in a child's best interests to take custody from a natural parent who has rectified all issues related to his or her fitness, and grant custody to a third party, such as that child's grandparents. As such,

we hold that the circuit court clearly erred in removing Syris from Devine's care and granting permanent guardianship to the Martenses.

Reversed and remanded.

GUNTER, J., dissents.

JIM GUNTER, Justice, dissenting. I would affirm the judgment in this case because the circuit judge was in a better position after two hearings to decide what was in the best interest of the child. While the majority gives lip service to our rule, regarding our deference to the trial judge and his superior position to resolve factual disputes, the majority bases its decision on evidence that was not only disputed by multiple witnesses, but also found to lack credibility. Guardianship and custody cases are the most difficult cases for our courts to decide, and the decision quite often rests on matters which are not evident on the printed page, which is all that we have before us. This was a complicated case with serious charges of neglect made against the mother. The evidentiary disputes were endless. The judge summed up the complicated nature of the evidence in this case, prior to issuing his findings:

> I have had an opportunity now to read over all of the exhibits that have been introduced in the case and I have had an opportunity to observe the witnesses as they have testified; to observe their body language, their demeanor while on the witness stand, the cadence of their testimony, all of those things we look to to determine whether or not a particular portion of somebody's testimony is true. In this case, it's probably more important that I've had the opportunity to personally observe the witnesses because, in this case, there has been a significant amount of testimony purportedly describing the same events that couldn't be more diametrically opposed in terms of what people say happened. So, in this case, as frequently happens, we are obliged to determine credibility.

The grandparents were providing a stable home and a good influence on the child, and the child was beginning to thrive once again. After two hearings, I am satisfied that the circuit judge did what he felt would be in the best interest of the child. In such a case, I would not substitute my judgment for that of the trial judge.

The grandparents raised valid concerns about the child's safety, noting the fact that the mother now had a male roommate. They questioned whether the type of person that would feel

comfortable living in a home decorated with sexually graphic material would pose a danger to the young boy. It is common for a court to determine whether it is appropriate for a child to live with an unmarried parent, who resides with a member of the opposite sex, and the issues that arise from such an inquiry were particularly relevant to this case. While the typical case that addresses this issue involves a dispute between two natural parents, the court, here, was mindful of that distinction and the presumption that existed in favor of the natural parent. While the mother's lifestyle in this case was unusual, the court recognized that such a lifestyle was not, alone, a sufficient basis to shift custody to a third party.

While the evidence of educational neglect did not have the shock value of other allegations, the attendance problems were serious enough that the Texas courts instituted criminal proceedings against Miss Devine. The court summarized the testimony presented by Miss Devine, regarding her child's excessive number of tardies and absences:

> Miss Devine testified that the school attendance of Syris was not particularly a problem. She had, in fact, indicated that to the extent that there was any problem at all she had changed schools to eliminate any difficulties that occurred earlier. The proof demonstrates conclusively to this court that Syris suffered from a staggering number of absences and tardies. Miss Devine and another witness testified that the Austin School District was simply too strict; that they were wrong-headed in their policies. The court did not find that testimony credible. In fact, the court found that the corroborating witness apparently engaged in similar patterns of behavior to Miss Devine, which this court finds appalling. The determination and credibility on this particular issue was determined, in part, by personal observation of Miss Devine's corroborating witness, her method and manner of the testimony and the content of their testimony.
>
> The court concludes and finds that both witnesses have given less than what the court would call enthusiastic emphasis to the education of their children.

The court then noted testimony that the Martenses presented, regarding the tardies and absences:

> The problem for Syris's tardiness and absences rose to a point which required the City of Austin to institute a criminal case against

> Miss Devine for a parent contributing to non-attendance of a child. Although warned about the problem, Miss Devine failed to correct it.
>
> This court concludes and finds that Miss Devine does not, and has not, provided an environment where Syris can receive full benefit of this education.
>
> The court has little difficulty concluding that Syris will be better served living the school year with the Martens. Accordingly, the court concludes that Petitioners have met their burden of proving entitlement to establishment of a guardianship for the child, Syris Norelli, and that request for guardianship is granted.

It is well established that the preference for the natural parent is overcome if the parent is not performing her duty to care for and protect her child. *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001). The trial court found that appellant was not fit, based on its findings of environmental neglect, educational neglect, questionable moral guidance, and abandonment.

The majority reverses the court's findings by relying on testimony that was disputed by numerous witnesses at the hearings. While the trial court had the opportunity to determine which party's evidence was more convincing, by observing the witnesses as they testified, this court does not, and I am not willing to replace the trial court's determinations with my own, when the evidence presented was so drastically conflicting. In addition, I believe that the court's findings are supported by objective evidence, such as school records, communications between Miss Devine and her son's teacher, and evidence regarding the criminal-contempt action in the Texas court system.

Our standard here is clear. We do not reverse the trial court's findings unless we conclude that the finding was clearly erroneous, which means that we are left with a definite and firm conviction that a mistake has been made. Based on the volumes of evidence in this case that support the trial court's decision, I cannot conclude that the decision was clearly erroneous. Accordingly, I would affirm.

Thomas Lee STONE *v.* STATE of Arkansas

CR 06-1129 263 S.W.3d 553

Supreme Court of Arkansas
Opinion delivered September 27, 2007

Knutson Law Firm, by: *Gregg A. Knutson*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Farhan Khan*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. The appellant, Thomas Lee Stone, was convicted of nine counts of rape for his alleged sexual contact with two young boys. Stone was sentenced to four life sentences plus 100 years imprisonment for all offenses, with all sentences to run consecutively. On appeal, he raises several points for reversal. We affirm.

On September 1, 2004, while looking for juveniles who were allegedly skipping school, Van Buren Police Officer James Blount learned that several juveniles were hiding at Stone's home. Officer Blount referred the matter to Detective Donald Eversole

of the Van Buren Police Department for further investigation. Detective Eversole spoke with several juveniles who had been to Stone's home before questioning Stone. Several of the juveniles indicated to Detective Eversole that Stone had had sexual contact with them and that he had supplied them with money, marijuana, alcohol, and pornographic materials.

Detective Eversole interviewed Stone on September 2, 2004. Stone first denied having had sexual contact with any of the juveniles, but then he admitted to having sexual contact with one juvenile, Ra.M. After receiving Stone's consent, Detective Eversole searched Stone's home and seized items used for smoking marijuana, such as scales and rolling papers, as well as pornographic magazines and videotapes.

A felony information was filed against Stone on October 12, 2004, charging him with ten counts of rape — counts one through four regarding Ri.M., count five regarding C.B., and counts six through ten regarding Ra.M., Ri.M.'s older brother. At the time the felony information was filed, Ri.M., C.B., and Ra.M. were approximately twelve, fourteen, and fifteen years old, respectively. A three-day jury trial began on June 26, 2006, and the jury ultimately convicted Stone of counts one through four and counts six through ten, with regards to Ri.M. and Ra.M. but acquitted Stone of count five regarding C.B. Stone was sentenced for those convictions, as already set out in this opinion. He now appeals from the judgment and commitment order.[1]

I. Sufficiency of the Evidence

Both Stone and the State agree that Stone's defense counsel at trial did not make a sufficient directed-verdict motion to preserve a challenge to the sufficiency of the evidence on appeal. Rule 33.1(c) of the Arkansas Rules of Criminal Procedure states:

[1] The original judgment and commitment order was entered on June 30, 2006, but it omitted the conviction for count 10. Stone filed a notice of appeal on July 7, 2006. On July 14, 2006, an amended judgment and commitment order was entered, which added the conviction for count 10. No amended notice of appeal was filed. Rule 2(b)(1) of the Arkansas Rules of Appellate Procedure – Criminal states that "[a] notice of appeal filed after the trial court announces a decision but before the entry of the judgment or order shall be treated as filed on the date after the judgment or order is entered." We apply Rule 2(b)(1) to the amended judgment in this case and deem the notice of appeal as filed the day after the amended judgment was entered.

> A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense.

This court has repeatedly said that "a motion for a directed verdict must specifically advise the circuit court about how the evidence was insufficient" in order to preserve a challenge to the sufficiency of the evidence on appeal. *Eastin v. State*, 370 Ark. 10, 15, 257 S.W.3d 58, 62 (2007). In this case, the defense counsel said at the end of the State's case:

> I would move for a directed verdict of acquittal on the basis of the insufficiency of the evidence that the State has presented in its case, and I don't believe there's enough evidence, although, I agree that the court probably could make a finding to the contrary, to submit the case to the jury.

Defense counsel did not specifically advise the circuit court of how the State's evidence was insufficient, and at the end of all evidence, his renewed directed-verdict motion was equally deficient. Any challenge to the sufficiency of the evidence is clearly not preserved. We affirm on this point.

II. Interviews With Other Juveniles

Stone next claims that the circuit court erred in allowing Detective Eversole to testify about his interviews with juveniles who were not called as witnesses and were not named as victims in the criminal information. Detective Eversole testified that the juveniles' stories were consistent and that their interviews were corroborated by his interview with Stone.

Stone contends that Detective Eversole's testimony was hearsay concerning prior sexual conduct between Stone and the other juveniles who were not witnesses or victims in the case. He further contends that Detective Eversole essentially testified about what the other juveniles told him and that these statements were offered for the truth of the matter asserted or to prove that Stone had sexual contact with the other juveniles. He insists that the statements made by the juveniles were not subject to cross-examination and were extremely prejudicial. Furthermore, he maintains that even if the testimony was admissible under a hearsay

exception, it should have been excluded under Rule 404 of the Arkansas Rules of Evidence, as it was introduced merely to prove bad character. Finally, Stone asserts that even if the testimony was admissible under Rule 404(b), it should have been excluded under Rule 403 of the Arkansas Rules of Evidence because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and the potential to mislead the jury.

The State argues that Stone's evidentiary challenges are not preserved, and we agree. This court has said that "in order to preserve a hearsay objection, a defendant must make a timely, specific objection, stating that ground," as a general objection is not sufficient to preserve a specific point. *Howard v. State;* 348 Ark. 471, 493, 79 S.W.3d 273, 286 (2002). In this case, defense counsel never specifically objected to Detective Eversole's testimony on hearsay grounds. When the prosecutor asked Detective Eversole whether he was able to corroborate what the juveniles told him in their interviews, defense counsel objected and argued that the question was "vague, inconsistent, and to corroborate what?" After the prosecutor restated the question, defense counsel said:

> Well, Your Honor, with — I'm going to still object, because I'm not sure that there are about like a dozen boys here. There are three boys named in the Information, which, er, amount to the charges that this jury will be dealing with. And the State has just introduced or — or got this witness to say that the other offenses were committed, and which the defendant has not been charged.

During a sidebar conference with the judge, defense counsel argued that Detective Eversole's testimony that he was able to corroborate what the juveniles had told him indicated there were other offenses for which Stone had not been charged. The judge ordered the prosecutor to restate his question and link it just to the three victims named in the charges in the case. The prosecutor did this, and Detective Eversole testified that he was able to corroborate the statements of Ra.M., C.B., and Ri.M. based on his interview with Stone. Defense counsel did not object further. Because defense counsel never specifically objected on hearsay grounds, Stone's hearsay argument is not preserved for appeal. *See Howard, supra.*

Stone also asserts that even if Detective Eversole's testimony was not inadmissible hearsay, it should have been excluded under Rule 404 of the Arkansas Rules of Evidence. That rule states:

> (a) *Character Evidence Generally.* Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . .
>
> . . . .
>
> (b) *Other Crimes, Wrong, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Stone urges on appeal that Detective Eversole's testimony regarding the juveniles he interviewed was improperly introduced merely to prove bad character on the part of Stone and to show that he acted in conformity with prior bad acts. Defense counsel, however, never made this argument to the circuit court, and, as a result, his argument is not preserved for appeal. It is well settled that this court will not address arguments raised for the first time on appeal. *See Young v. State*, 370 Ark. 147, 257 S.W.3d 870 (2007).

As a third argument, Stone maintains that Detective Eversole's testimony was inadmissible under Arkansas Rule of Evidence 403 because the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Again, defense counsel failed to make this argument to the circuit court, and, therefore, the argument is not preserved for appeal. *See Young, supra.* We affirm on this point as well.

III. C.M.

Stone claims next that C.M.'s testimony about his sexual contact with Stone was more prejudicial than probative under Rule 403 and also involved prior bad acts, which are inadmissible under Rule 404.

C.M. testified at trial during direct examination that he had sexual contact with Stone. Defense counsel objected and moved for a mistrial, arguing that C.M. was not one of the victims pursuant to the felony information. The circuit court sustained defense counsel's objection but was not requested by defense counsel to instruct the jury to ignore C.M.'s previous statement. On redirect examination, C.M. testified that the sexual contact occurred while watching a pornographic videotape at Stone's home. Defense counsel again objected, pointing out that C.M.'s testimony was beyond the scope of cross-examination. The circuit court sustained the objection a second time. Defense counsel asked for a mistrial, and the circuit court responded "certainly not . . . . I've sustained your objection both times."

Stone contends that C.M.'s testimony violated Rules 403 and 404, but he cites no authority for his proposition. His argument on this issue in his brief consists of over two pages of quotations from the record of C.M.'s testimony and the arguments made by the prosecutor and defense counsel to the circuit court, one paragraph conceding that the circuit court's rulings were unclear, and two sentences stating that Rules 403 and 404 were violated. It is well settled that this court will not consider arguments on appeal that are not supported by citations to legal authority or by convincing arguments. *See Young, supra.* For this reason alone, this court should not consider Stone's arguments. Moreover, Stone never argued to the circuit court that C.M.'s testimony violated Rules 403 or 404. As already discussed, this court does not consider arguments made for the first time on appeal. *See Young, supra.* We affirm on this point.

IV. Expunged Record

Stone contends as his fourth point that the circuit court abused its discretion in allowing the prosecutor to introduce into evidence his expunged conviction for carnal abuse during the sentencing phase of his trial. Stone urges that the conviction is eighteen years old, and not only has it been expunged, but it was also based on a plea of *nolo contendere* rather than a guilty plea. Stone insists that this court should now make a distinction between an expunged conviction based on a plea of *nolo contendere* and one based on a guilty plea. He maintains that the jury placed excessive weight on the expunged conviction and that he was unduly prejudiced by its admission as a result.

State law provides what evidence is relevant during the sentencing phase:

> Evidence relevant to sentencing by either the court or a jury may include . . .
>
> . . . .
>
> (2) Prior convictions of the defendant, both felony and misdemeanor. The jury may be advised as to the nature of the previous convictions, the date and place thereof, the sentence received, and the day of release from confinement or supervision from all prior offenses;

Ark. Code Ann. § 16-97-103 (Repl. 2006).

During the sentencing phase of trial, defense counsel objected to the introduction of Stone's prior expunged conviction for carnal abuse in the first degree. Defense counsel argued that an expunged conviction should be treated as if the defendant had never been convicted, and he tendered the Certificate of Expungement for admission into evidence. The circuit court ruled that the expunged conviction could be introduced to the jury. When the prosecutor moved to introduce the expunged conviction, defense counsel renewed his objection. Defense counsel, however, never argued to the circuit court that Stone's expunged conviction was based on a plea of *nolo contendere* and should be treated differently from an expunged conviction based on a guilty plea. In short, Stone raises this argument for the first time on appeal, and it should not be addressed by this court. *See Young, supra.*

V. Rule 4-3(h) Compliance

In accordance with Rule 4-3(h) of the Arkansas Supreme Court Rules and Ark. Code Ann. § 16-91-113, the record has been reviewed for all objections, motions, and requests made by either party, which were decided adversely to Stone, and no prejudicial error has been found.

Affirmed.

Heather KELLER *v.* STATE of Arkansas

CR 06-1418 263 S.W.3d 549

Supreme Court of Arkansas
Opinion delivered September 27, 2007

Gregory E. Bryant, for appellant.

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

ANNABELLE CLINTON IMBER, Justice. Appellant Heather Raye Keller was convicted by a jury in Pulaski County Circuit Court of the rape of C.R., a person under fourteen (14) years of age at the time of the sexual act, and the violation of a minor K.S., a person over fourteen (14) years of age at the time of the act. The circuit court sentenced Keller to fifteen (15) years' imprisonment for the rape conviction and six (6) years' imprisonment for the violation-of-a-minor conviction, to be served consecutively. Keller does not appeal her conviction. Instead, she challenges the circuit court's order denying her request during the sentencing phase to present evidence that C.R. had made prior allegations of sexual abuse against a third party. We find no error and affirm the circuit court.

As a threshold matter we must address the issue of whether Keller has preserved her argument for appeal. *See Wyles v. State*, 368 Ark. 646, 249 S.W.3d 782 (2007). Keller asks this court to reverse the circuit court's decision to exclude the evidence of C.R.'s prior allegations of sexual abuse during the sentencing phase. She also seeks to have her sentence for the rape conviction reduced from fifteen (15) to ten (10) years' imprisonment. The State argues that Keller never challenged the imposition of the fifteen-year sentence below, and, therefore, she did not preserve the challenge to her sentence for appeal. We agree that Keller never objected to the sentence in the circuit court, and thus her request to reduce the fifteen-year sentence is not preserved for appellate review. However, the record reflects that Keller did preserve her argument that the evidence of C.R.'s prior allegations of sexual abuse was admissible during the sentencing phase. Because we conclude that she preserved her challenge to the circuit court's evidentiary ruling, that argument is subject to review on appeal.

For several years, Keller was involved in the operation of daycare facilities, first as an employee and then as an owner. Eventually, she started an after-school acting group for children. Keller first came into contact with C.R. when C.R. was eight years old and was attending the daycare facility where Keller was employed. When Keller opened her own daycare, C.R.'s parents transferred her to the new daycare, and when the acting group began, C.R. was also sent there. In 1994, C.R.'s parents divorced,

and they began leaving her at the daycare after hours. They also began asking Keller to watch her overnight. It was at this point, when C.R. was nine or ten years old, that the sexual abuse began, and the abuse lasted until C.R. was thirteen or fourteen years old.

Keller devised a scheme in which she used C.R.'s religious upbringing to make C.R. believe that Keller was possessed by both angels and demons. Keller would tell C.R. that an angel wanted to talk to her, and then Keller would lie down and convulse, and upon rising Keller would be wearing a new, distinct facial expression and would have altered her voice. Keller formulated detailed stories about the angel and demon characters and how they came to be in her body. One of the angel characters was "Rickey," a male archangel, who became C.R.'s boyfriend and performed various sexual acts on C.R. through Keller's body. C.R. also reported being abused by several other angel and demon characters. At trial, K.S. and several other unnamed victims testified to being told similar stories by Keller.

C.R. did not report the abuse by Keller until she was twenty-one years old. However, when she was twelve, C.R. did make allegations that her aunt had sexually abused her when she was four or five years old.

Prior to trial, Keller filed a rape-shield motion to have the evidence of C.R.'s prior allegations against her aunt admitted during the guilt phase of trial. During the rape-shield hearing, defense counsel argued that the evidence was admissible to attack C.R.'s credibility as a witness because she did not report Keller's abuse at the same time she made allegations against her aunt. When questioned about this issue, C.R. testified that she did not report Keller at that time because her extended family tried to defend her aunt by saying that Keller was the real abuser, and C.R. was afraid that if she revealed Keller's abuse, her parents and family would not believe the true allegations against her aunt. The circuit court decided the evidence should be excluded under the rape-shield statute because any relevance would be outweighed by the high potential of prejudice to the victim.

During the sentencing phase of trial, the prosecutor asked C.R. what effect Keller had upon her life, and defense counsel objected, stating that such questions would be misleading to the jury. Specifically, defense counsel argued that the jury would be led to believe that all of the bad circumstances of C.R.'s childhood could be blamed on Keller, and defense counsel asked to be

allowed to cross-examine C.R. about her prior allegations against her aunt in order to show that Keller was not the sole cause of her childhood problems. The circuit court determined that the evidence was still barred by the rape-shield statute, and C.R. was allowed to testify about the impact of Keller's actions on her life.

Under Ark. Code Ann. § 16-97-103, evidence relevant to sentencing can be submitted to the jury, "provided no evidence shall be construed under this section as overriding the rape shield statute." Ark. Code Ann. § 16-97-103 (Repl. 2006). The rape-shield statute, Ark. Code Ann. § 16-14-101 (Repl. 1999), was enacted with the purpose of protecting victims of rape or sexual abuse from the humiliation of having their personal conduct, unrelated to the charges pending, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt. *See Parish v. State*, 357 Ark. 260, 163 S.W.3d 843 (2004). Section 16-42-101(b) provides that in a criminal prosecution for a sex crime the following evidence is not admissible:

> [O]pinion evidence, reputation evidence, or evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person, *evidence of a victim's prior allegations of sexual conduct with the defendant or any other person, which allegations the victim asserts to be true*, or evidence offered by the defendant concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denies making the allegations *is not admissible by the defendant*, either through direct examination of any defense witness or through cross-examination of the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.

Ark. Code Ann. § 16-42-101(b) (emphasis added). A defendant may, however, file a rape-shield motion under subsection 16-42-101(c) requesting that the circuit court make a determination as to the admissibility of the proposed evidence. Ark. Code Ann. § 16-42-101(c). Upon holding a hearing, if the circuit court determines that the offered proof is relevant to a fact in issue, "and that its probative value outweighs its inflammatory or prejudicial nature," the circuit court may grant the defendant's motion to admit the evidence. Ark. Code Ann. § 16-42-101(c)(2)(C).

Thus, the rape-shield statute is not a complete bar to the introduction of evidence of a victim's prior sexual conduct; but, the circuit court is vested with a great deal of discretion in ruling

whether the evidence is relevant. *See Harris v. State*, 322 Ark. 167, 907 S.W.2d 729 (1995). This court will not reverse the circuit court's decision as to the admissibility of rape-shield evidence unless its ruling constituted clear error or a manifest abuse of discretion. *Parish v. State, supra.*

Our opinion in *Ridling v. State*, 348 Ark. 213, 72 S.W.3d 466 (2002), involved facts and issues very similar to the case at hand. In that case, Ridling was charged with the rape of a girl under fourteen (14) years of age. During the guilt phase of trial, he asked to submit evidence that the victim had sexual relationships with other men while she was underage and having a relationship with Ridling. *Id.* The circuit court denied Ridling's motion, and Ridling attempted to introduce the same evidence during the sentencing phase to show "lack of any substantial harm" to the victim because she was engaging in other sexual relationships with older men while she had a relationship with Ridling. *Id.* The circuit court again denied Ridling's request without holding a separate hearing to determine the admissibility of the evidence during the sentencing phase. *Id.* We affirmed, holding that when an in camera review of the same evidence was held prior to the guilt phase, the circuit court was not required to hold a second, identical hearing, and we concluded that the circuit court did not abuse its discretion in denying Ridling's request to present the evidence during sentencing. *Id.*

Likewise, in the instant case, the circuit court held a pretrial hearing in which it concluded that the evidence of C.R.'s prior allegations against her aunt was more prejudicial to the victim than probative, and the court came to the same conclusion during the sentencing phase. We agree with the circuit court's evidentiary ruling. The relevance of the evidence to rebut C.R.'s claim that Keller caused the majority of her childhood problems was slight in comparison to the evidence that Keller occupied a role of trust in C.R.'s life as care giver and teacher and used that position of trust to abuse C.R. for almost four (4) years. Furthermore, in view of the highly prejudicial nature of the evidence along with our deferential standard of review, we cannot say that the circuit court's decision constituted a manifest abuse of discretion.

We also note that defense counsel elicited the very testimony that is the focus of Keller's argument on appeal. It was only after defense counsel suggested a figure of one-hundred

percent during cross-examination that C.R. attributed one-hundred percent of her childhood problems to Keller. One who is responsible for error cannot be heard to complain of that for which he or she is responsible. *Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004).

Affirmed.

STATE of Arkansas *v.* Roger Dale BARRETT

CR 06-1490 263 S.W.3d 542

Supreme Court of Arkansas
Opinion delivered September 27, 2007

Mike Beebe, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., and *Kent G. Holt*, Ass't Att'y Gen., for appellant.

Joel O. Huggins, for appellee.

JIM GUNTER, Justice. Appellee Roger Dale Barrett was convicted of the capital murder of Eunice "Yogi" Bradley and received a sentence of life imprisonment without the possibility of parole in the Arkansas Department of Correction. We affirmed the conviction in *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003). Subsequently, Barrett filed a petition for postconviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure (2007). After a Rule 37 hearing, the circuit court ruled that Barrett was entitled to postconviction relief. The State appeals from the circuit court's rulings. We affirm.

A recitation of the facts is provided in our prior opinion. *See Barrett, supra.* Following a four-day jury trial during which Barrett was convicted of capital murder, the circuit court entered a judgment and commitment order on September 21, 2001, and an amended order was filed on December 17, 2001. On December 12, 2003, Barrett filed a petition for postconviction relief in which Appellee made the following allegations of error: (1) that trial counsel, Johnny E. Gross, was ineffective in failing to formulate any kind of trial strategy; (2) that trial counsel was ineffective because he failed to discuss with Barrett his right to testify; (3) that trial counsel was ineffective because he refused to communicate with the prosecuting attorney in an effort to negotiate a fair plea

agreement; (4) that trial counsel was ineffective because of his failure to interview witnesses; (5) that trial counsel was ineffective in failing to communicate with Barrett regarding any type of trial strategy, tactics, or defenses; (6) that trial counsel was ineffective in failing to discuss with Barrett the potential petit jurors in Barrett's case; (7) that trial counsel was ineffective and "misled" Barrett by telling him that the Benton County Public Defender's Office failed to do "a good job"; (8) that trial counsel was ineffective because of his failure to go to the scene with Barrett; (9) that trial counsel was ineffective and worked under a conflict of interest because his office advised Barrett's wife, Nola Barrett, a possible suspect, to plead the Fifth Amendment; (10) that trial counsel was ineffective because he never prepared a mitigation case for sentencing purposes; and (11) that trial counsel was ineffective in his failure to advise Barrett of the State's plea offer. The State filed a response on October 18, 2004.

A two-day evidentiary hearing was held on Barrett's Rule 37 petition on February 8 and February 10, 2006. In an order dated December 18, 2006, the circuit court made the following rulings: (1) granting a new trial on Barrett's first claim that trial counsel failed to formulate any kind of trial strategy and did not use reasonable professional judgment; (2) granting a new trial on Barrett's second claim that trial counsel failed to advise, counsel, and communicate with Barrett his right to testify; (3) denying Barrett's third claim that he was prejudiced by trial counsel's failure to pursue a plea agreement, because the State did offer a reasonable plea; (4) denying Barrett's fourth claim that his sentence would not have been lessened had the jury heard the testimony of witnesses whom Barrett claimed trial counsel failed to interview; (5) denying Barrett's fifth claim that trial counsel failed to communicate, because Barrett did not demonstrate that there would be a different result; (6) denying Barrett's sixth claim regarding trial counsel's selection of the jury; (7) granting a new trial based upon Barrett's allegation that trial counsel solicited his case away from his public defender by "badmouthing" the public defender and misleading Barrett; (8) denying Barrett's eighth claim regarding trial counsel's alleged failure to visit the crime scene; (9) granting new trial on Barrett's ninth claim that trial counsel's performance was significantly affected by his conflicting interests with Nola Barrett; (10) denying Barrett's tenth claim that trial counsel's failure to prepare a mitigation case was ineffective because his lack of preparation

was not prejudicial to Barrett; and (11) granting Barrett a new trial on his eleventh claim for trial counsel's failure to communicate a plea offer.

On October 31, 2006, the State filed a notice of appeal from an order dated October 9, 2006. The State filed an amended notice of appeal on December 20, 2006. The State now seeks to appeal the December 18, 2006, order based upon Rule 2(a)(3) of the Arkansas Rules of Appellate Procedure–Civil (2006), or Rule 3(b) of the Arkansas Rules of Appellate Procedure–Criminal (2006).

As a threshold matter, we consider whether the State has properly brought its appeal pursuant to Ark. R. App. P.–Crim. 3 (2007). Recently, in *State v. Wilmoth*, 369 Ark. 346, 255 S.W.3d 419 (2007), we stated:

> As this court has frequently observed, there is a significant and inherent difference between appeals brought by criminal defendants and those brought on behalf of the State. The former is a matter of right, whereas the latter is not derived from the Constitution, nor is it a matter of right, but is granted pursuant to Rule 3. *State v. Boyette*, 362 Ark. 27, 207 S.W.3d 488 (2005); *State v. Pruitt*, 347 Ark. 355, 64 S.W.3d 255 (2002); *State v. McCormack*, 343 Ark. 285, 34 S.W.3d 735 (2000). When this court addresses an appeal by the State, we first determine whether the correct and uniform administration of the criminal law requires our review. *See* Rule 3(c); *State v. Markham*, 359 Ark. 126, 194 S.W.3d 765 (2004); *State v. Johnson*, 317 Ark. 226, 876 S.W.2d 577 (1994). As a matter of practice, this court has only taken appeals which are narrow in scope and involve the interpretation of the law. *State v. Pittman*, 360 Ark. 273, 200 S.W.3d 893 (2005); *State v. Warren*, 345 Ark. 508, 49 S.W.3d 103 (2001).
>
> However, we have recently noted that, when an appeal involves neither a direct nor an interlocutory appeal following a prosecution, but is rather a civil appeal arising from a collateral proceeding, the appeal is civil in nature, and the State is not required to satisfy Rule 3. *See State v. Burnett*, 368 Ark. 625, 249 S.W.3d 141 (2007). Because the instant case arises from a collateral proceeding, we conclude, as we did in *Burnett, supra*, that the State need not satisfy Rule 3.

Wilmoth, supra. Therefore, because the State is not required to satisfy Rule 3 in the instant appeal, we then will proceed to the merits of the State's arguments.

For its sole point on appeal, the State argues that the circuit court clearly erred by concluding that Barrett received ineffective assistance of counsel from his trial counsel, John Gross, and by granting Barrett's Rule 37 petition, thereby entitling him to a new trial. Specifically, the State contends that the circuit court erred in granting a new trial based upon the following ineffective-assistance claims: (1) trial strategy, (2) Barrett's right to testify, (3) Gross's solicitation of Barrett's case, (4) conflict of interest, (5) and the State's plea offer.

In response, Barrett argues that the circuit court properly concluded that he received ineffective assistance of counsel. Citing *Leasure v. State*, 254 Ark. 961, 497 S.W.2d 1 (1973), Barrett asserts that the circuit court's order should be affirmed because the same circuit judge tried the case, entered the order, and presided over the Rule 37 hearing, thereby giving the court the "best possible vantage point from which to evaluate the effectiveness of counsel's assistance to appellant from a review of files and records." *Id.* at 963, 497 S.W.2d at 2.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002) (per curiam). In making a determination on a claim of ineffectiveness of counsel, the totality of the evidence before the fact-finder must be considered. *State v. Franklin*, 351 Ark. 131, 89 S.W.3d 865 (2002). The resolution of credibility issues is within the province of the trial court. *Myers v. State*, 333 Ark. 706, 972 S.W.2d 227 (1998).

We must determine whether counsel's performance was ineffective under the two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). In *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007), we discussed this standard in detail:

> Under the standard set forth in *Strickland*, *supra*, to determine ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as

> the "counsel" guaranteed the petitioner by the Sixth Amendment. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See Cook v. State*, 361 Ark. 91, 204 S.W.3d 532 (2005).
>
> Second, the petitioner must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. The petitioner must show there is a reasonable probability that, but for counsel's errors, the fact finder would have had a reasonable doubt respecting guilt, *i.e.*, the decision reached would have been different absent the errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *See Cothren v. State*, 344 Ark. 697, 42 S.W.3d 543 (2001). The language, "the outcome of the trial," refers not only to the finding of guilt or innocence, but to possible prejudice in the sentencing. *Lasiter v. State*, 290 Ark. 96, 717 S.W.2d 198 (1986). In making a determination of ineffective assistance of counsel, the totality of the evidence must be considered. *Id.* Furthermore, trial strategy is not a basis for postconviction relief. *Wooten v. State*, 352 Ark. 241, 91 S.W.3d 63 (2002).

Id., 369 Ark. at 108, 251 S.W.3d at 292-93.

Unless appellant makes both *Strickland* showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *United States v. Cronic*, 466 U.S. 648 (1984).

Further, the burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). The defendant claiming ineffective assistance of counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Burton v. State*, 367 Ark. 109, 238 S.W.3d 111 (2006). The petitioner must show that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt and

that the decision reached would have been different absent the errors. *Id.* Further, conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003) (per curiam).

With this *Strickland* test in mind, we turn to the State's specific arguments. For its first point, the State argues that the circuit court erred in granting a new trial based upon Barrett's ineffective-assistance claim that his trial counsel failed to formulate a trial strategy. The State contends that Gross correctly refused to embrace an "accident theory," which the State maintains was fraught with evidentiary discrepancies. In response, Barrett argues that Gross failed to formulate a trial strategy, other than "put[ting] the State to its burden," and that the circuit court correctly granted a new trial on this basis.

We have stated that matters of trial strategy are not within the purview of Rule 37. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000) (per curiam). Counsel is allowed great leeway in making strategic and tactical decisions. Those decisions are a matter of professional judgment, and matters of trial tactics and strategy are not grounds for postconviction relief on the basis of ineffective assistance of counsel. *Id.*

Nonetheless, such strategic decisions must still be supported by reasonable professional judgment, pursuant to the standards set forth in *Strickland*. *Id.* Judicial review of counsel's performance must be highly deferential, and a fair assessment of counsel's performance under *Strickland* requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time. *Echols v. State*, 354 Ark. 530, 554, 127 S.W.3d 486, 501 (2003).

For example, in *Wicoff v. State*, 321 Ark. 97, 900 S.W.2d 187 (1995), the appellant had been convicted of first-degree sexual abuse and incest. The victims, who testified against him during the trial, were his eleven-year-old and ten-year-old stepdaughters. Wicoff filed a petition for postconviction relief in which he alleged that his counsel was ineffective for failing to file a motion under the rape-shield statute to explore the prior sexual conduct of the victims, and for failing to introduce the testimony of the victims' grandmother. According to Wicoff, the evidence of prior sexual abuse by other parties was relevant to explain how the children could have testified in such graphic detail about the alleged

incident with Wicoff. The testimony of the grandmother was relevant because she would have testified that one of the victims told her that the allegations against Wicoff were fabricated.

In *Wicoff*, we applied the prejudice prong of the test for ineffective assistance of counsel in *Strickland*, and determined that there was a reasonable probability that the outcome of the trial would have been different if Wicoff's attorney had attacked the victims' credibility with the evidence of prior sexual conduct and with the grandmother's testimony. Consequently, we concluded that despite the strategic reasons Wicoff's attorney articulated for not introducing the evidence, his decision did not exhibit the reasonable professional judgment required by *Strickland*. *See also Russell v. State*, 302 Ark. 274, 789 S.W.2d 720 (1990). Our decision in *Wicoff* indicates that, despite the deference that must be shown to the judgment and strategic decisions of counsel, there are instances where the resulting prejudice to the accused is so great that even a strategic decision can constitute ineffective assistance of counsel.

With this precedent in mind, we turn to the present case. Here, the circuit court found that Gross did not use his "reasonable professional judgment" by failing to develop any trial strategy. The circuit court reasoned that Gross failed to conduct "any voir dire on the presumption of innocence or the different mental states required for the various degrees of murder," noting that Gross's voir dire was "excruciating to observe." Further, the circuit court noted in its order that Gross, whom the circuit court described as "ill-equipped to handle a case of this nature," had never tried a murder case, and that when asked by the circuit court if he needed assistance from "more experienced, seasoned trial attorneys," Gross turned down the circuit court's offer.

With regard to the issue of trial strategy, the circuit court ruled in its order:

> During the hearing, Gross was questioned about his "strategy" — to present no defense and merely argue that the State had not met its burden of proof and there was no real evidence linking Barrett to the crime. Gross explained his decision to try the case this way and his explanation made absolutely no sense to this court. In this court's opinion, tactical and strategic decisions are decisions based on the specific facts of a given case, but a lack of tactical and strategic decisions are not "strategies," they are negligence and ignorance. Without a structured and coherent theory of defense, Gross's

reaction and response to the State's evidence, including objections, failure to object, and cross-examination, worked to his client's prejudice.

Based upon the *Strickland* test, we agree with the circuit court's rulings on this issue. Under the first prong of the *Strickland* test, Gross's performance was deficient for the following reasons. First, it is apparent from the record that Gross never developed a trial strategy at all. As the circuit court stated in Barrett's Rule 37 hearing, "[w]hat we are talking about here is much more egregious." Second, Gross failed to *voir dire* the jury on the elements of the State's case, the burden of proof, the presumption of innocence, or the mental states required for various degrees of murder. Third, Gross did not present a discernible defense. Specifically, Gross did not present any evidence or witnesses to testify to Barrett's intent or mental state, and he failed to present Barrett's defense or specific intent in closing argument.

Further, under the second prong of the *Strickland* test, there was a reasonable probability that the outcome of the trial would have been different had Gross's performance not been deficient. *Wicoff, supra.* Here, Gross's performance as counsel, when viewed in its totality, prejudiced his client because he failed not only to present a substantive defense, but also failed to distinguish the various mental states of murder to the jury. Had the accidental theory been presented to and believed by the jury, the jury could not have convicted Barrett of capital murder, and Barrett would have received a lesser sentence. With regard to the jury's belief of the accidental theory, the circuit court wrote at one point in the order: "[Barrett] had no prior felonies. He was sympathetic. He was believable." Thus, there was a reasonable probability that the jury would have had reasonable doubt as to Barrett's capital-murder charge. *See Williams, supra.*

Therefore, based upon our well-established standard of review, we hold that the circuit court was not clearly erroneous by articulating its firm convictions in its rulings on this issue. Accordingly, we affirm the circuit court's grant of new trial based upon Barrett's first claim of ineffectiveness regarding Gross's lack of trial strategy. Because we affirm the circuit court's grant of new trial on the first point, we will not delve into the remaining points on appeal.

Affirmed.

Charley Earl JARRETT *v.* STATE of Arkansas

CR 07-56 263 S.W.3d 538

Supreme Court of Arkansas
Opinion delivered September 27, 2007

[redacted]

Gary W. Potts, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

PAUL DANIELSON, Justice. Appellant Charley Earl Jarrett brings this appeal from the circuit court's final judgment finding him guilty of rape and sentencing him to life imprisonment. Our court has jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(a)(2) (2007). Jarrett's sole point on appeal is that the circuit court erred in denying his motion to dismiss his defense counsel, thereby not allowing Jarrett to represent himself at trial. We find no error and affirm.

In this appeal, Jarrett does not challenge the sufficiency of the evidence supporting his conviction and, as such, only a brief summary of the underlying facts is necessary. Jarrett was charged with the rape of W.L., the eleven-year-old daughter of his live-in girlfriend. W.L. testified at trial that on more than one occasion Jarrett had put his "privates" inside her "privates." On December 7, 2005, W.L. gave birth to a premature baby, and the DNA evidence presented at trial was that the probability that Jarrett was the father was 99.99%. A jury subsequently convicted Jarrett for the rape of W.L. and fixed his sentence at life imprisonment. Jarrett now appeals on the sole point that he should have been allowed to represent himself at trial.

A review of the record reflects that Jarrett attempted to have his defense counsel, Mr. Gary Potts, dismissed from the case at various times throughout the proceedings before his trial took place. On May 8, 2006, a hearing was held at which Jarrett first began to complain about his representation. Mr. Potts explained to the court that there was an issue which Jarrett wished for him to address with the court, however, he believed there was no basis upon which to file a motion. When Jarrett began to argue the issue to the court himself, the court explained to him that Mr. Potts was his attorney and if Jarrett would like Mr. Potts to be dismissed, he needed to file a motion.

A second hearing was held on June 12, 2006, as requested by Mr. Potts, to discuss a motion filed by the defense to have the case dismissed. After the court denied that motion, Jarrett pled to the court that the motion to dismiss was not the motion he wished to file, asserted that there were outstanding discovery issues, and again complained to the court about his counsel. Both Mr. Potts and the prosecutor assured the court that there were no discovery issues outstanding and, to be certain, the court ordered that Mr. Potts be able to review the State's file that very day. Jarrett then made his first request to the circuit court that Mr. Potts "step down so someone [could] represent [him]" and informed the court that he had a nineteen-page motion in his possession on this issue that had not yet been filed. The court informed Jarrett that no evidence had been presented that Mr. Potts was not diligently pursuing his case and mounting a defense, but that he would have the opportunity to revisit the issue at another time. The same day, subsequent to the hearing, the circuit court filed an order denying, what it considered to be, Jarrett's oral motion to dismiss Mr. Potts as his counsel.

On June 26, 2006, Jarrett filed a *pro se* motion with the circuit court, entitled "Petition to the Judge, Motion Change of Counsel, Conflict of Interest," which requested the court to dismiss counsel Gary Potts and appoint another counsel or to allow Jarrett to act *pro se* "with another counsel." While the court could not find a copy of the motion in its file on the day of the trial, Jarrett was allowed to verbalize his allegations during a pretrial hearing held in chambers on June 28, 2006. He asserted a lack of visitation by Mr. Potts and stated that Mr. Potts failed to subpoena certain witnesses that Jarrett had requested be present for trial. As Jarrett began to argue to the court that the State had not complied with discovery rules, the court interrupted him and stated that he had not moved to represent himself. While Jarrett disagreed with the court, claiming he had filed such a motion, it is clear from the record that the only motion Jarrett had filed was the June 26 motion and a motion to proceed *in forma pauperis* on appeal,[1] neither of which the court considered as a motion for Jarrett to represent himself. Mr. Potts then questioned Jarrett on the record

[1] Jarrett's motion for leave to proceed *in forma pauperis* on appeal was denied by the circuit court on May 12, 2006, as there had been no disposition of the charges to enable Jarrett to file an appeal.

about his plan if the court agreed to dismiss Mr. Potts, to which Jarrett responded, "[a] pro se inmate is not held accountable to the law. The judge has to . . ."

The circuit court did present Jarrett with the opportunity to make a request to proceed *pro se* by specifically asking him if he was then requesting that the court allow him to represent himself. Jarrett responded to the court's inquiry by stating, "[w]ell, you're forcing me to if you won't dismiss him," "you are forcing me to represent myself," and "I guess I'll have to represent myself." When the circuit court determined that it would not dismiss Mr. Potts, Jarrett's final statements to the court were "[y]our Honor, I don't want Mr. Potts as my counsel" and "I'll fire him."

Jarrett now argues that his constitutional right to conduct his own defense was violated by the circuit court refusing to allow him to do so. He urges this court to reverse the circuit court and hold that it abused its discretion in denying his motion to dismiss his defense counsel, thereby not allowing him to continue *pro se* at trial.[2] Finally, he asks us to reverse and dismiss his conviction, or in the alternative, remand the case for a new trial or sentencing.

The State responds that at no point in either Jarrett's oral or written motions, or pretrial discussions with the court, did he make the request to represent himself. The State concedes that Jarrett wanted to fire Mr. Potts and have him dismissed from the case, but maintains that Jarrett never unequivocally requested that he wanted to act as his own attorney at trial.

The United States Supreme Court addressed the federal constitutional right of a criminal defendant to proceed *pro se*. The Court, in *Faretta v. California*, 422 U.S. 806 (1975), held that "in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits [traditionally associated with the right of counsel]." *Id.* at 835. The Court further stated that, although a defendant need not have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, he "should be made aware of the dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.* (citing *Adams v. United States ex rel. McCann*,

[2] While Jarrett notes that the circuit court denied his motion to dismiss his defense counsel, his sole argument developed on appeal is that he had a constitutional right to defend himself *pro se* which was violated when the court did not allow him to do so.

317 U.S. 269 (1942)). In *Faretta*, the Court also concluded that a defendant's technical legal knowledge is not relevant to an assessment of his knowing exercise of the right to defend himself.

This court has long recognized the crucial aspect of informing an accused of his right to represent himself, along with the attendant risks. *See Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001). An accused is entitled to represent himself provided that he knowingly and intelligently forgoes his right to counsel and is able and willing to abide by the rules of procedure and courtroom protocol. *See Gilbert v. State*, 282 Ark. 504, 669 S.W.2d 454 (1984) (citing *Faretta v. California, supra*). We have previously held that the circuit court maintains a weighty responsibility in determining whether an accused has knowingly and intelligently waived his right to counsel. *See Gibson v. State*, 298 Ark. 43, 764 S.W.2d 617 (1989). Every reasonable presumption must be indulged against the waiver of fundamental constitutional rights. *See Bledsoe v. State*, 337 Ark. 403, 989 S.W.2d 510 (1999). Determining whether an intelligent waiver of the right to counsel has been made depends in each case on the particular facts and circumstances, including the background, the experience, and the conduct of the accused. *See id.* A specific warning of the dangers and disadvantages of self-representation, or a record showing that the defendant possessed such required knowledge from other sources, is required to establish the validity of a waiver. *See id.*

A criminal defendant may invoke his right to defend himself *pro se* provided that (1) the request to waive the right to counsel is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. *See Pierce v. State, supra.* All three factors must be satisfied in order to proceed *pro se*, as each requirement is used in the conjunctive with the word "and." *See id.*

The constitutional right to counsel is a personal right and may be waived at the pretrial stage or at trial. *See id.* However, a request to proceed *pro se* is not an unequivocal request if it is an attempt on the part of the defendant to have another attorney appointed. *See, e.g., Morgan v. State*, 359 Ark. 168, 195 S.W.3d 889 (2004); *Collins v. State*, 338 Ark. 1, 991 S.W.2d 541 (1999). Additionally, it is well settled that the right to counsel is not absolute and may not be used to frustrate the inherent power of the

court to command an orderly, efficient, and effective administration of justice. *See Collins v. State*, 338 Ark. 1, 991 S.W.2d 541 (1999).

In the instant case, neither the request that Jarrett made at the June 12 hearing, nor the request in his *pro se* motion filed on June 26, were requests that he be allowed to represent himself. He simply asked that Mr. Potts "step down so someone [could] represent [him]" and requested the court either dismiss his counsel and appoint another, or allow him to act *pro se* "with another counsel." It is clear that he had not made a request to represent himself. Furthermore, the statements Jarrett made at the pretrial hearing could not have been interpreted as an unequivocal request to proceed *pro se*. While his statements did exemplify his extreme displeasure with Mr. Potts as his counsel, a fact which is undisputed, they did not amount to an unequivocal request to take responsibility, be held accountable, and proceed *pro se*. Because Jarrett did not make such a request, we find no error and affirm.[3]

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 Jarrett, and no prejudicial error has been found. *See Winston v. State*, 368 Ark. 105, 243 S.W.3d 304 (2006).

Affirmed.

[3] We must point out that, at the conclusion of the pretrial hearing on June 28, 2006, the circuit court did find that Jarrett did not have the sufficient understanding of the rules of procedure and rules of conduct to represent himself. However, our review of the record reveals that Jarrett never made an unequivocal request to represent himself. Nonetheless, this court can always affirm where the circuit court reaches the right result, albeit for the wrong reason. *See Davis v. State*, 367 Ark. 330, 240 S.W.3d 115 (2006).

Glenn GALLAS, Terry Mayfield, & Richard McGrew *v.*
Cecil ALEXANDER, Chairman, Arkansas Racing Commission;
Oaklawn Jockey Club, Inc.; Arkansas Horsemen Benevolent
& Protective Assoc., Inc.; & Southland Racing Corp.

06-956 263 S.W.3d 494

Supreme Court of Arkansas
Opinion delivered September 27, 2007

Martha M. Adcock; *Cox, Cox & Estes, PPPLC*, by: *S. Lance Cox* and *Lauren E. Pratchard*, for appellants.

Timothy G. Gauger, Deputy Att'y Gen., and *Matthew McCoy*, Ass't Att'y Gen., for appellee Cecil Alexander, Chairman, Arkansas Racing Commission.

Friday, Eldredge & Clark, LLP, by: *James M. Simpson, Walter M. Ebel, III*, and *Martin A. Kasten*; *Wood, Smith, Schnipper & Clay*, by: *Don M. Schnipper*, for appellee Oaklawn Jockey Club, Inc.

Gary M. Lax, for appellee Horsemen's Benevolent and Protective Association, Inc.

Wright, Lindsey & Jennings, LLP, by: *Stephen R. Lancaster*; *Rieves, Rubens & Mayton*, by: *Kent J. Rubens*, for appellee Southland Racing Corporation.

PAUL DANIELSON, Justice. Appellants Glenn Gallas, Terry Mayfield, and Richard McGrew appeal from the circuit court's order granting summary judgment to appellees Cecil Alexander, Chairman of the Arkansas Racing Commission (the Commission); Oaklawn Jockey Club, Inc.; and Arkansas Horsemen Benevolent & Protective Association, Inc. (AHBPA) and dismissing appellants' complaint, which alleged that Act 1151 of 2005, permitting the public's authorization of wagering on electronic games of skill

at horse and greyhound racing parks, was unconstitutional.[1] Appellants raise three points on appeal: (1) that the circuit court erred in finding that Act 1151 was not an unlawful delegation of power by the legislature to the racing venues; (2) that the circuit court erred in finding that Act 1151 was not an unlawful delegation of power from the legislature to the Commission; and (3) that the circuit court erred in finding that Act 1151 was not unconstitutional as special or local legislation. We affirm.

On March 22, 2005, Act 1151 of 2005 became law without the signature of then-Governor Mike Huckabee. The Act provided, in part, that:

> cities or counties where horse racing or greyhound racing parks are located in Arkansas should have the opportunity to address these issues and promote economic development, tourism, and agribusiness by allowing the voters in these cities or counties to have the opportunity by local election to authorize horse racing or greyhound racing parks in their communities to offer wagering on additional forms of electronic games of skill.

Act 1151 of 2005, § 1 (now codified at Ark. Code Ann. § 23-113-101(c) (Supp. 2005)). The Act amended Title 23 of the Arkansas Code and established Chapter 113, entitled *Wagering on Electronic Games of Skill Conducted by Horse Racing and Greyhound Racing Franchisees, Subject to Approval at Local Option Election. See* Act 1151 of 2005, § 1. The Act set forth legislative findings explaining the basis for the legislation, *see* Ark. Code Ann. § 23-113-101, and named the legislation the "Local Option Horse Racing and Greyhound Racing Electronic Games of Skill Act." *See* Ark. Code Ann. § 23-113-102 (Supp. 2005).

On December 6, 2005, appellants filed a complaint and petition for declaratory judgment, challenging the legislation.[2] In it, appellants claimed that the Act was invalid in that it unlawfully delegated the legislature's authority to two private entities, namely

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[1] Southland Racing Corporation intervened in this matter, subsequent to the decision of the circuit court, rendering it too an appellee.

[2] The complaint was initially lodged against the following defendants: Senator Jim Argue, President Pro Tempore of the Senate; Representative Bill Stovall, Speaker of the House; Senator Bob Johnson; Representative Phillip Jackson; Mike Bush, Mayor of Hot Springs; Cecil Alexander, Chairman, Arkansas Racing Commission; and the Garland County Board of Election Commissioners. In a first amended petition, Gallas added

Southland Racing Corporation, a greyhound racetrack in West Memphis, Arkansas, and Oaklawn Jockey Club, a horse racetrack in Hot Springs, Arkansas, to determine whether a county-wide or city-wide election should be held on wagering on electronic games of skill.[3] It further alleged that the Act constituted an unlawful delegation of power to the Commission, in conferring upon the Commission the power to decide what constitutes an electronic game of skill. Finally, the complaint asserted that the legislation constituted special legislation. In a first-amended petition, appellants added additional claims. Specifically, appellants alleged an equal-protection claim, a monopolies claim, and petitioned for a preliminary and permanent injunction.

On February 1, 2006, appellee Oaklawn moved for summary judgment. In its motion, Oaklawn asserted that appellants' claims were fatally flawed and must be dismissed, on the following bases: (1) the plaintiffs were estopped from contesting the constitutionality of Act 1151 because they failed to challenge it by filing suit before the election; (2) Act 1151 was not special or local legislation; (3) Act 1151 did not improperly delegate legislative power; (4) there was no improper monopoly; (5) there was no equal-protection violation; (6) Arkansas Constitutional Amendment 46 permitted such regulation to promote horse racing in Hot Springs; (7) plaintiffs failed to exhaust their administrative remedies; (8) plaintiffs lacked standing; (9) the complaint failed to state facts upon which relief could be granted; (10) plaintiffs failed to follow statutory election-contest procedure; (11) Arkansas law prohibited amending of an election-contest complaint; (12) venue was not proper as to all parties; and (13) the circuit court lacked subject-matter jurisdiction. Appellants responded.

On February 13, 2006, the AHBPA moved to intervene in the matter, and appellants responded in opposition to the motion. On March 6, 2006, the circuit court held a hearing on the motion

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Oaklawn Jockey Club, Inc., as a defendant. However, in separate orders by the circuit court, Gallas voluntarily dismissed Mayor Bush, the Garland County Election Commissioners, Senator Argue, Representative Stovall, Senator Johnson, and Representative Jackson. Both the AHBPA and Southland Racing Corporation were subsequently permitted to intervene in the matter by the circuit court.

[3] Both Oaklawn and Southland are considered "franchise holders" under the Act. A "franchise holder" is "any person holding a franchise to conduct horse racing under the Arkansas Horse Racing Law, § 23-110-101 et seq., or greyhound racing under the Arkansas Greyhound Racing Law, § 23-111-101 et seq." Ark. Code Ann. § 23-113-103(6) (Supp. 2005).

to intervene, which the circuit court granted. Then, on March 16, 2006, appellants moved for summary judgment. In the motion, appellants asserted that Act 1151 was unconstitutional for the following reasons: (1) Act 1151 unconstitutionally delegated authority to Oaklawn; (2) Act 1151 unconstitutionally delegated power to the Commission; (3) Act 1151 was special legislation because it arbitrarily disenfranchised the residents of Garland County; (4) Act 1151 was special legislation because it only gave gambling rights to racetracks and, more specifically, to Oaklawn and Southland and no other persons or businesses in the State of Arkansas; (5) Act 1151 violated equal protection of the laws of Arkansas; and (6) Act 1151 created an illegal monopoly. On March 30, 2006, the Commission filed its motion for summary judgment. In addition to the reasons set forth by Oaklawn in its summary-judgment motion, the Commission asserted that the Act was constitutional for two additional reasons: (1) the franchise holder had not been delegated the power to make the law; and (2) the legislature provided sufficient oversight by the Commission and reasonably comprehensive guidance to audit the franchise holder's limited discretionary authority. With respect to determining whether a game constituted an electronic game of skill, the Commission maintained that the Act was constitutional because it conveyed sufficient direction to the Commission when measured by common understanding and practice. Finally, the Commission claimed that the Act did not constitute special legislation, did not violate equal protection, and did not authorize a monopoly because Oaklawn and Southland were not given the exclusive right to conduct wagering on electronic games of skill. On April 6, 2006, the AHBPA moved to adopt and join in the summary-judgment motions filed by Oaklawn and the Commission.

On April 14, 2006, the parties filed a stipulation to undisputed facts, and on April 21, 2006, the circuit court held a hearing on the cross-motions for summary judgment. At the conclusion of the hearing, the circuit court took the matter under advisement. On May 2, 2006, the circuit court filed its memorandum opinion. In it, the circuit court first found that the matter could not be characterized as an election contest, which should have been brought before the election. It then ruled that an exception to the rule of exhausting administrative remedies applied, since there were no disputed facts for the parties to present and the analysis required consisted solely of applying the law to the undisputed facts and rendering a decision. Next, the circuit court dismissed appellants' claims alleging an improper monopoly and an equal-

protection violation, finding that appellants lacked standing to make both challenges. That being said, the circuit court found that appellants did have standing to challenge the constitutionality of the Act as county voters that may have suffered harm by the citywide-only election. With respect to venue, the circuit court found that venue was proper as each of the remaining litigants stipulated to that.

Next, the circuit court found that the General Assembly did not delegate its power to make law, despite the extent to which the statute permitted franchise holders to determine the venue of the election, as it did not allow the franchise holder or the local voters any discretion in determining what the law was or would be with respect to wagering on electronic games of skill. In addition, the circuit court found that the conditions put in place by the General Assembly, which must be complied with *after* the election, demonstrated that the franchise holder did not have sole discretion in picking the forum. As to appellants' allegation that the Act impermissibly delegated legislative authority to the Commission, the circuit court found that making a factual determination as to whether a particular electronic game has an element of skill or not was clearly an administrative-agency function. The circuit court also found that the legislative definition of "electronic games of skill" conveyed sufficient direction to the Commission when making such a determination. Finally, the circuit court concluded that Act 1151 was constitutional because the rational-basis test was satisfied and it further found that the General Assembly's reasoning was rational with respect to why racetracks should be the place where electronic games of skill should be permitted. In conclusion, the circuit court denied the appellants' motion for summary judgment and found that the appellees were entitled to summary judgment. In a judgment filed May 12, 2006, the circuit court incorporated its memorandum opinion and dismissed the appellants' complaint with prejudice. Appellants now appeal.

Failure to Exhaust Administrative Remedies

As an aside, we first address whether the appellants failed to exhaust their administrative remedies. This issue was not raised by the parties, but was decided by the circuit court, and often poses a concern. That being said, it is of no moment in the instant case. 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 administrative remedy has

been exhausted. *See Department of Human Servs. v. Howard*, 367 Ark. 55, 238 S.W.3d 1 (2006). We have repeatedly held that in order to preserve a constitutional argument in an appeal from an agency decision, the constitutional issue must first be raised and developed at the administrative level. *See, e.g., Teston v. Arkansas State Bd. of Chiropractic Exam'rs*, 361 Ark. 300, 206 S.W.3d 796 (2005). Moreover, we recently held that a petitioner was not required to first seek a declaration regarding the constitutionality of an act from an agency, where the petitioner had no action pending before the agency that required her to also raise her constitutional challenge, prior to filing an action for declaratory judgment in the circuit court. *See McGhee v. Arkansas State Bd. of Collection Agencies*, 368 Ark. 60, 243 S.W.3d 278 (2006). Accordingly, the appellants' challenge to the constitutionality of Act 1151 is properly before us.

I. Unlawful Delegation of Legislative Authority to a Private Entity

For their first point on appeal, appellants argue that the General Assembly unlawfully delegated its legislative authority to a private entity when it allowed Oaklawn and Southland to choose who got to vote in a special election, pursuant to Ark. Code Ann. § 23-113-201(a)(2)(A)(ii) (Supp. 2005). Recognizing that this court has previously held that it was not a delegation of legislative authority to require a vote of the people as a condition to implementation of a law, appellants urge that the instant case differs in that, here, the franchise holders, who have a pecuniary interest in the outcome of the election, are permitted to choose whether the election on wagering on electronic games of skill will be submitted to just the city or to the entire county.

Appellee the Commission responds that the franchise holder's determination of election forums is constitutional for two reasons: (1) the franchise holder has not been delegated the power to make the law; and (2) the legislature provided sufficient oversight by the Commission and reasonably comprehensive guidance to audit the franchise holder's limited discretionary authority. Specifically, the Commission notes that the Act does not provide local voters or franchise holders any discretion to determine what the law is regarding wagering on electronic games of skill. In addition, the Commission maintains, Act 1151 does not evoke any "self-interest" concerns because franchise holders under Act 1151 are narrowly regulated to only one of two possible options for a local referendum — the county or the city.

Appellee Oaklawn avers that Act 1151 does not improperly delegate lawmaking power to racing franchise holders because the General Assembly itself conditioned wagering on electronic games of skill upon the franchise holder demonstrating local support for the games by a positive vote in either the city or the county. It asserts that the General Assembly's decision to require some local support for electronic games of skill by either city or county voters is not irrational. Finally, Oaklawn contends, the case relied upon by the appellants, *Leathers v. Gulf Rice Arkansas, Inc.*, 338 Ark. 425, 994 S.W.2d 481 (1999), is irrelevant to the appeal at hand.

Appellee Southland urges that it is not the franchise holder's decision as to whether wagering on electronic games of skill will be conducted, but instead, that decision rests with the voters. It asserts that the General Assembly exercised its power by declaring that a condition to allowing wagering on electronic games of skill was ascertaining the will of the majority in either the city or the county.

Appellee AHBPA responds that Act 1151 includes a complete plan of what will occur after a referendum on wagering on electronic games of skill, leaving no room for any of the appellees to "legislate." It urges that the Act simply allows a vote on the matter by the people, *i.e.*, a condition upon which the law will become operative.

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. *See City of Farmington v. Smith*, 366 Ark. 473, 237 S.W.3d 1 (2006). 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 id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *See id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *See id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *See id.*

In this case, we first must consider whether Act 1151 unconstitutionally delegates legislative authority to franchise holders, currently Oaklawn and Southland, when it permits the fran-

chise holder, whose park is located within the city limits, to elect whether the election on wagering on electronic games of skill shall be submitted to either the city, the town, or the county. At issue is Ark. Code Ann. § 23-113-201(a)(2) (Supp. 2005), which provides:

> (2)(A)(i) The franchise holder may not conduct wagering on electronic games of skill under this chapter unless the question of the wagering on electronic games of skill under this chapter has been submitted to the electors of the city, town, or county in which the franchise holder's racetrack park site is located and where the wagering on electronic games of skill is to be conducted, at any special or general election, and a majority of the electors voting on the question have approved at the election wagering on electronic games of skill under this chapter.
>
> (ii) *If the racetrack park is located within the corporate limits of a city or town, the question shall be submitted to the electors of either the city, town, or county in which the racetrack park is located, as requested by the franchise holder,* and if the racetrack park is not located within the corporate limits of a city or town, then the question shall be submitted to the electors of the county in which the racetrack park is located.
>
> (B)(i) The governing body of the city, town, or county, as the case may be, shall by ordinance submit the question to the electors if requested by the franchise holder.
>
> (ii) If the franchise holder makes a request for an election, the franchise holder shall present to the governing body evidence of anticipated benefits to economic development, job creation, tourism, and agribusiness which may result, directly or indirectly, from the authorization of wagering on electronic games of skill at the franchise holder's racetrack park site under this chapter, if approved by the local voters at the election.
>
> (iii) The franchise holder may make requests on one (1) or more occasions, and elections so requested from time to time by the franchise holder may be held during any one (1) or more calendar years as requested from time to time by the franchise holder, but not more than one (1) special election shall be held for such purposes by the same city, town, or county during any particular calendar year.
>
> (iv) The cost incurred by the city, town, or county involved in conducting each special election pursuant to the franchise holder's

> request shall be paid by the franchise holder. The election shall be held and conducted under the general election laws of the state, except as otherwise provided in this section.

Ark. Code Ann. § 23-113-201(a)(2)(A) (Supp. 2005) (emphasis added). We must observe that Arkansas statutes are presumed to be constitutional, and the burden is placed on the party attacking the statute. *See Boyd v. Weiss*, 333 Ark. 684, 971 S.W.2d 237 (1998). Thus, it was incumbent on the appellants to prove that Act 1151 amounted to an improper delegation of legislative power.

We have previously held that where the General Assembly decided to allow the voters a voice on the question of Hot Springs Sunday racing, it did not constitute a delegation of legislative authority to enact a law. *See Swanberg v. Tart*, 300 Ark. 304, 778 S.W.2d 931 (1989). In *Swanberg*, we recognized that on prior occasions, we had held that the General Assembly can enact a law and provide for operation under it to depend upon a contingency or condition, such as a favorable vote of the electors. *See id.*

[redacted] Indeed, in *Capps v. Judsonia & Steprock Road Improvement District*, 154 Ark. 46, 242 S.W. 72 (1922), we observed:

> The true distinction is between the delegation of power to make the law, which necessarily involves the discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made.

154 Ark. at 52, 242 S.W. at 74 (quoting *The Cincinnati, Wilmington & Zanesville, R.R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852)). In addition, we note that McQuillin's treatise on municipal corporations provides further guidance on the issue:

> Generally a provision in a statute or in a municipal charter that it shall not take effect unless it is assented to by a majority or fixed percentage of the inhabitants of the municipality is not invalid as a delegation of legislative power, provided the statute is complete in itself.

Eugene McQuillin, *The Law of Municipal Corporations* § 4.10 (3d ed. 2007) (footnote omitted).

In the instant case, the circuit court found, in pertinent part:

> When one considers this Act as a whole, consistent with well established rules of statutory construction, it is reasonable to conclude that it sets out a well defined substantive law. The statute clearly allows a franchise holder the right to trigger the election and to some extent determine its venue, but it does not allow such holder or the local voters any discretion in determining what the law is or will be with respect to wagering on electronic games of skill. Under those circumstances it does not violate the "unlawful delegation" doctrine. . . .

We agree and cannot say that Act 1151 constitutes an impermissible delegation of legislative authority on this basis. First and foremost, this case differs significantly from *Leathers v. Gulf Rice Arkansas, Inc.*, *supra*, as relied upon by the appellants. In *Leathers*, the appellees theorized that because Act 344 of 1995 empowered rice producers with the sole discretion of levying an assessment against rice buyers, without giving the buyers a vote, hearing, or review on the assessment, it constituted an unlawful delegation of legislative authority. We agreed, holding that Act 344 failed to afford the rice buyers any notice, hearing, or review before the assessment was imposed on them. Moreover, we found that the unlawful empowerment given to private rice producers was especially offensive when it affected other private persons, such as rice buyers, who had interests opposing or adverse to those of the producers. That is not the situation before us.

Here, it was stipulated by the parties that Oaklawn was a racing park "located within the corporate city limits of Hot Springs, Arkansas." Thus, pursuant to the statute, the question on wagering on electronic games of skill was to be submitted to the electors of either the city, town, or county in which the racetrack was located, as requested by Oaklawn. *See* Ark. Code Ann. § 23-113-201(a)(2)(A)(ii). Based on the language of the statute, it is clear that the General Assembly contemplated that the city, town, and county in which the racetrack was located would have similar interests in voting to approve or reject wagering on electronic games of skill in its respective area. Thus, irrespective of which electorate the franchise holder requests, the citizenry of the area and its opinions will be well-represented. Moreover, there is a vote by the citizenry — something that was not present in *Leathers*. While a private entity is involved in the process of submitting the matter to a vote of the people, the franchise holder

is not imposing any burden on the people without notice. For these reasons, we find *Leathers* to be inapposite.

In addition, neither Oaklawn nor Southland has been vested with lawmaking authority by the General Assembly's actions. Instead, the franchise holder must merely comply with the law established by the General Assembly, which requires that the question of wagering on electronic games of skill be put to a vote of the people, be it city, town, or county. More importantly, we should note, there are no guarantees when a matter is brought before the people; here, the franchise holder is responsible for the cost of the election, no matter what the outcome.[4] *See* Ark. Code Ann. § 23-113-201(a)(2)(B)(iv). Thus, we cannot say that it is unreasonable that the franchise holder should be able to choose which electorate shall vote on the measure. And again, a vote of the people is a vote of the people — the public interest is the same, no matter whether it is the city voting or the county. We find no basis on which to hold that the Act constitutes an unlawful or unreasonable delegation of legislative authority to the racing park franchise holders and, for that reason, we affirm the circuit court on this point.

II. Unlawful Delegation of Legislative Authority to the Commission

Appellants next argue that the General Assembly unlawfully delegated its legislative authority to the Commission when it directed the Commission, in Ark. Code Ann. § 23-113-201(f)(2)(A)(i) to make a finding as to whether a game and electronic device or machine constitutes an electronic game of skill. Specifically, the appellants urge that the General Assembly did not provide sufficient standards to determine what games should or will be approved by the Commission. They contend that the legislature should have provided a more complete plan and instructions as to what games were permissible and that, in failing to do so, the legislature has made the Commission a lawmaker.

[4] With respect to appellants' argument that the franchise holders have a pecuniary, self-serving interest in the outcome of the election, that may be true; the franchise holder must hold hope that the matter will pass. However, as we have already observed, there are no guarantees in elections. No evidence has been presented that the matter would have failed had it been put to the electors of Garland County. Certainly, the appellants do not expect that the franchise holder can see into the future.

Appellee the Commission responds that the definition of "electronic games of skill" is constitutional because it conveys sufficient direction to the Commission when measured by common understanding and practice. The Commission additionally urges that the appellants do not have standing to raise this constitutional challenge because they have not made a showing of injury or prejudicial impact.

Appellee Oaklawn responds that Act 1151 sufficiently defines the role of the Commission, which is to regulate, not legislate. It submits that nothing in Act 1151 provides the Commission with the authority to make the law. Further, it suggests that administrative agencies routinely make factual determinations that do not constitute improper making of law and that making an initial regulatory determination on whether an electronic game is a permissible game of skill as defined by the Act is purely an administrative function. Finally, Oaklawn avers that the General Assembly has given sufficient guidance by stating that the games must afford an opportunity for the exercise of skill or judgment where outcomes are not completely controlled by chance alone. Appellees Southland and AHBPA respond that Act 1151 merely delegates the responsibility for determining facts about proposed electronic games of skill to the Commission.

Before reaching the merits of this argument, we must first address the appellees' allegation that the appellants lack standing to bring the instant challenge. With respect to standing, we have said:

> In numerous cases, we have held that a litigant has standing to challenge the constitutionality of a statute if the law is unconstitutional as applied to that particular litigant. *Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997); *Hamilton v. Hamilton*, 317 Ark. 572, 879 S.W.2d 416 (1994); *Medlock v. Fort Smith Serv. Fin. Corp.*, 304 Ark. 652, 803 S.W.2d 930 (1991). The general rule is that one must have suffered injury or belong to a class that is prejudiced in order to have standing to challenge the validity of a law. *Morrison, supra*; *Medlock, supra*. Stated differently, plaintiffs must show that the questioned act has a prejudicial impact on them. *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996); *Garrigus v. State*, 321 Ark. 222, 901 S.W.2d 12 (1995).

Arkansas Tobacco Control Bd. v. Sitton, 357 Ark. 357, 363, 166 S.W.3d 550, 554 (2004) (quoting *Ghegan v. Weiss*, 338 Ark. 9, 14-15, 991 S.W.2d 536, 539 (1999)). Here, the circuit court specifically found that the appellants had standing to challenge the Act:

> Plaintiffs allege that Act 1151 stripped them of their right to vote through special or local legislation and improper delegation of legislative power. Since they are residents of Garland County and could have voted in a countywide election, they may have suffered harm if their constitutional argument on those issues is correct. On those points, the Court finds that they have standing to challenge the Act.

A review of the record reveals no notice of cross-appeal by the appellees. Thus, this finding was not challenged by them on appeal and is not preserved for our review. *See, e.g.*, *Lawson v. City of Mammoth Spring*, 287 Ark. 12, 696 S.W.2d 712 (1985) (wherein the appellee challenged, on cross-appeal, the circuit court's finding of appellant's standing).

That being said, it is true that had Oaklawn elected to present the question of wagering on electronic games of skill to the county, appellants would have been permitted to vote in the election, as they were found to be residents of Garland County by the circuit court. Thus, because the appellants may have been prejudiced by their inability to vote when the issue was presented to the city alone, we hold that they do have standing in the instant case.

With respect to the appellants' argument on appeal, we find it without merit. With respect to this argument, the circuit court found:

> The General Assembly has the power to legalize electronic gambling so long as the games do not constitute lotteries. And making a factual determination as to whether a particular electronic game has an element of skill or not is clearly an administrative agency function. This Court is convinced that the legislative definition of "electronic games of skill" conveys sufficient direction to the Commission as to how it should proceed when measured by common understanding and practice. In addition, the legislature has provided the Commission with sufficient oversight powers and reasonably comprehensive guidance to audit Oaklawn's limited discretionary authority.

We agree with the circuit court. Indeed, Ark. Code Ann. § 23-113-201(f)(2)(A)(i) clearly requires the Commission to determine whether a game constitutes an electronic game of skill:

> (f)(2)(A) Within sixty (60) calendar days after the submission of the information required by subdivision (f)(1) of this section, the commission shall make a finding as to whether:

> (i) The game and electronic device or machine constitutes an electronic game of skill authorized by this chapter[.]

Ark. Code Ann. § 23-113-201(f)(2)(A)(i). However, contrary to what the appellants claim, the General Assembly provided, what we consider to be, very clear guidelines for determining whether a game or device constitutes an electronic game of skill. First and foremost, the General Assembly defined the term "electronic game of skill:"

> (5)(A) "Electronic games of skill" means games played through any electronic device or machine that afford an opportunity for the exercise of skill or judgment when the outcome is not completely controlled by chance alone.
>
> (B) "Electronic games of skill" does not include pari-mutuel wagering on horse racing and greyhound racing governed by the Arkansas Horse Racing Law, § 23-110-101 et seq., or the Arkansas Greyhound Racing Law, § 23-111-101 et seq., whether pari-mutuel wagering on live racing, simulcast racing, or races conducted in the past and rebroadcast by electronic means[.]

Ark. Code Ann. § 23-113-103(5) (Supp. 2005). In addition, it specifically set forth what it considered to be a guideline in determining whether a game is "not completely controlled by chance alone:"

> (d)(1) In order to constitute an electronic game of skill under this chapter, the game must not be completely controlled by chance alone.
>
> (2) A game is not completely controlled by chance alone if the betting public may attain through the exercise of skill or judgment a better measure of success in playing the game than could be mathematically expected on the basis of pure luck, that is, on the basis of pure random chance alone.

Ark. Code Ann. § 23-113-201(d) (Supp. 2005).

■ Appellants cite to our decision in *Leathers v. Gulf Rice Arkansas, Inc., supra,* wherein we quoted the United States Supreme Court, for the following proposition when determining whether a delegation is constitutional:

> [E]ach enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the

> standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable.

338 Ark. at 429, 994 S.W.2d at 483 (quoting *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 574 (1939)). Reviewing the guidelines set forth by the General Assembly, we cannot say that the standards were not set out with sufficient exactness. In addition, we have recognized that the duty of an administrative agency is to hear evidence, decide the credibility of witnesses, and make findings of fact. *See Cain v. Arkansas State Podiatry Examining Bd.*, 275 Ark. 100, 628 S.W.2d 295 (1982). Our review reveals that the Commission will be able to fulfill its duty using the guidelines and standards set forth by the General Assembly. Furthermore, the appellants have not provided or suggested what they might consider more exacting guidelines or standards. Accordingly, we affirm the circuit court on this point.

III. Special or Local Legislation

For their final point on appeal, appellants argue that Act 1151 of 2005 is special legislation because it arbitrarily allows franchise holders Oaklawn and Southland to operate electronic gambling machines on their properties while making it a criminal offense for all other persons in the state to operate the same. They allege that there is no rational basis for limiting wagering on electronic games of skill to a horse or greyhound racetrack and that Amendment 46 to the Arkansas Constitution is inapplicable and does not provides such a basis. Finally, the appellants contend that the practical operation of the Act makes it local or special legislation.

Appellee the Commission responds that the Act does not constitute special legislation or local legislation because any franchise holder following the legislature's complete plan may conduct wagering on electronic games of skill. It further reasserts that the appellants lack standing to raise this argument because they have not suffered any injury, nor do they belong to a class that was prejudiced.

Appellee Oaklawn responds that Act 1151 is not special or local legislation as it contains provisions that are not presently applicable to any current franchise holder, but could be applied to

future franchise holders.[5] It further points out that other entities and localities can qualify under the requirements of the statute because it is open-ended. In short, it contends, based on the statutory framework in place, nothing in the Act limits its application to any particular franchise holder or to any particular county or locality.[6]

Appellee Southland responds that Act 1151's legislative findings provide numerous legislative facts and conclusions, which make the Act a piece of rational legislation. It further submits that the Act does not limit wagering on electronic games of skill to Oaklawn and Southland, as any franchise holder can operate such electronic gaming; thus, should an entity other than those two wish to operate such games, it simply must comply with the statutes for obtaining a franchise.

Appellee AHBPA responds that the legislative findings set forth by the General Assembly provide the rational basis for Act 1151. In addition, it maintains that the Act is not local legislation in that it clearly has statewide application because other Arkansas statutory authority does not limit horse racing and greyhound racing to Hot Springs and West Memphis, Arkansas. Finally, AHBPA contends that the appellants have not met their burden of proving the unconstitutionality of Act 1151.

State statutes are presumed to be constitutional, and the party attacking the statute has the burden of showing that the challenged statute is clearly unconstitutional. *See Weiss v. Geisbauer*, 363 Ark. 508, 215 S.W.3d 628 (2005). The Fourteenth Amendment to the Arkansas Constitution provides that "[t]he General Assembly shall not pass any local or special act." Ark. Const.

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[5] Specifically, Oaklawn points out that the Act provides for the situation in which a racetrack is located in the county, when neither of the current racetracks are so located.

[6] In addition, Oaklawn contends that the appellants are estopped from challenging the procedures under Act 1151 because they had ample opportunity to challenge the Act prior to the election, but did not. The circuit court found that the appellants were not challenging the election process and that the appellants recognized that if the Act was constitutional, the election was valid in all respects. Thus, the circuit court held, the lawsuit could not be characterized as an election contest which should have been brought before the election.

As was the case with standing, the appellees did not file a notice of cross-appeal, seeking to challenge this finding by the circuit court. Accordingly, we are precluded from reviewing the argument on appeal. Nonetheless, we cannot say that the circuit court erred. Appellants challenged the constitutionality of the statute, not the election process. Therefore, appellees' estoppel argument would be without merit.

amend. 14. We have defined local legislation as legislation that is arbitrarily applied to only one geographic area of the state, while special legislation arbitrarily separates from the operation of an act some person, place, or thing from another. *See Hall v. Tucker*, 336 Ark. 112, 983 S.W.2d 432 (1999).

In addition, the fact that a statute ultimately affects less than all of the state's territory does not per se render it local or special legislation. *See id.* We have consistently held that a statute that applies to only one area of the state is constitutional if the reason for limiting the statute to one area is rationally related to the purposes of that statute. *See id.* What we review is whether the decision to apply the act to only one area of the state is rational. *See id.* The rational-basis standard presumes the rationality of the statute, which when applied to social and economic legislation can only be overcome by a clear showing of arbitrariness. *See id.* We may also go beyond the legislation and take judicial notice of facts relevant to whether the act's operation and effect are local. *See id.*

With respect to local or special legislation, the circuit court made the following findings:

> In the case at bar, the purpose of Act 1151 is to promote live racing and the associated agribusiness, tourism and related economic activity including job creation and economic development, and to stop the flow of money out of state which might otherwise be spent in Arkansas. In addition residents of the entire state, including plaintiffs, can benefit from the tax generated from the authorized games. In the Court's judgment, the General Assembly has devised a comprehensive plan that reasonably addresses these goals in a rational manner.
>
> . . . .
>
> Oaklawn became a racetrack franchise holder in Arkansas many years ago and presently has the only sanctioned horse racetrack in the state. But under existing horse racing law, future racing franchises can be awarded in any and all of the remaining 74 counties to anyone who jumps through the same hoops Oaklawn jumped through to obtain its franchise. See *Ark. Code Ann.*, Sec. 23-110-301 *et seq.* Upon becoming a franchise holder, the recipient can conduct electronic games of skill if the necessary conditions set out in Act 1151 are met.
>
> A license is required for individuals to engage in many professions and/or business activity in this state, otherwise they run afoul

> of the law. Notably, it is illegal for a person to engage in the practice of law or medicine without a license. One cannot operate a nuclear power plant, a hospital or pharmacy without appropriate authorization. So the mere fact that gambling can only be conducted by licensed establishments does not create a constitutional problem. Act 1151 is constitutional because the rational basis test is sufficiently satisfied.
>
> . . . .
>
> The General Assembly set out numerous pages of reasoning why racetracks should be the place where electronic games of skill should be allowed. That reasoning is rational and should not be disturbed.

Again, we agree with the circuit court. Our review of the Act reveals that the General Assembly clearly and specifically set forth its findings and purpose for the Act. Section 23-113-101 (Supp. 2005) provides:

> (a) It is found and determined by the General Assembly that:
>
> (1) Horse racing and greyhound racing parks in the State of Arkansas promote economic and agribusiness activity in the state and especially in the local communities where the horse racing and greyhound racing parks are located;
>
> (2) Arkansas horse racing and greyhound racing parks also often promote tourism and positive publicity for the state, including recent national publicity surrounding the racehorse "Smarty Jones," the winner of the 2004 Arkansas Derby and the 2004 Kentucky Derby, that went on to be honored as the 2004 best three-year-old thoroughbred horse in the country;
>
> (3) Many states, including Louisiana and Oklahoma, have authorized racetracks to offer wagering on additional forms of electronic games. The State of Texas is considering doing the same;
>
> (4) Many Arkansans travel to adjoining states in order to wager at legal gambling establishments in those states. This adversely impacts Arkansas tourism and results in certain economic activity leaving Arkansas for the benefit of adjoining states;
>
> (5) Economic and agribusiness benefits derived by the State of Arkansas from horse racing and greyhound racing parks in Arkansas,

including Arkansas farms and breeding operations, are and will continue to be adversely impacted by these developments in adjoining and other states;

(6) Although Arkansas horse racing and greyhound racing parks presently are allowed to offer wagering on electronic games based on previously run horse and greyhound races, racetracks in adjoining and other states are allowed to offer more types of electronic wagering games; and

(7) These developments place Arkansas horse racing and greyhound racing parks at a competitive disadvantage to their counterparts in other states and especially affect the economies of the local Arkansas communities and related agribusinesses where the horse racing and greyhound racing parks are located in Arkansas.

(b) It is further found and determined by the General Assembly that:

(1) If no effort is made to address these issues:

(A) Arkansans will continue to spend money out of state which might otherwise be spent in Arkansas;

(B) Arkansas horse racing and greyhound racing parks will remain at a competitive disadvantage to their out-of-state counterparts, and this will not only adversely impact horse racing and greyhound racing parks in Arkansas, but also related Arkansas agribusinesses, including farms and breeding operations, and other Arkansas businesses that realize economic benefits from horse racing and greyhound racing activities in Arkansas; and

(C) Jobs at Arkansas horse racing and greyhound racing parks and at related Arkansas agribusinesses, including farms and breeding operations, along with jobs at other Arkansas businesses that realize economic benefits from horse racing and greyhound racing activities in Arkansas, may become in jeopardy; and

(2) If this chapter is enacted and becomes law and local voters in the communities where the horse racing and greyhound racing parks are located approve the wagering on additional games of skill at Arkansas horse racing and greyhound racing parks as provided in this chapter:

(A) Arkansans will spend money in Arkansas which might otherwise have been spent out of state;

(B) Arkansas horse racing and greyhound racing parks will become more competitive, and this will provide economic benefits to related Arkansas agribusinesses, including farms and breeding operations, as well as other related Arkansas businesses; and

(C) Jobs at Arkansas horse racing and greyhound racing parks and at related agribusinesses, along with jobs at other businesses that realize economic benefits from horse racing and greyhound racing activities in Arkansas, will be better protected and more secure, and additional job opportunities may be created.

(c) For the reasons stated in subsections (a) and (b) of this section and other reasons, the General Assembly finds that cities or counties where horse racing or greyhound racing parks are located in Arkansas should have the opportunity to address these issues and promote economic development, tourism, and agribusiness by allowing the voters in those cities or counties to have the opportunity by local election to authorize horse racing or greyhound racing parks in their communities to offer wagering on additional forms of electronic games of skill.

Ark. Code Ann. § 23-113-101 (Supp. 2005). It is evident to us that the General Assembly's clear intent in enacting the Act was to protect Arkansas's economic and agribusiness activity in the state and in the communities in which horse and greyhound racing parks are located. In addition, the General Assembly specifically cited to the racing parks' competition in other states, which have permitted the same types of establishments to offer more types of electronic gaming, thereby placing Arkansas's tracks at a competitive disadvantage.

We hold that there was nothing irrational or arbitrary about the legislature's decision to authorize wagering on electronic games of skill at the state's establishments, which were already engaged in pari-mutuel wagering, which were subject to a competitive disadvantage by their counterparts in other states, and, most importantly, which are considered to be vital to the state and local economies. Moreover, the legislature's application of the Act is not expressly limited to Oaklawn and Southland; instead, it permits any "franchise holder" to conduct wagering on electronic games of skill, so long as there is compliance with the statutory

scheme. While at the current time Oaklawn and Southland are the only two franchise holders in the state, we observe no limitation which would prohibit another business entity from becoming a franchise holder similar to Oaklawn and Southland, thereby entitling the entity to the same rights provided for under the Act, assuming that the local electorate voted in favor of such.

In the instant case, Act 1151 is not only presumed rational, it is rational, pursuant to our review. Nor do we find that the appellants have met their burden in showing that the Act is clearly unconstitutional. For these reasons, we affirm the circuit court's order on this point.

Affirmed.

Special Justice JIM JACKSON joins.

Special Justice C.C. "CLIFF" GIBSON, III dissents.

BROWN and IMBER, JJ., not participating.

C.C. "CLIFF" GIBSON, III, Special Justice, dissenting. I am in agreement with the majority decision to the effect that 2005 Ark. Acts No. 1151 does not constitute a constitutionally impermissible delegation of legislative authority to "make law," but would note that Act 1151's granting of the power to call and at the same time determine the boundaries of the venue for a local option election to a private for-profit concern, and no one else, is troubling[1] as observed by the Arkansas Attorney General in his review of Act 1151. "Identifying the local electorate would seem to be a matter for the legislature, given that authority to conduct the additional wagering is contingent upon this vote." Op. Att'y Gen. # 2005-093.

I respectfully dissent from that part of the majority opinion that upholds Act 1151 in the face of our Constitution's prohibition against local and special legislation. Ark. Const. amend. 14, provides: "The General Assembly shall not pass any local or special act."

This straightforward blanket prohibition on local and special acts was recently employed by this court to invalidate another enactment of the legislature in *Wilson v. Weiss*, 368 Ark. 300, 245

[1] Arkansans are generally accustomed to local option elections being called by proper petitions signed by a significant percentage of registered voters, *see, e.g.*, Ark. Code Ann. § 3-8-502, or at the instance of the local governing body, *see, e.g.*, Ark. Code Ann. § 26-73-111; *see also* Ark. Const. amend. 7 (Initiatives and Referendums).

S.W.3d 144 (2006). The *Weiss* court reviewed the previous applications of amendment 14 to a piece of legislation in some detail as follows:

> We have "differentiated that 'special' legislation arbitrarily separates some person, place, or thing, while 'local' legislation arbitrarily applies to one geographic division of the state to the exclusion of the rest of the state." *McCutchen v. Huckabee*, 328 Ark. 202, 208, 943 S.W.2d 225, 227 (citing *Fayetteville Sch. Dist. No. 1 v. Arkansas State Bd. of Educ.*, 313 Ark. 1, 852 S.W.2d 122 (1993)).
>
> With regard to a challenge under Amendment 14, this court has also said:
>
>> [T]his court has repeatedly held that merely because a statute ultimately affects less than all of the state's territory does not necessarily render it local or special legislation. *Fayetteville, supra*; *City of Little Rock v. Waters*, 303 Ark. 363, 797 S.W.2d 426 (1990). Instead, we have consistently held that an act of the General Assembly that applies to only a portion of this state is constitutional if the reason for limiting the act to one area is rationally related to the purposes of that act. *Fayetteville, supra*; *Owen, supra*; *Board of Trustees v. City of Little Rock*, 295 Ark. 585, 750 S.W.2d 950 (1988); *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). Of particular interest, is *Phillips v. Giddings*, 278 Ark. 368, 646 S.W.2d 1 (1983), where we clarified that although there may be a legitimate purpose for passing the act, it is the classification, or the decision to apply that act to only one area of the state, that must be rational.
>
> *McCutchen*, 328 Ark. at 208-09, 943 S.W.2d at 227-28.
>
> In *McCutchen, supra*, we further said that when making a decision as to whether there is a rational reason for applying an act to only one county in this state, "this court may look outside the act and consider any fact of which judicial notice may be taken to determine if the operation and effect of the law is local, regardless of its form." 328 Ark. at 209, 943 S.W.2d at 228. We noted in that case that the purpose of Act 739 of 1995 was to provide funds for the construction of a multipurpose civic center (Alltel Arena in North Little Rock) that would increase tourism, recreation, and economic development throughout the state. We further recognized that in order to achieve those purposes, Pulaski County could well have

> been selected as the regional location for the center because of judicially noticed facts, such as the fact that Pulaski County is the most populous county in the state, because it is centrally located, and because it is the seat of state government. This court found that these reasons were not arbitrary or capricious. Because we acknowledged that it is not this court's role to second-guess the legislature, we concluded that the decision to construct the civic center in Pulaski County was rationally related to the intended purposes of Act 739 of 1995.

Weiss, 368 Ark. at 307-08, 245 S.W.3d at 150-51. Also of considerable importance to the *Weiss* Court was the history of and reasons for the adoption of Amendment 14 which it reviewed as follows:

> [O]ne commentator on Amendment 14's history has said that prior to the overwhelming approval of Amendment 14 by the people of Arkansas in 1926, our State had employed piecemeal limitations through the legislature on local and special legislation, which, over time, "proved inadequate to slow the pace of special and local legislation." Robert M. Anderson, *Special and Local Acts in Arkansas*, 3 Ark. L. Rev. 113, 114 (1949). In fact, editorials and articles published about the time of the passage of Amendment 14 showed that "proponents of the Amendment were chiefly concerned with the rapid growth of special and local legislation and the diminishing amount of time devoted to the consideration of general laws." *Id.* at 114 n.6, 943 S.W.2d 225. Initially, the enforcement of pre-Amendment 14 limitations on the passage of special and local acts was left largely to the legislature, which led to statements like that of Chief Justice Hart of the Arkansas Supreme Court, who said, "[i]f the judgment of the Legislature must control in all cases, the amendment (Amendment 14) could serve no purpose, and the people might just as well not have initiated and adopted it." *Id.* at 115, 943 S.W.2d 225 (quoting *Simpson v. Matthews*, 184 Ark. 213, 216, 40 S.W.2d 991, 992 (1931). Certainly, our case law supports that conclusion. *See, e.g.*, *Weiss v. Geisbauer*, 363 Ark. 508, 215 S.W.3d 628 (2005) (no rational basis existed for giving only Mississippi River border cities preferential tax treatment); *Humphrey v. Thompson*, 222 Ark. 884, 763 S.W.2d 716 (1954) (no justification or special need existed for appropriating funds to establish a vocational-technical school in only one county).

Weiss, 368 Ark. at 310, 245 S.W.3d at 152.

The pertinent query in the circumstances of this case is whether there is a rational basis for limiting wagering on "electronic games of skill" to persons running a dog or horse track as done by Act 1151.[2]

These "electronic games of skill" are defined by Act 1151 to be "games played through any electronic device or machine that afford an opportunity for the exercise of skill or judgment where the outcome is not completely controlled by chance alone," Ark. Code Ann. § 23-113-103(5)(A), and, notably, "do *not* include pari-mutuel wagering on horse racing and greyhound racing . . . whether . . . live racing, simulcast racing, or races conducted in the past and rebroadcast by electronic means," Ark. Code Ann. § 23-113-103(5)(B) (emphasis supplied). It is, therefore, abundantly clear that these "electronic games of skill" are in no way dependent for their operation on the running of a dog or horse race at the same facility in which they are housed and utilized.

Indeed, these electronic games of skill can obviously be used at a hotel, a restaurant, a tavern, a truck stop, and so on, without a dog or a horse being within a hundred miles, and certainly there are citizens in Arkansas that (together with any employees and the communities in which they are situated) would economically prosper just as much as any dog/horse track from being able to offer electronic games of skill, assuming, of course, that the legislature's findings set forth in Act 1151 about these machines creating economic prosperity are, in fact, true.[3] It is noteworthy in this regard that our sister state of Louisiana does not limit these machines to dog or horse tracks. *See* La. Rev. Stat. Ann. § 27:311.

I harken back to this court's language in *Weiss* in holding the act there involved violated amendment 14's prohibition against local and special legislation, *viz:* "*Any* community located in some proximity to a park or tourist attraction could claim

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[2] It is noted that gambling devices are prohibited by the general criminal laws of Arkansas. *See* Ark. Code Ann. §§ 5-66-104, -106. Gambling devices are defined by those laws as things "adapted, devised, or designed for the purpose of playing any game of chance, or at which any money or property may be won or lost." Ark. Code Ann. § 5-66-104. Also covered by these anti-gambling criminal statutes is betting on "any game of hazard or skill." Ark. Code Ann. § 5-66-113(a). Act 1151 operates to suspend the operation of these general criminal statutes of state-wide application relative to wagering on its "electronic games of skill" at authorized dog and horse tracks. Ark. Code Ann. § 23-113-602.

[3] There are certainly those who argue with some force that these gambling machines are a detriment to the economic health of citizens of an area where permitted.

comparable needs" to the City of Bigelow for $400,000 in State funds to fix their streets, sewer, etc. 368 Ark. at 309, 245 S.W.3d at 151 (emphasis supplied). Indeed, in the context of the present case cannot it be said that there are many citizens across Arkansas that have comparable needs for economic prosperity that could be addressed by revenue from electronic games of skill (assuming, again, the legislature is right in its finding that these machines generate such an economic benefit)? Rational thought or logic would also indicate that the State itself would derive greater tax and fee revenues from a wide, as opposed to concentrated, disbursement of these machines.

Why, then, limit the use of these machines to citizens whose only qualification is that they run a dog or horse track, and thereby exclude all other citizens of the State from legal use of same?[4] Appellee Oaklawn urges that the purpose behind the granting of a special privilege to dog and horse tracks to operate these gambling machines is to protect the business of horse (and presumably dog) racing, Appellee's Brief at Arg. 22-23, and certainly this is a reasonable construction of the legislative findings made in support of passage of Act 1151. However, is it a proper purpose to protect, and thereby promote the for-profit enterprises of a select few,[5]

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[4] It should be noted at this juncture that this writer in no way advocates state-wide use of these machines, but only points out that what is made legal for one should be made legal for all unless there is a clear and reasonable rational basis to do otherwise.

[5] Oaklawn argues mightily that it does not have a corner on the horse racing business as others can qualify to get a franchise and thereby become eligible to have electronic games of skill. Appellants rightly point out the extreme difficulty under existing law to qualify for and hold one of these franchises. *See, e.g.*, Ark. Code Ann. § 23-110-301(d) (only one franchise per county); Ark. Code Ann. § 23-110-303 (state-wide as opposed to local option election required); Ark. Code Ann. §§ 23-110-306, 23-111-306, 23-110-303 & 304, 23-111-303 & 304 (franchise holders other than Oaklawn and Southland have to face subsequent elections to maintain their franchises); Ark. Code Ann. §§ 23-110-305, 23-111-305 (new horse racing franchisees must invest at least $3 million in plant and equipment, and new dog racing franchisees must invest at least $1 million in plant and equipment). Indeed, there is real cause to believe that it is unreasonable to expect other Arkansans will seek one of these difficult to obtain and hard to keep horse or dog racing franchises, and certainly none have despite the passage of several decades. In such circumstances this court has said:

> Of course it may be argued that elasticity is found in the provision for reception of counties that may 'hereafter' fall within the circumscription. Practical operation, however, is to establish a system of road overseers by a process which excludes seventy-four other counties from the public policy so declared.

actually two, citizens *to the exclusion of all others* in the State of Arkansas? More pointedly, does amendment 14 to our Constitution permit the legislature to play favorites in handing out special privileges that these two, *and no one else*, can use to make money?

There must, of course, be a rational basis under amendment 14 for the granting of such a special privilege to such a select few Arkansas citizens. Although not addressed by the legislature in its findings, nor by the parties in their briefs, it has occurred to this writer that a possible reason for limiting the use of these machines to dog and horse tracks in Arkansas is because it is only at those places of business that one can legally make a wager or gamble in Arkansas subject to a limited exception for charitable bingo/raffles under Ark. Code Ann. § 23-114-101 et seq. Certainly it is the duty of this court to consider such a possible explanation for the granting of such a special privilege to a select two favorites. *Streight v. Ragland*, 280 Ark. 206, 214, 655 S.W.2d 459, 464 (1983).

Having noted the above, the clear terms of Act 1151 state that the running of a dog/horse track is irrelevant to the operation of these electronic games of skill[6] and, consequently, one is unable to discern any special expertise on the part of these dog/horse track operators that would make them specially or uniquely qualified to operate the subject machines and, furthermore, there is no reason to believe these dog/horse track people possess any special skill or expertise in running electronic games of skill machines.

State ex rel. Burrow v. Jolly, 207 Ark. 515, 518, 181 S.W.2d 479, 481 (1944). And there is the case of *Simpson v. Matthews*, 184 Ark. 213, 40 S.W.2d 991 (1931), where this court stated:

> It is a matter of judicial knowledge that Pulaski County is the only county in the State which contains over 75,000 inhabitants or which is likely to do so for any reasonable time in the future. No ordinary increase in population will place any other county in the same class within any reasonable time. No express words could have been used by the Legislature to limit the application of the act to Pulaski county more definitely than those employed.

Id. at 219, 40 S.W.2d at 993. There is, therefore, a clear basis in the precedents of this court to disregard the "anyone can get one" argument made by Oaklawn relative to dog/horse racing franchises. Having said that, there is a much more weighty constitutional concern in the context of this case, and that is whether the legislature may properly select only dog and horse tracks as special favorites to have a special privilege enjoyed by no one else to make money (all in the name of economic development and in order to protect and thereby promote the businesses of dog/horse tracks) given the prohibitions of amendment 14.

[6] *See* Ark. Code Ann. § 23-113-103(5).

There are those, however, who may still argue that what this is all about is gambling and handling the gambling activities of gamblers, and that the owners of dog/horse tracks know how to handle that sort of thing better than other folks in Arkansas because they have had considerable practice in the area of gambling on dog/horse races. If that be the criteria to hold that there is a rational basis under amendment 14 for limiting electronic games of skill machines to dog/horse tracks, then this writer cannot discern any limit on the special gambling legislation[7] that can be legitimately passed by the legislature notwithstanding amendment 14 for these dog/horse tracks to the exclusion of all others in Arkansas who might like to participate in the economic prosperity the legislature says comes from such things.

We are now at the heart of the conflict between amendment 14 and Act 1151 and at a core reason for the adoption of amendment 14 to our Constitution — a deep abiding concern about powerful special interests being able to legally get special favors from the legislature. It is this "playing of favorites" by the legislature that amendment 14 was specifically designed to stop, and so it should in this instance.

Simply put, there is no special skill or qualification held by a dog/horse track to run these electronic games of skill machines and, consequently, any law, including Act 1151, allowing *only them* to skirt the anti-gambling criminal laws of general application throughout our State would be unconstitutional under amendment 14 as prohibited "special" legislation as there is no rational basis for granting them, *and only them*, the exclusive right to use these electronic games of skill.

Instructive here are the laws pertaining to gambling at bingo. *See* Ark. Code Ann. § 23-114-101 et seq. They are in no way limited to dog/horse tracks. The point is that just because one is skilled at pari-mutuel betting on dog/horse races, does not mean they have any special skills or expertise at another type of gambling

[7] What's next? Making book on college football games? Roulette? Blackjack? Poker? Dice games? Is casino gambling already here in Arkansas? Probably so, much to the chagrin of the People of Arkansas (who probably think they get to vote on such things) as they are only another special act of the legislature away from every type of gambling a casino can offer. Indeed, one might reasonably argue that Act 1151 is an end run around the voters of Arkansas.

such as electronic games of skill which the legislature was careful to point out are "not" related to racing a dog or horse. *See* Ark. Code Ann. § 23-113-103(5)(B).

In conclusion, I would observe the following language of this court in these types of cases: "[I]n determining whether a law is public, general, special, or local, the courts will look to its substance and practical operation rather than to its title, form, and phraseology, 'because otherwise prohibitions of the fundamental law against special legislation would be nugatory.' " *State ex rel. Burrow v. Jolly*, 207 Ark. 515, 517-18, 181 S.W.2d 479, 480 (1944); *see also Laman v. Harrill*, 233 Ark. 967, 349 S.W.2d 814 (1961)(quoting same language with approval).

I would reverse the trial court with directions to enter judgment finding Act 1151 unconstitutional under amendment 14 to the Arkansas Constitution.

Jayson Wayne CARROLL *v.* STATE of Arkansas

CR 07-941 263 S.W.3d 535

Supreme Court of Arkansas
Opinion delivered September 27, 2007

Don G. Gillaspie, for appellant.

No response.

PER CURIAM. Appellant Jayson Wayne Carroll, by and through his attorney, has filed a motion for rule on the

clerk. His attorney, Don G. Gillaspie, states in the motion that our clerk has refused to accept his untimely tender of the record.

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 stated 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." *Id.* 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.*

Although Mr. Gillaspie does not accept responsibility for failing to perfect this appeal, it is clear that he failed to tender the record in a timely manner. Pursuant to Ark. R. App. P. – Civ. 5(a) (2007), the record on appeal must be filed with our clerk "within 90 days from the filing of the notice of appeal, unless the time is extended by order of the circuit court as hereinafter provided." The circuit court may extend the time for filing the record "by order entered before expiration of the period prescribed in subdivision (a) of this rule." Ark. R. App. P. – Civ. 5(b)(1) (2007). Here, the judgment and commitment order was entered on January 10, 2007, and the notice of appeal was filed on January 23, 2007. Although a motion for extension of time to file the record was timely filed on April 3, 2007, and the circuit court held a hearing on the motion in a timely manner, the order extending the time to file the record was not entered before April 23, 2007, which was the deadline for entry of the extension order under Ark. R. App. P. – Civ. 5(a). The record, as certified by the circuit court clerk on July 25, 2007, was not tendered to our clerk until August

14, 2007. No further facts need to be determined. Mr. Gillaspie failed to file the record in a timely manner.[1]

In accordance with *McDonald v. State*, *supra*, there is no need for Mr. Gillaspie to admit fault. The record plainly shows that he is at fault. The motion for rule on clerk is granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion granted.

Billy Ray SHELTON *v.* STATE of Arkansas

CR 07-935 263 S.W.3d 558

Supreme Court of Arkansas
Opinion delivered September 27, 2007

Joseph C. Self, for appellant.

No response.

PER CURIAM. Appellant Billy Ray Shelton, by and through his attorney, Joseph C. Self, brings the instant motion for

[1] We note that the April 23, 2007 deadline for entry of the extension order occurred well before late July and August 2007, when, according to Mr. Gillaspie, he underwent surgery and was in and out of the hospital.

rule on clerk after the clerk of this court refused to accept the record in this case due to noncompliance with Ark. R. App. P. – Civ. 5(b). The clerk refused the filing because there was no finding in the order by the circuit court that "[a]ll parties have had the opportunity to be heard on the motion, either at a hearing or by responding in writing" as required by Rule 5(b)(1)(C). Shelton admits that there is a violation of Rule 5; nevertheless, Shelton asks this court to grant the instant motion because the violation of Rule 5 was a mere technical violation.

Rule 5(b)(1)(C) provides in part:

> (b) *Extension of time.*
>
> (1) If any party has designated stenographically reported material for inclusion in the record on appeal, the circuit court, by order entered before expiration of the period . . . may extend the time for filing the record only if it makes the following findings:
>
> . . . .
>
> (C) All parties have had the opportunity to be heard on the motion, either at a hearing or by responding in writing[.]

This court has made it very clear that we expect strict compliance with the requirements of Rule 5(b), and that we do not view the granting of an extension as a mere formality. *See, e.g.*, *Russell v. State*, 368 Ark. 439, 246 S.W.3d 856 (2007) (per curiam); *Roy v. State*, 367 Ark. 178, 238 S.W.3d 117 (2006) (per curiam). The order of extension in this case makes no reference to the findings of the circuit court required under Rule 5(b)(1)(C). Accordingly, we remand this matter to the circuit judge for compliance with Rule 5(b)(1)(C).

Remanded.

Christopher Alan WARD *v.* STATE of Arkansas

CR 07-937 263 S.W.3d 537

Supreme Court of Arkansas
Opinion delivered September 27, 2007

Dee A. Scritchfield, for appellant.

No response.

PER CURIAM. Appellant Christopher Alan Ward, by and through his attorney, has filed a motion for belated appeal. His attorney, Dee A. Scritchfield, a Benton County deputy public defender, states in the motion that the notice of appeal was filed late due to a lack of due diligence on her part.

This court has 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 stated 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." *Id.* at 115, 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 if good reason is present.

(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*, Ms. Scritchfield has candidly admitted fault. The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Andre Peter DUNN *v.* STATE of Arkansas

CR 07-96 264 S.W.3d 504

Supreme Court of Arkansas
Opinion delivered October 4, 2007

Gary McDonald and *William A. McLean*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Nicana C. Sherman*, Ass't Att'y Gen., for appellee.

JIM HANNAH, Chief Justice. Appellant Andre Peter Dunn was convicted of first-degree murder and sentenced to a term of life imprisonment. For reversal, Dunn argues that the circuit court erred in finding that he lacked standing to object to a search of the decedent's apartment. He contends that the search violated his constitutional rights pursuant to the Fourth Amendment of the United States Constitution and article 2, § 15 of the Arkansas Constitution. Dunn also contends that the circuit court erred when it allowed into evidence results of luminol testing conducted at the apartment. Finally, Dunn argues that the circuit court erred in denying his motion for directed verdict because there was insufficient evidence at trial to support his conviction. As this is a criminal appeal in which a sentence of life imprisonment has been imposed, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(2). We find no error and, accordingly, we affirm.

Dunn argues that there was insufficient evidence to sustain his conviction for first-degree murder. While the sufficiency-of-the-evidence argument was not Dunn's first point on appeal, due to double-jeopardy concerns, we review the issue before reaching other issues on appeal. *See Isom v. State*, 356 Ark. 156, 148 S.W.3d 257 (2004). In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Malone v. State*, 364 Ark. 256, 217 S.W.3d 810 (2005). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Tillman v. State*, 364 Ark. 143, 217 S.W.3d 773 (2005).

Circumstantial evidence may constitute substantial evidence to support a conviction. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). Guilt can be established without direct evidence and evidence of guilt is not less because it is circumstantial. *Id.* The longstanding rule in the use of circumstantial evidence is that, to be substantial, the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused. *Id.* The question of whether the circumstantial evidence excludes every hypothesis consistent with innocence is for the jury to decide. *Id.* We will disturb the jury's determination only if the evidence did not meet

the required standards, leaving the jury to speculation and conjecture in reaching its verdict. *Brunson v. State*, 368 Ark. 313, 245 S.W.3d 132 (2006).

On November 23, 2003, Dunn placed a 911 call advising that he had found his girlfriend, Wandala Creer, dead in her apartment at 300 B Smith Street in Magnolia. Officers Mark Bridges and Michael Cauldwell of the Magnolia Police Department responded to the 911 call. When Bridges arrived, he was met outside the apartment by Dunn. Dunn told Bridges that he had used his key to unlock the door of the apartment, went inside, and found Creer's dead body on the couch. Dunn said he then covered Creer's body with a comforter. Bridges told Dunn to wait outside; then, Bridges entered the apartment and found Creer's body on the couch. Bridges observed what appeared to be blood stains on the wall near the couch, and he noticed that Creer had a large amount of blood around her throat area. Bridges and Cauldwell then walked through the apartment to make sure there was no one else inside who might be injured or deceased. Bridges stated that, at the time he and Cauldwell walked through the apartment, he did not consider Dunn a suspect; rather, he believed that Dunn was a "bereaved boyfriend."

Bridges asked Dunn if he would be willing to go to the police department and speak to a detective. Dunn agreed to go to the police station, and an officer transported him there. Dunn was not placed under arrest.

Meanwhile, officers led by Detective Todd Dew conducted a search of the apartment. Dew testified that he observed in the living room blood spatter on the walls, the ceiling, and the couch. He lifted the comforter from Creer's body and began taking photographs of the scene. In addition, officers dusted for fingerprints, took blood samples, and gathered other evidence from the scene.

After completing the crime-scene investigation, Dew went to the police department to speak to Dunn. In a taped statement, Dunn told Dew that he last saw Creer on a Friday evening, and that he had left the apartment after the two had an argument. Dunn said that he tried to call Creer sometime that weekend, but was unable to reach her. He said that he returned to the apartment Sunday morning to find Creer dead.

Dew stated that he asked Dunn if he could take his fingerprints for purposes of elimination. Dunn agreed, and during the fingerprinting process, Dunn told Dew that he needed to tell him

something. Dunn then admitted that he had actually found Creer's body on Friday night, rather than Sunday morning when he called the police. Dunn stated that he found Creer, touched her body, and went into the bathroom to wash his hands. He then retrieved some clothing and personal items from the apartment and left. Dunn told Dew repeatedly that he did not kill Creer.

Dew obtained a search warrant and returned to the apartment on November 24, the following day, for luminol testing to detect the presence of blood in the apartment that had been washed away or cleaned. Dew testified that his luminol testing in the bathroom showed areas consistent with the presence of blood on the floor, in the sink, on the wall behind the sink, and in the bathtub.

At trial, Dr. Charles Kokes, Chief Medical Examiner at the Arkansas State Crime Lab, testified that he had conducted the autopsy of Creer's body. He stated that the cause of death was based on both blunt-force injuries and sharp-force injuries. He testified that the blunt-force injuries consisted of a series of lacerations or tears in the skin on the back of her head, her forehead, the top of her head, and the right side of her head, with the majority of blows being to the left side of her head. One of the blows on the left side of Creer's head fractured her skull, causing hemorrhaging and bruising to her brain. The sharp-force injuries consisted of four stab wounds and cuts on the front of the neck. Dr. Kokes stated that one of these injuries was relatively larger and deeper than the others, extending deep into the musculature of the upper neck and extending internally across the base of the tongue. Dr. Kokes could not specify an exact time when death occurred, because of the intervening events before the autopsy, but stated that decomposition had begun. He determined that the manner of death was homicide.

Dunn testified at trial that most of the "disagreements" he and Creer had were about money. James Shaw testified that on Friday, November 21, 2003, he had gone next door to Creer's to return Dunn's cell phone, and that Dunn was present and commented that Creer "accused me of getting her money, [but] it's right there. Look. She's walking all over it," and put the money back on the coffee table. No testimony was presented about finding any money on the coffee table after Creer's body was discovered. Shaw also testified that, the same day, at Creer's apartment, he observed a metal pipe. Shaw stated that he believed he might have seen the pipe there prior to that day.

Shaw testified that he had borrowed Dunn's cell phone on Friday to call Nichole Hunter to pick him up and take him to the convenience store so he could get some cigarettes. He stated that it was getting dark when she got there to pick him up. Hunter testified that while she was waiting for Shaw in the parking lot about 5:45 p.m., she saw Dunn in Creer's ground-floor apartment, taking his shirt off, looking at it, then putting it back on, and acting fidgety. Hunter took Shaw to the store, and they returned a few minutes later, just before 6:00 p.m., and Hunter noticed that Creer's apartment door was closed and the lights were off.

Dunn admitted that he sometimes spent money on crack cocaine or marijuana. Frank Moss testified that he gave Dunn between $40 and $60 worth of crack on credit on Friday, November 21, 2003. He added that Jason Shepard was at his house when Dunn came to get the crack. Dunn admitted that he bought drugs from Moss, but he claimed that he had not gotten any the night Creer was murdered. Moss testified that he told Dunn that if he did not pay, he "was going to bust his mother fucking head." Shepard testified that he overheard Moss tell Dunn that something would happen to him if he did not have Moss's money. Shepard said that when Dunn returned to Moss's house later that night, he heard Dunn tell Moss, "[r]emember what you told me earlier about if I didn't have your money? I just had to do another mother fucker just the same way." Moss testified that when Dunn came over the second time that night, Dunn told him, "you know what you told me you were going to do to me . . . [w]ell shit, I just had to bust a some-bitch's head."

In his description of his relationship with Creer, Dunn alleged that she would frequently get drunk and fall asleep on the couch with the apartment door wide open and he would have to get her up and put her to bed. In contrast, Creer's mother testified that her daughter regularly slept on a couch instead of a bed and had done so for many years. She said that her daughter would never leave a front door open and would make sure that it was closed and locked.

Dunn contends that the circuit court erred when it failed to grant his motion for directed verdict because the State failed to present sufficient evidence to support a conviction for first-degree murder. Dunn argues that the State never produced a murder weapon, and that the testimony about a metal pipe proved nothing

other than a metal pipe may have been in the apartment. Further, he contends that the State failed to prove that he had any connection to the pipe.

Dunn also argues that there is no physical evidence tying him to the crime. Specifically, he states that his fingerprints were not found in the sink, where the State theorized there had been a cleanup of the crime scene, and he states that there was no DNA evidence that connected him to the crime scene. In addition, Dunn claims that those who testified that they heard Dunn talk about doing harm to Creer are not credible witnesses.

To prove murder in the first degree, the State must show that a person, with the purpose of causing the death of another person, the person caused the death of another person. Ark. Code Ann. § 5-10-102(a)(2) (Repl. 1997). A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result. Ark. Code Ann. § 5-2-202(1) (Repl. 1997). A person's intent or state of mind at the time of the offense is seldom apparent. *Wyles v. State*, 368 Ark. 646, 249 S.W.3d 782 (2007). However, a person is presumed to intend the natural and probable consequences of his or her actions. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). Because intent cannot be proven by direct evidence, the jurors are allowed to draw upon their common knowledge and experience to infer it from the circumstances. *Watson v. State*, 358 Ark. 212, 188 S.W.3d 921 (2004). Intent can be inferred from the type of weapon used, the manner of use, and the nature, extent, and location of the trauma suffered by the victim. *Harshaw v. State*, 348 Ark. 62, 71 S.W.3d 548 (2002).

The State contends that, beyond a reasonable doubt, the jury could conclude from the direct and circumstantial evidence adduced at trial that Dunn had the motive and the opportunity to kill Creer. We agree. Dunn had a key to the apartment, and he admitted that he was at the apartment on the evening of the murder. Testimony at trial revealed that Dunn purchased drugs that night from Frank Moss and told Moss that he had "bust[ed] a some-bitch's head." Shepard testified that he overheard Dunn tell Moss, "[r]emember what you told me earlier about if I didn't have your money? I just had to do another mother fucker just the same way." Dunn lied to the police during the investigation; he first said that he found Creer's body on Sunday morning prior to calling 911, but he later admitted that he saw Creer dead on Friday night.

We note that Dunn attempts to discount witness testimony by claiming that the witnesses are not credible. This court has repeatedly held that the weighing of evidence and witness credibility are matters left solely to the discretion of the jury. *Wyles, supra.* Dunn himself testified at trial, and some of his testimony was inconsistent with testimony from other trial witnesses. 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. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). Based upon the foregoing, we hold that there is substantial evidence to support a conviction for first-degree murder.

Standing to Challenge Search

The circuit court concluded that Dunn lacked standing to challenge the search of the apartment and denied Dunn's motion to suppress evidence. In reviewing the denial of a motion to suppress, we conduct a de novo review based on the totality of the circumstances, giving due consideration to the findings of the trial judge. *See Blanchett v. State*, 368 Ark. 492, 247 S.W.3d 477 (2007). We will reverse a circuit court's ruling denying a motion to suppress only if the ruling is against the preponderance of the evidence. *See Hart v. State*, 368 Ark. 237, 244 S.W.3d 670 (2006).

We have recognized that, where the defendant owns or possesses the property searched, he or she has standing to challenge a search under the Fourth Amendment. *See, e.g., Mazepink v. State*, 336 Ark. 171, 987 S.W.2d 648 (1999); *Hodge v. State*, 332 Ark. 377, 965 S.W.2d 766 (1998). The defendant's rights are violated if the challenged conduct invaded his or her legitimate expectation of privacy. *See Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863 (1992). A person's Fourth Amendment rights are not violated, however, by the introduction of damaging evidence secured by the search of a third person's premises or property. *Id.*; *Fernandez v. State*, 303 Ark. 230, 795 S.W.2d 52 (1990) (citing *Rakas v. Illinois*, 439 U.S. 128 (1978)).

At the suppression hearing, Dunn testified that he had a key to the apartment, given to him by Creer. Dunn stated that he had made phone calls about renting the apartment and filled out the rental application, but had not listed himself as the renter because he was not working at the time. He claimed that he lived there

with Creer at the time she was killed. However, on cross-examination, Dunn stated that he had moved most of his things out of the apartment one to two weeks prior to Creer's death because the two had a disagreement.

Dunn alleged that he and Creer had made up and that he intended to return. He claimed that he had stayed at the apartment with Creer since the time he moved out and had personal items in the apartment, such as houseshoes, deodorant, and underwear. The State avers that, whatever Dunn's alleged intent was does not matter because he also admitted that he had retrieved those few remaining belongings when he took them away with him on the day of the murder.

The circuit court concluded that, by Dunn's own admission, his role as occupant of the apartment had terminated one to two weeks before the death of Creer, and that Dunn failed to show that he had resumed the role of occupant. The credibility of witnesses who testify at a suppression hearing is for the trial judge to determine, and this court defers to the superior position of the trial judge in matters of credibility. *Baird v. State*, 357 Ark. 508, 182 S.W.3d 136 (2004).

In addition, Dunn made no showing that he had been an "overnight guest" in Creer's apartment at the time the search occurred. Dunn told the dispatcher and the responding officers that he had gone to the apartment Sunday morning and found Creer. Thus, by his own admission, he had not been an overnight guest at the time of the search. Therefore, unlike the accused in *Minnesota v. Olson*, 495 U.S. 91 (1990), Dunn had no reasonable expectation of privacy in Creer's apartment. *See, e.g.*, *Marshall v. State*, 316 Ark. 753, 875 S.W.2d 814 (1994). In sum, Dunn failed to show that he owned, leased, or maintained control over the apartment. *Davasher, supra.* The proponent of a motion to suppress has the burden of showing that his own rights under the Fourth Amendment of the United States Constitution or article 2, § 15 of the Arkansas Constitution have been violated by the challenged search or seizure, and that has not occurred in this case. *See id.* We hold that the circuit court did not err in concluding that Dunn lacked standing to challenge the search of the apartment. Because we hold that Dunn lacked standing, we need not address his challenges to the circuit court's denial of his motion to suppress.

Luminol Testing

Dunn argues that the circuit court erred when it allowed into evidence the results of luminol testing. Prior to trial, Dunn filed a motion in limine to exclude the results of luminol testing and a motion to suppress any evidence obtained as a result of those tests, pursuant to this court's holding in *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993). In *Brenk*, we held that it was reversible error to admit evidence of luminol testing showing positive results for blood without also admitting evidence of follow-up tests confirming the presence of blood. Here, Detective Dew testified that the luminol testing showed positive results for blood on the bathtub plug lever, the soap dish on the wall, the bathtub wall, the floor in the area in front of the sink and toward the bathtub, the sink, the wall behind the sink, and the faucet knob and cap. Kermit Channel, with the Arkansas State Crime Lab, testified that DNA testing was done on the samples obtained from Creer, her shirt, the comforter covering her body, and a faucet knob, and that the testing he performed showed that the blood in all the samples was that of Creer.

Dunn argues that the State used a drop of blood found upon the faucet knob, which was confirmed to be Creer's blood, to justify the wholesale usage of other unconfirmed luminol testing. He states that lab confirmation of the presence of human blood on the faucet knob does not prove that the substances found in other areas of the bathroom were human blood or blood of any kind. Dunn contends that the evidence of the results of the luminol testing in this case gave the impression that there was a cleanup, which was highly prejudicial, making this evidence confusing and misleading to the jury.

In *Brenk*, luminol testing was done of appellant's trailer, his car, his van, and a building behind his trailer. At trial, a criminalist for the Arkansas State Crime Lab testified that the luminol testing revealed positive reactions for blood on the building, the trailer, and the car. We stated:

> In this case, very little additional testing was done to determine whether the substances causing the luminol reaction were human blood since a minute amount of blood was actually found. The only samples which could be found and which tested positive for human blood consisted of a small speck of blood found on the back of a kitchen drawer, and an area of blood about one millimeter square found on the inside of one of appellant's pairs of jeans. The

> blood samples were so small that the testing could only establish that the sample tested was human blood and could not establish the blood type of the samples or connect the samples in any way with the victim, Lou Alice Brenk, or appellant. A bed sheet found in the bedroom of appellant's trailer tested positive for the presence of blood, but the results of the test used to establish whether blood is human were negative. Given the lack of follow-up testing, the results of the luminol test, which are presumptive only, had no probative value and did nothing to establish the likelihood of the presence of Lou Alice Brenk's blood, or even human blood, in the trailer, the block building, appellant's car, or on any of the other items tested where follow-up testing was not able to confirm the presence of human blood, much less blood of the same blood type as Lou Alice Brenk. *State v. Moody,* 573 A.2d 716 (Conn. 1990). Since we have determined that luminol tests done without follow-up procedures are unreliable to prove the presence of human blood or that the substance causing the reaction was related to the alleged crime, we find it was error for the trial court to admit the evidence of luminol testing done by Mr. Smith where there was no follow-up testing done to establish that the substance causing the luminol reaction was, in fact, human blood related to the alleged crime. *See Moody*, 573 A.2d 716 (Conn. 1990); *see also Lee v. State*, 545 N.E.2d 1085 (Ind. 1989); *cf. Commonwealth v. Yesilciman*, 550 N.E.2d 378 (Mass. 1990).

Brenk v. State, 311 Ark. at 593-94, 847 S.W.2d at 9.

In *Palmer v. State*, 315 Ark. 696, 870 S.W.2d 385 (1994), we held that it was error for the trial court to admit the evidence of luminol testing done by a criminologist from the State Crime Lab where there was no follow-up testing done to establish the substance causing the luminol reaction was, in fact, human blood related to the alleged crime. In that case, a forensic serologist testified that he had examined and tested four samples of wallpaper from the residence. On two samples he was able to identify human blood but not the blood type; on one sample he was able to detect blood but could not determine whether it was animal or human; in the remaining sample he could not identify blood of either kind. Tests on scrapings from appellant's vehicle were negative. The serologist later examined additional wallpaper samples from the appellant's residence and found no blood; these samples were submitted to the FBI and the report was negative. Based on our holding in *Brenk*, we reversed and remanded. *See Palmer, supra.* In *Young v. State*, 316 Ark. 225, 871 S.W.2d 373 (1994), we held that

it was error for the trial court to allow evidence of positive luminol test reactions on appellant's truck where follow-up tests from the State Crime Lab did not confirm the presence of human blood.

We believe that *Brenk* and its progeny are distinguishable from the instant case because in those cases either no follow-up testing was done, *see Brenk, supra*, or the follow-up testing that was conducted did not confirm the presence of human blood. *See Young, supra*; *Palmer, supra*. Here, there is no dispute that Dunn washed his hands in the bathroom sink and that luminol testing was conducted within two feet of the bathroom sink and within less than one foot above the bathroom sink. Testimony at trial revealed that human blood belonging to Creer had been identified in the immediate vicinity of the area where luminol testing was done. Dunn's testimony that he washed Creer's blood from his hands after touching her body connects the blood evidence directly to the crime. We conclude that adequate follow-up testing was conducted in this case. Accordingly, we hold that the circuit court did not err in denying Dunn's motion in limine to exclude results of luminol testing and motion to suppress any evidence obtained as a result of the testing.

4-3(h) Review

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

Affirmed.

James HYDEN and Hyden, Miron and Foster, PLLC *v.*
CIRCUIT COURT of PULASKI COUNTY, Arkansas,
The Honorable Willard Proctor Jr., Circuit Judge

06-1328 264 S.W.3d 493

Supreme Court of Arkansas
Opinion delivered October 4, 2007

Wright, Lindsey & Jennings, LLP, by: *Bettina E. Brownstein* and *Troy A. Price*, for petitioners.

Griffin, Rainwater & Draper, PLC, by: *Paul S. Rainwater*, for interested party Charles Grassi, Sr.

JIM HANNAH, Chief Justice. James W. Hyden, and Hyden, Miron & Foster, P.L.L.C. ("Hyden") petition this court for a writ of prohibition alleging that because more than ninety days had passed since entry of judgment, and because there was no evidence of misrepresentation by Hyden in moving for dismissal, the circuit court was without jurisdiction to vacate the judgment of dismissal under Ark. R. Civ. P. 60. We disagree and deny the petition. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(3).

On June 3, 2002, Grassi filed a legal malpractice action against Hyden. The record reveals that discovery disputes have existed in this case over many months, and that on February 7, 2006, the circuit court entered an order that Grassi respond to certain discovery within thirty days or suffer dismissal. Subsequently, Hyden filed a motion to dismiss based on an alleged failure to comply with the circuit court's February 7, 2006, order. The case was dismissed with prejudice on March 30, 2006, for failure to timely file a response to the motion to dismiss with the circuit court.

On July 31, 2006, Grassi filed a motion in the circuit court to vacate the judgment of dismissal alleging that the dismissal was entered without notice or a hearing; he further alleged that he had responded to the discovery at issue in the motion to dismiss, and that he had timely responded to the motion to dismiss and Hyden's counsel failed to make the court aware that Grassi had timely served a response to the motion to dismiss on Hyden's counsel. He also alleged that he first learned of the dismissal on July 18, 2006, although a certificate of service indicates that his counsel was served with the dismissal at the time it was granted.

At the hearing on the motion to vacate the judgment, Grassi asserted that "however innocent," counsel for Hyden may have been in representing to the court that the motion to dismiss should be granted for failure to timely file a response with the circuit court, it constituted a misrepresentation. Counsel for Hyden responded as follows:

> Your Honor, there was no misrepresentation. First of all, I don't think a misrepresentation has been shown such as to take this case out of Rule 60.
>
> We filed our motion. We checked with the Court to see if a reply — excuse me, response had been filed. At the time that the Court entered the order, a response had not been filed.
>
> Frankly, I was not in the office. I don't know when a response was received. I was in the hospital actually, but I know that we checked with the Court to see if a response had been filed and it had not been and, therefore, this Court entered the order on the basis that no response had been filed and, in fact, no response was filed until after the order was entered.

Hyden filed its motion to dismiss, representing to the circuit court that it was entitled to a dismissal based on Grassi's failure to file a

response with the circuit court. However, Hyden's counsel was in error as to the law. A timely response had been served on her office of which she was apparently unaware. An attorney is expected to know the law. *Lewellen v. Sup. Ct. Comm. on Prof'l Conduct*, 353 Ark. 641, 110 S.W.3d 263 (2003). As acknowledged by the parties and the circuit court at the hearing, under Ark. R. Civ. P. 5(c), the response to the motion was timely. Under Rule 5(c), it had to be filed with the circuit court before the date of service or "within a reasonable time thereafter." The circuit court found that filing the response one day after the response was received by Hyden's counsel was "within a reasonable time thereafter." That ruling has not been appealed. We note as well that the circuit court informed the parties that it was taking judicial notice of problems the circuit clerk's office was having in getting documents timely filed.

The circuit court granted the motion to vacate based on Rule 60 stating that "[t]here was no misrepresentation on the part of the defendant," and that "had I known about the service, I wouldn't have entered the order at all . . . I think that the order of dismissal should be set aside based upon the Clerk's not having a copy of the actual response in the file."

Hyden seeks a writ of prohibition alleging the circuit court was wholly without jurisdiction to grant the motion to vacate judgment. As this court has often stated, a writ of prohibition is an extraordinary writ. *McCarthy v. Pulaski County Circuit Court*, 366 Ark. 316, 235 S.W.3d 497 (2006). The writ should issue only when the lower court is wholly without jurisdiction. *Id.* Further, the writ is appropriate only when there is no other remedy, such as an appeal, available. *Id.* This court has defined jurisdiction as "the power to hear and determine the subject-matter in controversy between the parties to the suit; to adjudicate or exercise any judicial power over them." *Young v. Smith*, 331 Ark. 525, 964 S.W.2d 784 (1998) (quoting *Lamb & Rhodes v. Howton*, 131 Ark. 211, 213, 198 S.W. 521, 522 (1917).

Rule 60 provides in pertinent part as follows:

> (a) *Ninety-Day Limitation.* To correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order or decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk.
>
> . . . .

> (c) *Grounds for Setting Aside Judgment, Other than Default Judgment, After Ninety Days.* The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the expiration of ninety (90) days of the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:
>
> . . . .
>
> (3) For misprisions of the clerk.
>
> . . . .
>
> (4) For misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party.

The circuit court's decision was based on the circuit clerk's failure to timely file the response to the motion to dismiss. Under Ark. R. Civ. P. 60(c)(3) a judgment may be vacated based on misprisions of the clerk; however, the circuit court erred in reaching it finding of a clerical misprision. A clerical misprision occurs when a court clerk's mistake or fraud is apparent from the record. *New Holland Credit Co., LLC v. Hill*, 362 Ark. 329, 208 S.W.3d 191 (2005). No mistake of the clerk is apparent from the record. The response in the court file bears a file date, and the record does not reveal any error by the clerk.

However, while the circuit court erred in its reasoning in finding that the judgment should be vacated, the decision to vacate the judgment was correct. We may affirm because the circuit court reached the right result even if for the wrong reason. *See, e.g.*, *First Security Bank v. Estate of Leonard*, 369 Ark. 213, 253 S.W.3d 434 (2007).

Pursuant to Ark. R. Civ. P. 60(c)(4), a judgment may be vacated more than ninety days after being filed with the clerk where there was misrepresentation or fraud. While the circuit court and the parties appear to agree that any misrepresentation was inadvertent, in *Davis v. Davis*, 291 Ark. 473, 476, 725 S.W.2d 845, 847 (1987), we discussed Rule 60 and stated that, "[w]e have many times held that there may be a constructive fraud even in the complete absence of any moral wrong or evil intention." When Hyden's counsel presented the motion to dismiss to the circuit court, counsel was representing by that motion that it was entitled

to have the case dismissed because Grassi had not filed a timely response. Hyden's counsel had a duty to be aware of the response served on her office and to make the circuit court aware that a timely response had been provided. It is apparent that counsel made representations to the circuit court that were incorrect.

While the circuit court expressly found that there were no misrepresentations on the part of the defendant, it also found that had it known of Grassi's response to the motion to dismiss, it would not have dismissed the case. Thus, there cannot be a finding that Hyden's counsel made no misrepresentations, but rather there was a finding that no intentional misrepresentations were made. Counsel was served with the response to the motion to dismiss and failed to let the court know. Further, counsel represented that Hyden was entitled to an order of dismissal because a response had not been timely filed with the circuit clerk, which was a misrepresentation of what was required by law. Obviously a misrepresentation was made to the circuit court on the status of the case. The fact that the misrepresentations were inadvertent does not alter their effect on the circuit court; they resulted in a miscarriage of justice that Rule 60 is designed to remedy. Pursuant to Rule 60, the circuit court had the power to hear and determine the subject-matter in controversy between the parties on the issue of vacating the judgment. There is no merit to the claim that the circuit court was acting outside its jurisdiction.

Writ denied.

GLAZE and BROWN, JJ., dissent.

IMBER, J., not participating.

ROBERT L. BROWN, Justice, dissenting. The decision in this case is extraordinary. The circuit judge specifically found that no misrepresentation had been made to him by counsel for Hyden. He further said that he too thought that the law required a filing of the response in the circuit clerk's office for it to be effective and that he had checked the case file and found no response.

Here are the judge's exact words:

> I guess I learned something I did not realize before, but I had always read the Rules of Civil Procedure to require the filing of the complaint or rather the response of (sic) pleading prior to the time that the motion — the time for service of motion was due.

> I never realized that actually it does not say that. It actually says it has to be served within the time and then it says it has to be filed on the party with the clerk's office before service, so within a reasonable time after.

The circuit judge acknowledged that both parties had stipulated to the fact that Grassi's response had actually been timely served, and he found that the filing of Grassi's response was made within a reasonable time after service. The following colloquy then took place:

> HYDEN'S ATTORNEY: There was no misrepresentation made to the Court at all. The Court, as I understand, looked to whether the response had been filed —
>
> THE COURT: That's correct.
>
> HYDEN'S ATTORNEY: — and found that there had been a timely filing. so it had nothing to do —
>
> THE COURT: With the parties, exactly. That's true. For the record, I need to make that clear.
>
> HYDEN'S ATTORNEY: There was no misrepresentation made at all.
>
> THE COURT: Right.
>
> GRASSI'S ATTORNEY: But, Your Honor, a precedent was forwarded to the Court for that purpose, for entry and I think that implies that it was a fault.
>
> THE COURT: Well, I agree with [Hyden's attorney]. I want to make the record clear. There was no misrepresentation on the part of the defendant. That is correct, the Court did look to the — the Court looked to the file to see whether or not — well, I mean there was a representation that there had not been a filing. And so the Court looked to the clerk's file and there was not a response that was made to it. So that's what the Court did.

Nor does constructive fraud control this case. Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt or the valid reason, the law declares fraudulent

because of its tendency to deceive others; neither actual dishonesty or purpose nor intent to deceive is an essential element of constructive fraud. *See South County, Inc. v. First Western Loan Co.*, 315 Ark. 722, 871 S.W.2d 325 (1994). How can the majority conclude that the circuit judge was the victim of constructive fraud when the judge made his own independent determination? He said he checked the clerk's file and found no response and further said he had always read the Rules of Civil Procedure to require the filing of the response with the clerk before service on opposing counsel. Of course, constructive fraud was never argued by counsel in the case to the circuit judge or raised as an issue in this appeal.

Despite this, the majority says a misrepresentation was practiced on the circuit judge. Never mind that the circuit judge said this did not happen and that he checked the clerk's file on his own. Never mind that one of the five required elements of fraud is justifiable reliance by the purported victim of the misrepresentation, *see Bullock v. Barnes*, 366 Ark. 444, 236 S.W.3d 498 (2006), and the circuit judge said there was no misrepresentation for him to rely on.

I am convinced that we wander far afield when we superimpose our judgment on a trial judge, especially when we presume to tell that judge what his state of mind was and whether something was misrepresented to him when he says it was not.

I respectfully dissent.

IMBER, J., not participating.

GLAZE, J., joins.

Kevin Ray ADKINS *v.* STATE of Arkansas

CR 06-1082 264 S.W.3d 523

Supreme Court of Arkansas
Opinion delivered October 4, 2007

Butler, Green & Boyd, P.A., by: *Adam H. Butler*, for appellant.

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

TOM GLAZE, Justice. Appellant Kevin Adkins was convicted by a Benton County jury of aggravated assault on a correctional facility employee, possession of marijuana, and failure to register as a sex offender. The jury recommended sentences of fifteen years' imprisonment and a $10,000 fine for the failure-to-register conviction; fifteen years' imprisonment and a $10,000 fine for aggravated assault; and 30 years in prison and a $5,000 fine for the possession conviction. The trial court then sentenced Adkins to fifteen years for failure to register and thirty years for possession of marijuana, to run concurrently; the court also suspended imposition of sentence for the aggravated-assault conviction for fifteen years and ordered payment of a $10,000 fine.

On appeal, Adkins does not challenge his conviction for aggravated assault on an employee of a correctional facility. Instead, he argues that the trial court 1) should have granted his directed-verdict motion on the failure-to-register charge; 2) erred in allowing certain testimony during the sentencing phase of the trial; and 3) erred in allowing testimony about the state of Adkins's clothing at the time of his initial encounter with police.

In his first point on appeal, Adkins argues that the State failed to prove that he possessed a culpable mental state and thus failed to

meet its burden of proving all of the elements of the crime of failing to register as a sex offender under Ark. Code Ann. § 12-12-901 et seq. (Repl. 2003). For that reason, he urges that the trial court erred in denying his motion for directed verdict.

We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Saul v. State*, 365 Ark. 77, 225 S.W.3d 373 (2006); *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). This court has repeatedly held that in reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

Adkins argues on appeal that the State failed to prove that he violated the requirements of the Sex Offender Registration Act because it did not establish that he possessed the requisite mental state at the time of the alleged offense. Under the Act, a person who has been adjudicated guilty of a sex offense has a duty to register as a sex offender using a registration form prepared by the Arkansas Crime Information Center. *See* Ark. Code Ann. § 12-12-906 (Repl. 2003 & Supp. 2005); Ark. Code Ann. § 12-12-907 (Repl. 2003). The failure to register under the Act was, at the time of Adkins's arrest, a Class D felony. Ark. Code Ann. § 12-12-904(a)(1) (Repl. 2003).[1] Adkins does not deny that he was a sex offender who was required to register under the Act; rather, he urges that the Act is not a strict liability offense, and the State was therefore required to prove that he acted with a culpable mental state.

With some exceptions, when a statute defining an offense does not specifically delineate a culpable mental state, "a culpable mental state is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly." Ark. Code Ann. § 5-2-203(b) (Repl. 2006). Those exceptions are found in Ark. Code Ann. § 5-2-204 (Repl. 2006), which provides, in pertinent part, as follows:

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[1] Act 1743 of 2006 amended the classification of the offense to a Class C felony. *See* Ark. Code Ann. § 12-12-904(a)(1)(A)(i) (Supp. 2006).

> (b) A person does not commit an offense unless he or she acts with a culpable mental state with respect to each element of the offense that requires a culpable mental state.
>
> (c) However, a culpable mental state is not required if:
>
> . . . .
>
> (2) An *offense defined by a statute not a part of the Arkansas Criminal Code clearly indicates a legislative intent to dispense with any culpable mental state requirement* for the offense or for any element of the offense.

(Emphasis added.)

In the instant case, the Sex Offender Registration Act is not a part of the Arkansas Criminal Code; rather, it is located in Title 12 of the Code, which deals with "Law Enforcement, Emergency Management, and Military Affairs." Thus, under § 5-2-204(c)(2), a culpable mental state is not required if the offense "clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any element of the offense."

Adkins argues that the Act is silent as to the requirement of a culpable mental state, and he relies on three cases — *State v. Setzer*, 302 Ark. 593, 791 S.W.2d 365 (1990); *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996); and *McDougal v. State*, 324 Ark. 354, 922 S.W.2d 323 (1996) — in support of his argument that this court should "graft" a mental-state requirement onto § 12-12-904. However, in each of those three cases, the crimes of which the defendants were accused were found in the Arkansas Criminal Code. Here, the crime of failing to register as a sex offender is not a part of the Criminal Code, and accordingly, Adkins's reliance on these cases as examples of instances in which this court will graft a *mens rea* requirement into a crime is inapposite.

More akin to the instant case is *Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558 (2003), in which this court found a strict-liability offense in a violation of Ark. Code Ann. § 27-53-101 (Supp. 2003), which requires the driver of a vehicle involved in an accident resulting in injury to return to and remain at the scene of the accident. In *Stivers*, the defendant had asked the trial court to give a jury instruction that would have required the jury to find that the State had to prove that Stivers *knew* the accident victim had

been injured and *purposely* failed to stop his vehicle at the scene of the accident. *Stivers*, 354 Ark. at 144, 118 S.W.3d at 560-61 (emphasis in original). The trial court refused to give the requested instruction, and on appeal, Stivers argued that the trial court was statutorily required to graft a *mens rea* requirement onto § 27-53-101. *Id.*, 118 S.W.3d at 561.

This court rejected his argument, however, noting that the "language of the statute itself does not explicitly enunciate any particular mental state," but rather stated that the driver of a vehicle involved in an accident resulting in injury or death to any person "shall immediately stop the vehicle at the scene of the accident." *Id.* at 145-46, 118 S.W.3d at 562-63. Our court concluded that "[t]his mandatory language is a clear indication that the accident-causing driver's mental state is irrelevant." *Id.* at 146, 118 S.W.3d at 562.

In addition, the *Stivers* court noted that other statutes contained within the "Accidents" and "Accident Reports" chapters of Title 27 of the Arkansas code clearly set out the required mental states necessary before a person could be penalized for violating those statutes. *Id.* For example, the court cited Ark. Code Ann. § 27-53-201(b) (Supp. 2001), which provided that, "[f]or *willful* refusal to comply [with other associated statutes], the commissioner shall revoke the driver's license . . . of the person so convicted." *Id.* Our court then concluded as follows:

> Clearly, when the General Assembly desires to incorporate a *mens rea* element into the statutes governing traffic accidents, it can and, as seen in § 27-53-201(b), has done so. Here, the legislature clearly intended to dispense with any intent requirement in § 27-53-101. Therefore, the trial court did not err in declining to engraft an element of intent into the statute, or in refusing Stivers's proffered instruction.

Id.

In *Stivers*, there was a clear legislative intent to dispense with any *mens rea* requirement. Here, unless there is a clear legislative intent to dispense with any culpable mental state requirement for the offense of failing to register as a sex offender, "a culpable mental state is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly" under § 5-2-203(b), because the Sex Offender Registration Act does not prescribe a culpable mental state. Accordingly, we must examine the Act itself.

As mentioned above, a person is "guilty of a Class [D] felony who . . . fails to register or verify registration as required under this subchapter." § 12-12-904(a)(1). The portions of the statute that set out an offender's duty to register are found in Ark. Code Ann. § 12-12-906, which provides as follows:

> (a)(1)(A) At the time of adjudication of guilt, the sentencing court shall enter on the judgment and commitment or judgment and disposition form whether or not the offender is required to register as a sex offender and shall indicate whether the offense is an aggravated sexual offense under § 12-12-903.
>
> (B) The Department of Correction shall ensure that a sex offender received for incarceration completes the sex offender registration form prepared by the Director of the Arkansas Crime Information Center pursuant to § 12-12-908.
>
> . . . .
>
> (b)(2) Immediately prior to the release of a sex offender . . . , the Department of Correction . . . shall update the registration file of the sex offender who is to be released . . . .

Ark. Code Ann. § 12-12-906 (Supp. 2005).[2]

Further subsections of the Act provide that, when registering or updating the registration file of a sex offender, the Department of Correction is required to inform the offender of the duty to submit to assessment and to register and obtain the information required for registration, Ark. Code Ann. § 12-12-906(c)(1)(A)(i); inform the offender of the need to advise the ACIC of any changes of address, § 12-12-906(c)(1)(A)(ii); inform the offender of the need to register in another state if the offender moves out of Arkansas, § 12-12-906(c)(1)(A)(iii); obtain fingerprints and a DNA sample, § 12-12-906(c)(1)(A)(iv) – (v); and require the sex offender to complete the entire registration process, "including, but not limited to, requiring the sex offender to read and sign a form stating that the duty of the sex offender to register under this subchapter has been explained." § 12-12-906(c)(1)(A)(vi).

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[2] As mentioned above, the Act was amended in 2006 and now incorporates several new provisions; however, because the new language was not in effect at the time of Adkins's arrest, they do not apply to his situation.

Reading these provisions as a whole with the rest of the Act certainly indicates a legislative intent to place the burden of knowing the gravity of the situation, as well as the mandatory nature of the registration scheme, on the sex offender. As in *Stivers, supra*, although the General Assembly did not specifically spell out an intention to dispense with a *scienter* requirement, it is obvious that the registration requirements are mandatory, and that failure to comply with those duties is a strict liability offense.

Moreover, in *Kellar v. Fayetteville Police Department*, 339 Ark. 274, 5 S.W.3d 402 (1999), this court stated that "no *scienter* is indicated in Arkansas's Act, and we conclude the offender's failure to register alone is sufficient to trigger the Act's provisions." *Kellar*, 339 Ark. at 285, 5 S.W.3d at 409. *Kellar* was concerned with whether the Act violated the *ex post facto* provisions of the United States and Arkansas Constitutions. In making that determination, this court had to consider whether the Act was punitive in nature, or was merely regulatory. To that end, the *Kellar* court examined the seven factors set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Among those seven factors was whether the sanction imposed by the Act (the "sanction" in this case being the registration requirement itself) "comes into play only on a finding of *scienter*." *Kellar*, 339 Ark. at 282, 5 S.W.3d at 407. Our court discussed the *scienter* factor as follows:

> The third factor in *Kennedy* concerns the *scienter* element. States have taken at least two approaches with this factor. Some recognize that *scienter* "comes into play when the offender is adjudicated guilty of the underlying offense." *Collie* [*v. State*,] 710 So. 2d [1000,] 1010 [(Fla. App. 1998)]; *see also* [*State v.*] *Manning*, 532 N.W.2d [244,] 247-48 [(Minn.App. 1995)] (because the registration requirement is dependent upon the conviction of an underlying crime, there will necessarily be a finding of *scienter*). *Other states hold that there is no element of scienter inherent in the registration statute, stating rather that the "offender need only be released into the community to trigger the provisions of these statutes."* [*State v.*] *Cook*, [83 Ohio St. 3d 404,] 700 N.E.2d [570,] 573; [*People v.*] *Logan*, 705 N.E.2d [152,] 159 [(Ill. 1998)]. *In our case, no scienter is indicated in Arkansas's Act, and we conclude the offender's failure to register alone is sufficient to trigger the Act's provisions. Accordingly, we hold this factor is not indicative of a punitive effect.*

Kellar, 339 Ark. at 285, 5 S.W.3d at 408-09 (emphasis added).

Combining these statements from *Kellar* with an analysis of the entire statutory scheme, we conclude that it is clear that failure to register is a strict liability offense. Because the State proved that Adkins was required to register but failed to do so, and because it was not required to prove that he failed to do so with any particular culpable mental state, the trial court did not err in denying Adkins's motion for directed verdict.

In his second argument on appeal, Adkins contends that the trial court erred by "allowing irrelevant highly prejudicial hearsay testimony during the sentencing phase" of Adkins's trial. A trial court's decision to admit evidence in the penalty phase of a trial is reviewed for an abuse of discretion. *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002). Pursuant to Ark. Code Ann. § 16-97-103 (Repl. 2006), certain evidence is admissible at sentencing that would not have been admissible at the guilt phase of the trial. *Crawford v. State*, 362 Ark. 301, 208 S.W.3d 146 (2005). Section 16-97-103 provides in pertinent part:

> Evidence relevant to sentencing by either the court or jury may include, but is not limited to, the following
>
> . . . .
>
> (5) Relevant character evidence;
>
> (6) Evidence of aggravating and mitigating circumstances. The criteria for departure from the sentencing standards may serve as examples of this type of evidence;
>
> (7) Evidence relevant to guilt presented in the first stage;
>
> (8) Evidence held inadmissible in the first stage may be resubmitted for consideration in the second stage if the basis for exclusion did not apply to sentencing; and
>
> (9) Rebuttal evidence.

While evidence introduced during the sentencing phase may include evidence described in this section, the list is not exhaustive. *Crawford v. State*, *supra*. However, the admissibility of proof in the penalty phase of a jury trial is governed by the Arkansas Rules of Evidence. *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994). The *Hill* court also noted

that the State should not be precluded from introducing *relevant* evidence at a sentencing proceeding. *Id.* at 415, 887 S.W.2d at 278 (emphasis added).

Adkins argues that the testimony of three sentencing witnesses — Nancy Large, Kathy Taylor, and Corporal Keith Foster of the Rogers Police Department — constituted inadmissible hearsay evidence. Hearsay is defined by the Arkansas Rules of Evidence 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. Even if hearsay is deemed relevant and admissible under one of the hearsay exceptions, *see* Ark. R. Evid. 803 & 804, it may nonetheless still be excluded under Ark. R. Evid. 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

As mentioned above, the challenged testimony came from Nancy Large and Kathy Taylor during the sentencing phase of Adkins's trial. Both women testified generally that they had seen Adkins "acting suspiciously" in the neighborhood park on the day of his initial contact with police. Large stated that her daughter came home from the park and said that there was "a man down there that was watching her" and who "kept her from going on the slide and freaked her out." Large also testified that she approached the man, who turned out to be Adkins, and asked him if he had a problem. She stated that she asked Adkins why he was talking to her daughter, and Adkins replied that he had asked the girl her name and that he knew a girl who lived down the street from him a few years ago.

Taylor stated that her daughter was also playing in the park that day; when Taylor went to the park, she saw a man sitting on the play equipment, and she gathered up her children and brought them home. Later, Taylor had a conversation with Large about the man in the park, and she called the police to report it.

Officer Foster testified that he came to be in the park because he had gotten a call from dispatch regarding a "suspicious incident of a person talking to kids in the park." Upon arriving at the park, Foster saw Adkins, who was the only person in the park, and confronted him. Adkins told Foster that he had asked a little girl her name because he thought he recognized her. On cross-

examination, Foster acknowledged that Adkins had said he was sorry if he caused any alarm, and that he had seemed sincere in that statement.

During the guilt phase of Adkins's trial, the trial court had deemed Large and Taylor's testimony inadmissible; however, during sentencing, the court allowed the testimony, informing the jury that the women's testimony was not being offered for the truth of the matter asserted, but instead to explain why Large and Taylor may have subsequently called the police. Regarding Foster's testimony, the court found that he could "testify as to what he saw, heard, or experienced. He can't testify as to what other people said to him."

On appeal, Adkins argues that the testimony of Large, Taylor, and Officer Foster was inadmissible hearsay that was not relevant for purposes of sentencing under Ark. Code Ann. § 16-97-103. He contends that the State introduced the testimony in an effort to inflame the jurors by suggesting that he was engaged in improper conduct for which he was not charged and had no real bearing on the issues in the case.

The State responds by asserting that the trial court correctly found that the statements were not hearsay, because they were not being offered for the truth of the matter asserted. This contention is correct; the trial court specifically instructed the jury that Large and Taylor's testimony was only to be considered to show why the women called the police.

However, even if the testimony was not hearsay, we must still determine whether it was admissible under Rule 403 — that is, whether its probative value was substantially outweighed by the danger of unfair prejudice. We conclude that this testimony was not unduly prejudicial. In *Crawford v. State*, *supra*, this court held that evidence of subsequent drug offenses, introduced during the sentencing phase of Crawford's trial for possession of drug paraphernalia with intent to manufacture, was relevant character evidence. Noting that character evidence that might not be admissible at the guilt phase could, under Ark. Code Ann. § 16-97-103(5), be admissible at sentencing, this court determined that evidence of Crawford's subsequent drug activity provided proof of his character and was relevant to the jury's determination of an appropriate punishment. *Crawford*, 362 Ark. at 306, 208 S.W.3d at 149. Similarly, we conclude that Large and Taylor's testimony

went to Adkins's character, and we cannot say that the trial court abused its discretion in admitting it.

Finally, Adkins challenges the trial court's decision to allow Officer Tom Helmich, of the Rogers Police Department, to testify that Adkins's pants were unbuttoned and unzipped at the time of his arrest. Adkins maintains that this evidence was irrelevant to the issue of whether he was guilty of the crimes of failure to register as a sex offender and possession of marijuana.

At trial, Officer Helmich testified that, on August 12, 2005, he and a police trainee were driving through the Maple Grove Park when they saw two men sitting on a park bench. Helmich and the other officer drove back by several other times, and the two men were still there, which "seemed odd" in light of some complaints of "some activity in the park." Helmich stated that he recognized Adkins and knew him to be a sex offender; Helmich also testified that he knew there "had been some issues with him failing to register." Helmich then contacted Adkins and also had dispatch check for any warrants on him for the registration issue.

At this point, Adkins objected and argued to the trial court that Helmich was going to testify that he saw Adkins's pants unbuttoned and unzipped, and that this testimony would be irrelevant and prejudicial. However, the court overruled Adkins's objection, and Helmich then proceeded to testify that, as he approached Adkins and Adkins stood up, Helmich noticed something bulging on the sides in front of him and wanted to make sure it wasn't a weapon. Helmich asked what it was, and Adkins replied that it was just his pants; Adkins lifted his shirt and revealed that his pants were unbuttoned and unzipped. Helmich was concerned as to why Adkins's pants were open, and Adkins said that his pants were too tight, so he unbuttoned them. Helmich also asked if Adkins had anything illegal on him, to which Adkins said he did not. Helmich then searched Adkins and discovered a marijuana cigarette in his pocket.

On appeal, Adkins argues that this testimony was unduly prejudicial because it "suggest[ed] he was engaged in improper sexual conduct for which he was not charged, and had no real bearing on the ultimate issues in the case." However, Adkins cured any potential prejudice when he cross-examined Helmich. On that cross-examination, Helmich stated that, although Adkins's pants were unbuttoned, he did not observe Adkins "doing anything sexual" with the other man on the bench, and he did not

observe "any activity . . . that was of a sexual nature" or see Adkins "doing anything sexual to himself." Helmich stated that, "[w]hen he stood up, his pants were unbuttoned, and his explanation was they were too tight; he was sitting down and he had them unbuttoned."

Moreover, as the State suggests, the appearance of Adkins's clothing was relevant to why Helmich searched him in the first place. As mentioned above, Helmich noticed a bulge in Adkins's clothing and wanted to make sure Adkins was not carrying a weapon. Because Adkins's appearance was part of the reason Helmich decided to search him, the state of his clothing was arguably relevant to the issue at hand.

Demontierre Breon PERRY *v.* STATE of Arkansas

CR 07-107 264 S.W.3d 498

Supreme Court of Arkansas
Opinion delivered October 4, 2007

William R. Simpson, Jr., Public Defender, *Brett Qualls*, Deputy Public Defender, by: *Clint Miller*, for appellant/cross-appellee.

Dustin McDaniel, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee/cross-appellant.

ROBERT L. BROWN, Justice. Appellant Demontierre Breon Perry appeals the judgment of conviction for first-degree murder and aggravated robbery and his sentence, as a habitual offender, of sixty years for each offense, to be served consecutively. The State cross-appeals on the issue of whether it was error to give a jury instruction on felony manslaughter as a lesser-included offense of capital-felony murder. We affirm on direct appeal and declare error on cross-appeal.

The facts of this case were developed at trial. London Holman, Perry's uncle by marriage, worked at the Advance Auto Parts ("Advance") on Asher Avenue in Little Rock beginning in July 2004 and ending in January 2005, when he was fired. During the time that Holman was employed by the store, it was customary to have the manager or assistant manager on duty leave work on Sunday night carrying a bank bag containing Friday's, Saturday's, and Sunday's deposits. Sometime after Holman's termination, this custom was changed and all nighttime deposits were eliminated.

On February 19, 2006, Holman left his home in Little Rock a little before 9:00 in the evening. As he drove away, his wife told a friend that he was going to rob Advance. He picked up Perry and Perry's girlfriend, Myesha Cooper, and proceeded to Advance. They dropped Cooper off on a nearby street to watch for employees leaving Advance. When she called and said two men were leaving the building, Perry got out of the car carrying a gun. Holman, who knew what the managerial team looked like, had told Perry to look for a white man wearing a black and white shirt. Holman remained in the vehicle.

Charlie Miles, Jr. and John Shelton were employed by Advance. On the night in question, they closed the store and entered the parking lot at about 9:00 in the evening. Miles got into

his truck and waited to make sure that Shelton's truck, which had not been running properly, would start. While Miles was waiting, Perry approached Miles's truck, opened the front driver's side door, and stuck a gun in Miles's face. Miles told Perry that he could have the truck, but Perry closed the door and walked away, having seen that Miles was a black man in a red and black shirt and therefore did not match the description that Holman had given of the assistant manager.

Perry then approached Shelton, who was white and wearing a black and white shirt. Shelton was still outside his truck, pulling on a pair of coveralls. Perry was heard to shout, "Give me the money, mother fucker." Shortly thereafter, he shot Shelton, striking him in the shoulder. Shelton subsequently died from the gunshot wound. Perry suggested in his statement to police and through his counsel at trial that the gun discharged accidentally while he and Shelton struggled for the gun. The medical examiner could not rule out this possibility, although he did testify that there was no evidence that Shelton was touching the gun when it discharged. Expert testimony was introduced that the gun was not touching Shelton but was no more than ten inches away from him when it was fired.

While these events were occurring, Miles fled the parking lot in his truck. Perry shot the gun a second time, hitting Miles's truck. Miles left the parking lot but returned shortly thereafter and found Shelton lying on the ground.

The police investigation soon led to Holman, and a search of both Holman's and Perry's residences ensued. The police recovered a box of ammunition from Holman's home, and in Perry's home, police officers found a pistol, loaded with six live rounds, and additional bullets. A forensic firearm and tool mark examiner found that the bullets recovered from Perry's home, the bullets recovered from Holman's home, and the bullets recovered from the crime scene were of the same type, were all purchased at Wal-Mart, and could have come from the same box. He also testified that the bullets recovered from the crime scene were fired from the gun recovered from Perry's house. Perry was charged with capital-felony murder and aggravated robbery. At the jury trial that followed, Perry did not call any witnesses during the guilt phase of the trial.

Before the jury instructions on the law were read to the jury, the State objected to the inclusion of felony manslaughter as a lesser-included offense of capital-felony murder. The circuit court

overruled this objection. The jury convicted Perry of first-degree-felony murder and aggravated robbery.

This was followed by a sentencing hearing. Perry's mother, Edna Peel, testified at that hearing that she had heard Holman had blackmailed Perry and forced him to participate in the robbery and that Perry had told her he was sorry for what he did. She also testified that Perry suffered from attention deficit hyperactivity disorder, anxiety, depression and insomnia.

Defense counsel next attempted to have Peel read a letter that she had helped Perry write to Shelton's family. The prosecutor objected, saying that the letter was hearsay and that if Perry wanted the letter introduced, he should take the stand. The State's objection was sustained, and the letter was not read to the jury. Perry did not testify at the sentencing hearing.

The jury was informed that Perry had previously been convicted of three felonies, which qualified him for an increased sentence as a habitual offender under Ark. Code Ann. § 5-4-501 (Repl. 2006). These habitual-offender guidelines provided for a sentence of ten to sixty years or life for each Class Y felony. The jury sentenced Perry to sixty years for each conviction, as previously referenced in this opinion.

After the jury was dismissed, Perry's counsel read the court the letter he had written to Shelton's family. The letter expressed remorse, stated that the shooting was an accident, and mentioned that Perry had been coerced into participating by Holman.

Perry contends on direct appeal that the letter which his mother sought to read for him at the sentencing hearing contained mitigating circumstances that were relevant. Those mitigating circumstances are: (1) that Perry did not intend to kill Shelton; (2) that he was coerced into committing the robbery by Holman; and (3) that he was remorseful. Perry claims that the letter would have provided reasons to impose a less severe sentence. Perry urges that, as a result of the judge's ruling, he was prejudiced by the imposition of a sentence in excess of the minimum sentence allowable.

The State, on the other hand, first maintains that Perry's argument regarding the relevance of the letter was not preserved because he did not mention relevance or mitigating circumstances at the hearing. Furthermore, the State argues that, even if the letter was relevant, it was inadmissible hearsay. Lastly, the State argues that Perry has failed to show that he was prejudiced by the letter's

exclusion. In support of this argument the State notes: (1) that other evidence of lack of intent, coercion and remorse was introduced either at trial or during sentencing; and (2) that under the recent rulings of this court, it has been established that no prejudice can be shown where the sentence received is less than the statutory maximum.

Though the State correctly points out that the words "relevance" or "mitigating circumstance" were not used at the sentencing hearing by Perry, our preference is to decide this issue on the merits. The prosecutor objected to Peel reading Perry's letter as hearsay and contended that the proper way to present it to the jury was for Perry to take the stand and read his own letter. This he refused to do but sought, rather, to have his mother read his words for him. This is classic hearsay and falls well within the definition set in our rules: " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ark. R. Evid. 801(c) (2007). That is precisely what Edna Peel was attempting to do with the letter on her son's behalf. We affirm on this point.

The next issue for our consideration is the State's cross-appeal on the instruction for felony manslaughter. Perry answers that this question is moot, given that Perry was not convicted of felony manslaughter. The Arkansas Rules of Appellate Procedure — Criminal allow the State to appeal where the attorney general finds "that error has been committed to the prejudice of the state, and that the correct and uniform administration of the criminal laws requires review by the Supreme Court." Ark. R. App. P. – Crim. 3(c) (2007).

The initial question regarding mootness is whether Rule 3(c) requires the State to demonstrate that the error complained of resulted in prejudice in the case at hand, or merely that the error, if repeated, could result in prejudice in future cases. Because Perry was convicted of first-degree murder, the State does not and cannot argue that it was prejudiced by the inclusion of felony manslaughter as a lesser-included offense in this particular case. Instead, the State argues that, despite the language of Rule 3(c), no such showing of prejudice is required.

We agree with the State. In *Boone v. State*, this court declared error in the trial court's exclusion of a dying declaration, despite the fact that the defendant had been convicted of the crime with

which she was charged. 282 Ark. 274, 275, 280, 668 S.W.2d 17, 18, 21 (1984). Likewise, in *State v. Brown*, this court, ruling on the State's cross-appeal, noted that the trial court's choice of jury instructions was in error. 265 Ark. 41, 44, 577 S.W.2d 581, 583 (1979). The court did so even though the defendant was convicted under the jury instruction used and even despite the fact that the defendant's appeal was granted, and his conviction reversed and dismissed. *Id.* The court concluded as it did because "there could be other[] [prosecutions] for this same offense." *Id.* Both *Boone* and *Brown* indicate this court's willingness to accept the possibility of future prejudice to the State as grounds for hearing an appeal by the State.

In short, the question of whether felony manslaughter is a lesser-included offense to felony murder has ramifications for all prosecutions for felony murder, making it "important to the correct and uniform administration of criminal law." Ark. R. App. P. – Crim. 3(c) (2007). Likewise, the issue presented is narrow in scope. *State v. Hagan-Sherwin*, 356 Ark. 597, 602, 158 S.W.3d 156, 159-60 (2004). Lastly, the issue presented by the State is purely one of statutory interpretation and is not dependent upon the facts of the case. *State v. Williams*, 348 Ark. 585, 588, 75 S.W.3d 684, 687 (2002) We, therefore, address the merits of the State's appeal.

Both capital and first-degree-felony murder require that "[i]n the course of and in furtherance of [a qualifying felony] or in the immediate flight from the felony, the person or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life." Ark. Code Ann. §§ 5-10-101(a)(1)(B), 102(a)(1)(B) (Repl. 2006).[1] Felony manslaughter, on the other hand, occurs when a person "commits or attempts to commit a felony . . . and [i]n the course of and in furtherance of the felony or in immediate flight from the felony . . . [t]he person or an accomplice negligently causes the death of any person." Ark. Code Ann. § 5-10-104 (Repl. 2006). The difference between felony murder and felony manslaughter, there-

[1] The difference between the two stems from the fact that only the commission of certain enumerated felonies qualifies a person for capital-felony murder, while first-degree-felony murder can be the result of the commission of any felony. Ark. Code Ann. §§ 5-10-101(a)(1)(A), 102(a)(1)(A) (Repl. 2006)

fore, centers on whether the death is caused "under circumstances manifesting extreme indifference to the value of human life" or instead is caused "negligently."

As this court stated in *McCoy v. State*, there are three independent ways in which an offense can qualify as a lesser-included offense under Arkansas statute. 347 Ark. 913, 919, 921, 69 S.W.3d 430, 433, 435 (2002) (interpreting Ark. Code Ann. § 5-1-110(b), and retreating from earlier cases which had held that three separate requirements must *each* be met). Under § 5-1-110(b), an offense is a lesser-included offense if it: (1) "[i]s established by proof of the same or less than all of the elements required to establish the commission of the offense charged," (2) "[c]onsists of an attempt to commit the offense charged or to commit an offense otherwise included within the offense charged," or (3) "[d]iffers from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish the offense's commission."

Felony manslaughter does not qualify as a lesser-included offense to felony murder under the first test of § 5-1-110(b), given that felony manslaughter requires that the State prove negligence, which is not an element of felony murder. Nor does felony manslaughter qualify under the second test, because it is not an attempted felony murder. Likewise, felony manslaughter does not present a less serious injury or risk of injury than felony murder. Therefore, the only question is whether felony manslaughter only differs from felony murder in that "a lesser kind of culpable mental state suffices to establish the offense's commission." *Id.*

This court has a line of cases in which it has said that in felony murder "the culpable intent or *mens rea* relates to the crime of the underlying felony . . . and not to the murder itself." *Jenkins v. State*, 350 Ark. 219, 225, 85 S.W.3d 878, 881 (2002); *Cook v. State*, 345 Ark. 264, 269, 45 S.W.3d 820, 823 (2001); *Jones v. State*, 336 Ark. 191, 204, 984 S.W.2d 432, 438 (1999) ("[I]n felony murder, a defendant need only have the requisite intent to commit the underlying felony, not the murder."). In one such case, this court had the opportunity to address whether felony manslaughter qualified as a lesser-included offense of felony murder, and this court held that it did not. *Hill v. State*, 344 Ark. 216, 224-25, 40 S.W.3d 751, 755 (2001), *overruled on other grounds by Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). In so doing, this court

noted that the culpable mental state for felony murder and felony manslaughter were the same, because each related to the mental state of the underlying felony. *Id.*

This court has observed recently that "[t]he requirement of extreme indifference involves actions that evidence a mental state on the part of the accused to engage in some life-threatening activity against the victim." *Williams v. State*, 351 Ark. 215, 224, 91 S.W.3d 54, 59 (2002). *See Jordan v. State*, 356 Ark. 248, 255, 147 S.W.3d 691, 694-95 (2004). Clearly, our reference to "against the victim" was not made with respect to a specific victim deliberately or purposefully killed, but generally referred to the person who died as a result of the defendant's perpetration of the felony.

We conclude that the language "under circumstances manifesting extreme indifference to the value of human life" does not add an additional *mens rea* element to felony murder. We emphasize that the sole *mens rea* element in capital-felony murder and first-degree-felony murder relates to the underlying felony (here, aggravated robbery) and not to the homicide itself. The "extreme indifference" element is not a culpable mental state relating to a specific homicide victim but merely describes the dangerous circumstances generally set in motion by the defendant. Because the "extreme indifference" standard is not a *mens rea* related to a specific victim, we hold that it cannot support a lesser-included offense based on a less culpable mental state. We further hold, as we did in *Hill v. State*, *supra*, that a negligent homicide under felony manslaughter is not a lesser-included offense of capital-felony murder or first-degree-felony murder. Accordingly, the circuit court erred in instructing the jury on felony manslaughter as a lesser-included offense in this case.

Affirm on direct appeal. Error declared on cross-appeal.

Fernando NAVARRO *v.* STATE of Arkansas

CR 06-549 264 S.W.3d 530

Supreme Court of Arkansas
Opinion delivered October 4, 2007

Susan Lusby, for appellant.

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

ANNABELLE CLINTON IMBER, Justice. Appellant Fernando Navarro was convicted in Washington County Circuit Court of the following criminal offenses: first-degree murder, aggravated robbery, residential burglary, and felony theft of property. The circuit court sentenced him to two consecutive life sentences for the crimes of first-degree murder and aggravated robbery, as well as five years and three years in prison for the offenses of residential burglary and felony theft of property, respectively. On appeal, Navarro raises seven points of error. As this is a criminal appeal in which a sentence of life imprisonment has been imposed, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(2) (2007). We find no error and affirm.

On Thanksgiving Day in 2004, Navarro and his co-defendant, Michael Chavez, agreed to rob an apartment they expected to be unoccupied. Upon discovering the victim, David Edwards, in the apartment, Navarro began to punch him with his fists and stab him with a knife. After the knife broke, he stabbed Edwards with a screwdriver. Navarro also beat the victim with a dumbbell and strangled him with a cord. Chavez poured a hot pot of beans onto the victim. The medical examiner's report later revealed that the causes of death were blunt force head injuries, multiple sharp force injuries, and scalding burns on the victim's head. A neighbor observed Navarro and Chavez removing several large items of property from the apartment and identified the car into which they were loading the items as a white Dodge Shadow. That car was later stopped for a traffic violation. Both men were inside the car, and Chavez was arrested for driving while intoxicated; but, because the homicide had not yet been discovered, Navarro was released. Shortly thereafter, the stolen property was dumped into a lake.

The following day, after the homicide was discovered, Navarro responded to a request by law enforcement that he report to the police department for questioning. He initially denied any involvement in the crimes but eventually confessed to hitting, kicking, and stabbing the victim. Navarro claimed that his friend Chavez was not involved but happened to be driving near the apartment building and offered him a ride. During the interview, Navarro stated that he could not remember any details because he had been intoxicated. For example, he could not remember what objects he used to stab the victim or what items of property he loaded into the car. When asked if he thought that he killed David Edwards, Navarro responded, "Probably, yeah." At the conclusion of the interview, Navarro was arrested.

At trial, Navarro asserted the defense of not guilty by reason of mental disease or defect. The jury heard testimony from experts on both sides and rejected the defense.

I. Sufficiency of the Evidence

Navarro claims his convictions should be reversed because of the lack of any fingerprints or other forensic evidence tying him to any of the murder weapons or stolen property. He also points out that he only admitted to hitting and kicking the victim and possibly inflicting some non-fatal stab wounds. Double jeopardy considerations require this court to consider a challenge to the sufficiency of the State's evidence prior to the other issues raised in the case. *See Holsombach v. State*, 368 Ark. 415, 246 S.W.3d 871 (2007).

Our standard of review for a sufficiency challenge is well settled. We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006). This court has repeatedly held that in reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

Furthermore, circumstantial evidence may provide a basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion.

Id. Whether the evidence excludes every other hypothesis is left to the jury to decide. *Id.* The credibility of witnesses is an issue for the jury and not the court. *Id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

With regard to the charges of aggravated robbery, residential burglary, and theft of property, Navarro was convicted as an accomplice. When a theory of accomplice liability is implicated, we affirm a sufficiency-of-the-evidence challenge if substantial evidence exists to show that the defendant acted as an accomplice in the commission of the alleged offense. *Wilson v. State*, 365 Ark. 664, 232 S.W.3d 455 (2006). We have said that there is no distinction between principals on the one hand and accomplices on the other, insofar as criminal liability is concerned. *Id.* When two people assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Id.* One cannot disclaim accomplice liability simply because he did not personally take part in every act that went to make up the crime as a whole. *Id.*

a. Residential Burglary

A person commits residential burglary if he enters or remains unlawfully in a residential occupiable structure of another with the purpose of committing in the structure any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201(a)(1) (Repl. 2006). Chavez testified that he and Navarro went to the victim's apartment with the purpose of committing theft. He also testified that Navarro popped the lock with a card. This evidence amply satisfies the elements of residential burglary.

Navarro nonetheless asserts that there is no forensic evidence tying him to the stolen property. This argument is without merit. The State presented proof that he unlawfully entered the apartment with the purpose of committing theft, an offense punishable by imprisonment. Moreover, the statute does not require that property actually be stolen. *See* Ark. Code Ann. § 5-39-201(a)(1) (Repl. 2006). Accordingly, we conclude there is substantial evidence to support the jury's verdict on the residential-burglary charge.

b. First-Degree Murder

A person commits murder in the first degree if he commits or attempts to commit a felony and, in the course and

furtherance of the felony or in immediate flight from the felony, he or an accomplice causes the death of another person under circumstances manifesting extreme indifference to the value of human life. Ark. Code Ann. § 5-10-102(a)(1) (Repl. 2006). The State alleged in this case that the underlying felony was burglary, as defined in Ark. Code Ann. § 5-39-201 (Repl. 2006).

We have already concluded that the jury's verdict on the burglary charge is supported by substantial evidence. Likewise, we conclude that Navarro's murder conviction under the felony-murder statute is supported by substantial evidence. Specifically, the evidence is sufficient for the jury to conclude that Navarro caused the death of David Edwards. He admitted to hitting, kicking, and stabbing the victim. According to the autopsy report, these actions are consistent with two of the three causes of death — blunt force injuries to the head and multiple sharp force injuries. Furthermore, a knife blade was found at the crime scene, and a matching handle was later found in the driveway of the house where Navarro lived. Police also seized a screwdriver, which was consistent with the victim's wounds, from Navarro's bedroom. Items of clothing that were determined to be stained with the victim's blood were seized from his bedroom as well. We conclude that these facts are more than enough to support the jury's verdict.

Alternatively, a person commits murder in the first degree if, with a purpose of causing the death of another person, he causes the death of another person. Ark. Code Ann. § 5-10-102(a)(2) (Repl. 2006). A person acts purposely with respect to his conduct or as a result of his conduct when it is his conscious object to engage in conduct of that nature or to cause the result. Ark. Code Ann. § 5-2-202(1) (Repl. 2006).

As stated earlier, there is ample evidence to support the jury's conclusion that Navarro caused the death of David Edwards. With regard to the remaining mental-state element under section 5-10-102(a)(2), Navarro asserted the defense of mental disease or defect, but this issue was not raised in the directed-verdict motions. Furthermore, his arguments challenging the sufficiency of the evidence — the lack of forensic evidence and his statement that he merely punched, kicked, and stabbed the victim — are also without merit. Navarro's statement to the investigating officer indicated that his conscious object was to cause the death of David Edwards. While he stated that he did not mean to kill the victim,

the balance of his statement reflects otherwise. This court has held that intent is seldom capable of proof by direct evidence. *Walker v. State*, 324 Ark. 106, 918 S.W.2d 172 (1996). Usually it must be inferred from the circumstances of the killing. *Id.* The intent necessary for first-degree murder may be inferred from the type of weapon used, the manner of its use, and the nature, extent, and location of the wounds. *Id.* In the instant case, Navarro stabbed David Edwards several times with a knife and a screwdriver, beat him with dumbbells, and hit and kicked him repeatedly in the face. The jury could reasonably infer from this evidence that Navarro purposely intended to cause the victim's death. It is axiomatic that one is presumed to intend the natural and probable consequences of his actions. *Id.* We conclude that the evidence is sufficient to support a conviction of first-degree murder under sections 5-10-102(a)(1) and 5-10-102(a)(2).

c. Aggravated Robbery

A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person. Ark. Code Ann. § 5-12-102(a) (Repl. 2006). A robbery is aggravated if the person is armed with a deadly weapon, represents by word or conduct that he is armed with a deadly weapon, or inflicts or attempts to inflict death or serious physical injury upon another person. Ark. Code Ann. § 5-12-103 (Repl. 2006).

Once again, Chavez testified that he and Navarro had a purpose of committing theft when they went to the apartment. Navarro admitted, and the discovery of the knife handle, screwdriver, and bloodied clothes confirmed, that he used physical force upon David Edwards and that he was armed with a deadly weapon. His continued assertion that he was not forensically linked to any stolen property or to any of the murder weapons is irrelevant. The theft statute does not require that property actually be stolen. *See* Ark. Code Ann. § 5-12-102(a) (Repl. 2006). Similarly, a murder weapon is not required to enhance robbery to aggravated robbery. *See* Ark. Code Ann. § 5-12-103 (Repl. 2006). The recovery of the knife handle and screwdriver from Navarro's home is sufficient

proof that he was armed with a deadly weapon. Accordingly, the jury's verdict on the aggravated robbery charge is supported by substantial evidence.

d. Theft of Property

A person commits theft of property if he 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 of the property. Ark. Code Ann. § 5-36-103(a)(1) (Repl. 2006 & Supp. 2007). Navarro challenges the sufficiency of the evidence on the theft conviction by asserting that there were no fingerprints on the stolen property. His argument is unavailing.

In his statement to the investigating officer, Navarro admitted removing property from the apartment. Chavez testified that he and Navarro loaded property from the apartment into the car after the homicide. Another witness, Sarah Overton, testified that she observed Chavez and Navarro carry out a television and load it into the car, and that she saw several items of property already in the car. A neighbor testified that he saw two males removing property from the apartment. The police officer who arrested Chavez for driving while intoxicated observed several items in the car that matched the description of the stolen property. Thus, there is sufficient evidence from which to conclude that Navarro took the property of another person, with the purpose of depriving the owner of the property.

II. The Affirmative Defense of Mental Disease or Defect

A defendant bears the burden of proving the affirmative defense of mental disease or defect by a preponderance of the evidence. *Davis v. State*, 368 Ark. 401, 246 S.W.3d 862 (2007). On appeal, our standard of review of a jury verdict rejecting the defense of mental disease or defect is whether there is any substantial evidence to support the verdict. *Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998). This court will affirm a jury's verdict if there is any substantial evidence to support it. *Id.*

Navarro argues on appeal that he submitted evidence at trial that satisfied his burden of proof on the affirmative defense of mental disease or defect. He also argues that the standard by which this court reviews jury verdicts on the issue of mental disease or

defect is an insurmountable burden. Our court's standard of review, according to Navarro, should be changed to one of reasonableness, because the current standard effectively eviscerates the rule that a defendant need only prove the defense by a preponderance of the evidence. Specifically, Navarro suggests that the current standard deprives defendants of a defense expressly approved by the legislature. *See* Ark. Code Ann. § 5-2-312 (Repl. 2006).

At trial, the State put on the testimony of Dr. Robin Ross, a forensic psychiatrist at the Ozark Guidance Center, which contracts with the State to do mental health evaluations on defendants. Dr. Ross testified that Navarro showed no signs of significant cognitive impairment or active psychiatric disease. She diagnosed Navarro with alcohol dependence and marijuana dependence, neither of which constitutes a mental disease. She also testified regarding Navarro's IQ, which his own expert found to be 78. Dr. Ross stated that such an IQ indicated "borderline intellectual functioning," which is in the "low average range." She stated that, in her experience, people with that level of intellectual functioning are generally responsible for their actions.

Navarro called Dr. Ronald McInroe, a clinical neuropsychologist, to testify on his behalf. Dr. McInroe spent approximately twelve to fifteen hours evaluating Navarro, as contrasted with the one-hour evaluation by Dr. Ross. He testified that Navarro had a learning disorder, limitations in both English and Spanish expression, and a history of two head injuries (one of which resulted in three hours' loss of consciousness). According to Dr. McInroe, Navarro's verbal IQ was 69, which falls in the mildly mentally retarded range, and his performance IQ was 92. He opined that such a significant difference between the two components of the IQ test is extremely atypical and usually indicates either a head injury or a congenital abnormality. Dr. McInroe further reported that Navarro suffers from major depression, anxiety, and auditory hallucinations. Navarro, however, exhibited no signs of an anti-social personality disorder. Dr. McInroe also stated that his examination was more comprehensive than the one performed by Dr. Ross.

Although medical evidence and expert testimony can be highly persuasive, the jury is not bound to accept the opinion testimony of any witness as true or conclusive, including the opinion testimony of experts. *Davis v. State*, 368 Ark. 401, 246 S.W.3d 862 (2007). As the sole judge of the credibility of expert

witnesses, the jury has the duty to resolve conflicting testimony regarding mental competence. *Id.* In the instant case, the jury heard opinion testimony from Drs. Ross and McInroe that was totally contradictory. The jury was entitled to believe the testimony of the State's expert over that of the defendant's expert and to decide that Navarro had not proven the defense of mental disease or defect by a preponderance of the evidence. For this reason, we decline to overturn the jury's verdict.

As for Navarro's contention that our standard of review should be changed, we note that this court has a well-settled policy of affording deference to jury verdicts. The determination of the credibility of trial witnesses and the weighing of evidence are solely within the province of the jury. *Winston v. State*, 368 Ark. 105, 243 S.W.3d 304 (2006). To engage in a review based on reasonableness would invade the province of the jury. It would, in essence, constitute a second trial on the issue, with this court, rather than the jury, evaluating the credibility of witnesses and weighing the evidence. We are unwilling to engage in such a review. Navarro is correct in asserting that a jury's rejection of the defense of mental disease or defect may be upheld even in the absence of any evidence presented by the State on the issue. *Morgan v. State*, *supra*; *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863 (1992). However, this is no reason to change our existing standard of review; it simply shows that our deference to jury verdicts is so great that the jury may choose to reject all the evidence presented by one side on any issue. The jury, as fact-finder, is entitled to decide whether a defendant has satisfied his burden of proving mental disease or defect by a preponderance of the evidence. Accordingly, we decline to alter our standard of review.

III. Jury Selection

Navarro next alleges that he was denied a fair trial by the administrative circuit judge's decision to select jury venires from lists of registered voters rather than from enhanced lists, which include registered voters as well as licensed drivers. He asserts the administrative circuit judge made a conscious choice to decline a method of jury selection that would yield higher percentages of Hispanic jurors.

Navarro bases his jury-selection argument on the Sixth Amendment of the United States Constitution. Our court has set forth the appropriate standard of review in cases involving the

interpretation of a constitutional provision. We read the laws as they are written and interpret them in accordance with established principles of constitutional construction. *State v. Oldner*, 361 Ark. 316, 206 S.W.3d 818 (2005). It is this court's responsibility to decide what a constitutional provision means, and a lower court's determination is to be reviewed *de novo*. *Id.*

It is well settled that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to trial by jury. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692 (1975); *Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996). A criminal defendant is entitled to require that the State not deliberately or systematically deny to members of his race the right to participate as jurors. *Danzie v. State, supra.* The defendant, however, bears the burden of proving systematic exclusion. *Id.* Once the defendant makes a *prima facie* showing of racial discrimination in the jury-selection process, the burden shifts to the State to justify its procedure. *Id.*

This court has adhered to the standard set by the United States Supreme Court in *Duren v. Missouri*, 439 U.S. 357 (1979). *Danzie v. State, supra.* In order to establish a *prima facie* violation of the fair-cross-section requirement of the Sixth Amendment, a defendant must show the following: 1) the group alleged to be excluded is a distinctive group in the community, 2) the representation of this group in venires from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community, and 3) this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Duren v. Missouri, supra.* In the case at bar, Navarro falls short of the requisite standard.

Navarro's fair-cross-section claim rests on the following facts. The jury pool from which Navarro's jury was selected included only one potential juror who identified herself as Hispanic on the questionnaires sent out by defense counsel with permission from the circuit court. At a pretrial hearing, defense counsel proffered data based on the most recent United States census, which indicated that approximately four percent of the populace in Washington County identified itself as Hispanic. The premise of the argument on appeal is that the one potential juror who identified herself as Hispanic represented only two percent of the total number of potential jurors. Defense counsel elicited testimony from the Washington County Circuit Clerk and her

chief deputy about the process used for summoning the venire in this case. The witnesses explained that 112 names were drawn randomly by computer from a jury pool of over 140 qualified people. Those 112 names were placed in alphabetical order, and they were called by the clerk's office in that order. The first seventy-eight who responded to the telephone call were asked to appear for jury duty. Navarro suggests that the one potential juror who identified herself as Hispanic did not get called because her last name begins with the letter "T," and by the time the clerk's office reached her name on the list, they had already obtained seventy-eight responses. The circuit court refuted Navarro's suggestion by pointing out that the potential juror was not called because she was not on the randomly selected list of 112.

[redacted] The first prong of the *Duren* test has been satisfied here by virtue of the undisputed fact that Hispanics make up a distinctive group in the community. With regard to the second prong, however, Navarro's proof is insufficient. This court has followed the holding in *Duren* that the test requires a fair and reasonable representation of the distinctive group in every venire from which juries are selected, not just the particular venire summoned at a defendant's trial. *Danzie v. State, supra.* All that has been offered in this case is data on the number of Hispanics in Washington County and the number of Hispanics believed to be in this particular pool. Navarro has not offered proof of the number of Hispanics on every jury venire in Washington County. When not presented with data as to the representation of a particular group in all jury venires in the county, we have declined to speculate. *Danzie v. State, supra.* Finally, with regard to the third prong of the *Duren* test, Navarro offers no real argument as to how this alleged underrepresentation is due to systematic exclusion. He merely suggests that, if the county used the enhanced list rather than the registered voter list to select its juries, the percentages of Hispanics on juries would be more representative of the community. However, the current system of summoning juries has been consistently upheld by this court. *Danzie v. State, supra.* Administrative circuit judges for each county are given the choice of using the registered voter list or the enhanced list, based on a determination of whether the use of registered voters creates a sufficient pool to offer an adequate cross section of the community. *See* Ark. Code Ann. § 16-32-303 (Supp. 2007). Our court has been unwilling to mandate use of the enhanced list. *Danzie v. State, supra.*

IV. Evidentiary Rulings

For his fourth point of appeal, Navarro alleges that the circuit court erred in refusing to enforce a subpoena issued on behalf of the defense and served on Dr. Stephen Erickson, the medical examiner who performed the autopsy. He claims Dr. Erickson would have testified that, at the time of death, the victim had a lethal dose of cold medicine in his system. Navarro asserts this testimony was critical to the defense, not only as evidence on the cause of death, but also as mitigating evidence, in that it would have shown that the victim did not suffer or that he suffered less than he would have otherwise. At the time of trial, Dr. Erickson was out of state, and the State's chief medical examiner, Dr. Charles Kokes, was called to testify on behalf of the State. Before Dr. Kokes testified, the circuit court granted the State's motion in limine to exclude evidence about the cold medicine. In any event, according to the State, Dr. Kokes would have testified that the dosage of cold medicine found in the victim's system would not have been lethal. Navarro now argues the circuit court erred in allowing Dr. Kokes to testify in Dr. Erickson's place. It is unclear from the record whether Navarro sought to have the circuit court enforce the subpoena or grant a continuance; in either case, we find no error.

The standard of review for alleged error resulting from denial of a continuance is abuse of discretion. *Price v. State*, 365 Ark. 25, 223 S.W.3d 817 (2006). Absent a showing of prejudice by the defendant, we will not reverse the decision of a trial court. *Id.* Furthermore, in discussing our standard of review for evidentiary rulings generally, we have said that trial courts have broad discretion and that a trial court's ruling on the admissibility of evidence will not be reversed absent an abuse of that discretion. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006).

The court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case. Ark. R. Crim. P. 27.3 (2007). This court has dealt before with cases of missing witnesses. Where a doctor subpoenaed to testify at trial did not appear, the trial court attempted to have counsel stipulate as to what his testimony would have been; counsel would not agree. *Golden v. State*, 265 Ark. 99, 576 S.W.2d 955 (1979). Also, there was no request that the case be continued because of the witness's absence. *Id.* Pursuant to Ark. R. Crim. P.

27.3 and in the interest of prompt disposition of the case, we held the trial court did not abuse its discretion in carrying on without the doctor's testimony. *Id.*

The case at bar presents a similar situation. The parties disagreed regarding what Dr. Erickson's testimony would be if he were called as a witness. Navarro objected to Dr. Kokes' appearance as the State's expert witness but did not specifically request that the trial be continued until Dr. Erickson could be located. Furthermore, the toxicology report, which apparently would have resolved the issue of whether the dosage was lethal, was not proferred. Finally, the autopsy report signed by Drs. Erickson and Kokes, among others, did not list the cold medicine as a cause of death. For these reasons, we cannot say that the circuit court abused its discretion in refusing to enforce the subpoena or grant a continuance.

Navarro next argues that the circuit court abused its discretion when it refused to grant the defense a continuance so that it could consult an expert regarding autopsy photographs allegedly given to the defense one working day before trial. He claims the prosecutor's office had been telling him for over a year that there were no autopsy photographs in this case; but, on the Friday before the trial was to begin on Tuesday, the State indicated to defense counsel that there were autopsy photographs and that it intended to use them at trial. Navarro asserts that he could not have obtained funding for and consulted an expert in time for trial.

When a motion for continuance is based on a lack of time to prepare, we will consider the totality of the circumstances. *Davis v. State*, 318 Ark. 212, 885 S.W.2d 292 (1994). Where a defendant argued lack of time to prepare as a result of being notified of his trial date only ten days before trial, we upheld the trial court's denial of a continuance because the defendant failed to demonstrate prejudice. *Id.* The defendant in that case did not specify what could have been done but for the lack of time to prepare. *Id.* In the instant case, Navarro alleges he would have consulted an expert had he had sufficient time to do so. Yet, he has made no argument as to how the inability to consult an expert prejudiced him. Moreover, in objecting to the admission of the autopsy photographs, Navarro noted that the causes of death were stipulated by the parties, as was the fact that he or Chavez caused the death. We have upheld a denial of a continuance, requested due to insufficient time to prepare, when the evidence that would

have been discovered was stipulated. *Lee v. State*, 326 Ark. 529, 932 S.W.2d 756 (1996). Furthermore, in view of the totality of the circumstances, the circuit judge was correct in noting that Navarro had four days in which he could have e-mailed the photographs to an expert he had already consulted on other issues in the case. In light of these factors, we cannot say the circuit court abused its discretion.

For his next point of appeal, Navarro argues that the circuit court abused its discretion in permitting what he claims was expert testimony by a lay witness. Detective Bryan Johnson of the Springdale Police Department, the lead investigator on the case, testified that there was no blood found on the screwdriver recovered from Navarro's home. He further explained that it was not unusual to not find blood or fingerprints on objects, even after they had been touched or penetrated into a body. Navarro objected to that explanation on the basis that the detective was not qualified as an expert to make such a statement.

The State is correct in noting that we have previously dealt with this issue. *Robinson v. State*, 353 Ark. 372, 108 S.W.3d 622 (2003). In *Robinson*, an investigator with extensive experience in homicides testified that, based on his experiences with gunshot wounds to the head, there is often very little blood loss. *Id.* The defendant objected to this testimony, arguing that the investigator was not qualified as an expert. *Id.* This court held that it did not need to determine the investigator's qualifications as an expert because the State never offered him as an expert and he was never qualified as one. *Id.* Rather, he was testifying as a lay witness, and the requirements of Ark. R. Evid. 701 (2007) applied: the testimony in the form of opinions and inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. *Id.* We held that the investigator's testimony was rationally based on his years of experience as a homicide investigator, and that his testimony was helpful to a clear understanding of the determination of a fact in issue, namely, whether the killer would have had to clean up a large amount of blood. *Id.*

Detective Johnson's testimony is analogous to the investigator's testimony in *Robinson*. He was not offered as an expert, nor was he qualified as one. The detective testified as to his opinion, rationally based on his thirteen years of experience as an investigator, which testimony was helpful to the jury's clear

understanding of his testimony or the determination of a fact in issue. The circuit judge's evidentiary ruling on this point was not an abuse of discretion.

For his penultimate argument, Navarro suggests that a reference to his tattoo in the video and transcript of his interview with the detective should have been excluded by the circuit court. During the course of the interview, Detective Johnson inquired about Navarro's tattoo, which read, "L.A." Specifically, the detective asked Navarro if he was born there, and Navarro responded that he was. Detective Johnson then asked how long he lived in L.A., whereupon Navarro replied, "Sixteen years." Finally, upon being asked if he had a lot of family and friends in L.A., Navarro answered, "I don't know. I didn't know nobody." That was the extent of the conversation on the subject. Navarro claims the circuit court erred in refusing to excise that portion, because the tattoo is highly suggestive of gang affiliation and, therefore, prejudicial under Ark. R. Evid. 403 (2007).

We agree with Navarro's assertion that the United States Supreme Court has found constitutional error where evidence of gang affiliation was admitted. *Dawson v. Delaware*, 503 U.S. 159 (1992). In *Dawson*, however, there was a stipulation that the defendant belonged to a prison gang. *Id.* In this case, Navarro offers no argument regarding why a tattoo reading "L.A." is suggestive of gang affiliation or activity. Furthermore, the conversation with Detective Johnson about the tattoo sheds no light on his contention that the tattoo is suggestive of gang affiliation.

In a case where a defendant gave a taped statement in which he was asked by the interviewer whether he was a member of a gang, this court upheld the circuit court's decision to admit the evidence. *Walker v. State*, 313 Ark. 478, 855 S.W.2d 932 (1993). In that case, the defendant objected to the question on the grounds of relevancy and prejudice and moved to have it deleted from the tape. *Id.* There was no follow up to the defendant's negative response to the question, the prosecutor did not emphasize it or suggest that the defendant was a gang member, and the question and answer were part of a nine-page transcribed statement that was relevant as a whole. *Id.* We held the question was asked in good faith and that the unfair prejudice, if any, was not so drastic as to warrant an assignment of error. *Id.* Likewise, in the instant case,

there was no follow up or suggestion based on the questions and answers about the tattoo. Navarro's statement was transcribed over the course of fifty-eight pages, and the discussion at issue here was a mere six lines. Based upon the brevity of the discussion in an otherwise completely relevant statement, coupled with the fact that Navarro offers no explanation as to how the tattoo suggests gang affiliation, we hold that the circuit court did not abuse its discretion in refusing to exclude the reference to Navarro's tattoo in the video and transcript of his interview with the detective.

For his final point on appeal, Navarro contends he was prejudiced by a showing of a video depicting his arrest. At the conclusion of his interview with Detective Johnson, Navarro was handcuffed and arrested. A video of the entire interview was played for the jury, and the circuit court denied Navarro's motion to excise that portion. Navarro argues that this ruling was an abuse of the circuit court's discretion.

As support for his argument on this point, Navarro suggests that the video of his arrest is analogous to appearing in court wearing prison clothing and visible shackles. We disagree. As the State points out, a defendant appearing in court in prison clothing and visibly shackled suggests to the jury that the defendant is a continuing threat, or that his tendencies for violence are so great that he must be restrained at all times. A video depicting an arrest for a crime that the jury is called upon to evaluate is not similarly prejudicial. No juror would be surprised to learn that Navarro was handcuffed and arrested after confessing to murder. The risk of prejudice is thus minimal.

Moreover, this court has long held that a litigant is entitled to a fair trial but not a perfect one, because there are no perfect trials. *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984). As we have noted, "The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." *Id.* In other words, error which is not prejudicial may be considered harmless. Here, we cannot say that the jury's viewing of Navarro's arrest affected the essential fairness of his trial. Accordingly, we hold that the circuit court did not abuse its discretion in denying Navarro's motion to edit the video.

V. Rule 4-3(h) Review

Pursuant to Ark. Sup. Ct. R. 4-3(h), the record in this case has been reviewed for all objections, motions, and requests made by either party, which were decided adversely to Navarro, and no prejudicial error has been found.

Affirmed.

Jay and Connie POTTER and American RV Park, Inc. *v.* CITY of TONTITOWN and Washington County Planning Board

07-161 264 S.W.3d 473

Supreme Court of Arkansas
Opinion delivered October 4, 2007

Jones Jones & Doss, PLC, by: *D. Westbrook Doss, Jr.*, and *Richard E. Walden*, for appellants.

Davis, Wright, Clark, Butt & Carithers, PLC, by: *Constance G. Clark*, *Mark W. Dossett*, and *Jeff Fletcher*, for appellee City of Tontitown.

JIM GUNTER, Justice. This appeal arises from a December 22, 2006, order of the Washington County Circuit Court denying a motion to dismiss sought by Appellants Jay and Connie Potter and American RV Park, Inc. (collectively "the Potters"). The circuit court also temporarily enjoined the Potters from constructing an RV park on their property. The Potters now bring this appeal.

In December of 2005, the Potters purchased nineteen acres of land outside the city limits of Appellee, City of Tontitown (Tontitown). The Potters applied to Tontitown for a permit to construct an RV park on their property. The Potters later withdrew their application to the City of Tontitown and sought approval for the RV park from the Washington County Planning Board. On October 6, 2006, the Washington County Planning Board granted preliminary approval for the park, but stated, "[c]ity of Tontitown's jurisdiction for this project is currently under debate. If Tontitown is found to have jurisdiction for this project — all County approvals shall be null and void." At this time, the Potters began constructing their RV park.

On October 10, 2006, the Potters filed a complaint against Tontitown and others in the United States District Court for the

Western District of Arkansas, alleging, among other things, that Tontitown did not have planning-area jurisdiction and that Tontitown's actions amounted to a taking of the Potters' property. The complaint sought monetary damages and an injunction to prevent Tontitown from exercising jurisdiction over the property. On October 31, 2006, the Potters filed a complaint in Washington County Circuit Court against Tontitown and the Washington County Election Commission. The Potters sought a declaration invalidating three of Tontitown's ordinances. The Potters also filed a motion for a preliminary injunction to enjoin an election scheduled for November 7, 2006, on the proposed annexation of certain property, including the Potters' nineteen acres, into the Tontitown city limits.

On November 2, 2006, the Potters filed a motion in Washington County Circuit Court to withdraw their motion for preliminary injunction. That same day, the circuit court granted their motion. On November 9, 2006, Tontitown filed an answer to the Potters' complaint as well as a counterclaim. Tontitown also filed a motion for preliminary injunction seeking a declaration that the Potters' property was within Tontitown's planning-area jurisdiction and seeking a preliminary injunction enjoining the Potters from constructing under their permit from the Washington County Planning Commission. The Potters responded to Tontitown's motion for preliminary injunction and filed a motion to dismiss on the basis of the pendency of the federal-court action.

On December 14, 2006, the Potters moved to nonsuit their complaint seeking to invalidate the three city ordinances. On December 15, 2006, the circuit court dismissed the Potters' complaint without prejudice and then conducted a hearing on the pending motions. The circuit court denied the Potters' motion to dismiss on the basis of the pending federal-court action. On December 20, 2006, the Potters filed a motion for reconsideration on the circuit court's denial of the motion to dismiss. On December 22, 2006, the circuit court reaffirmed its denial of the Potters' motions to dismiss and granted Tontitown's motion for a preliminary injunction, finding that Tontitown had a likelihood of success on the merits and would suffer irreparable harm if the injunction was not granted. The circuit court entered an order enjoining the Potters from performing any construction, improvement or other work related to the RV park on the subject property until further order of the court. On December 22, 2006, the Potters filed their notice of appeal. On April 10, 2007, the circuit court entered a

judgment permanently enjoining the Potters from making improvements to their land. The Potters filed a notice of appeal to this court from that order on May 3, 2007. On September 6, 2007, we denied Tonitown's motion to supplement the record in this case.

For their first point on appeal, the Potters argue that the order of preliminary injunction should be overturned for failing to comply with Ark. R. Civ. P. 65(e) (2007) because the order does not contain findings that Tontitown proved a likelihood of success on the merits or that Tontitown would be irreparably harmed if an injunction was not issued. Tontitown responds, arguing that the Potters' appeal from the circuit court order granting a preliminary injunction is moot by virtue of the circuit court's later order granting a permanent injunction. Alternatively, Tontitown asserts that the circuit court's order complied with Rule 65(e) because the order incorporates by reference the reasons stated by the court from the bench. In their reply brief, the Potters argue that we should not consider the permanent injunction because the permanent injunction has not been made part of the record in this case.

I. Mootness

We will first address the mootness issue. As a general rule, appellate courts of this state will not review issues that are moot. *Allison v. Lee County Election Commission*, 359 Ark. 388, 198 S.W.3d 113 (2004). To do so would be to render advisory opinions, which we will not do. *Id.* Generally, a case becomes moot when any judgment rendered would have no practical legal effect upon a then-existing legal controversy. *Id.* We have recognized two exceptions to the mootness doctrine. *Id.* The first one involves issues that are capable of repetition, but that evade review, and the second one concerns issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation. *Id.*

In the present case, the Potters filed their notice of appeal from the preliminary injunction order on December 22, 2006. On February 19, 2007, the Potters filed the record with this court. On April 10, 2007, the circuit court entered the permanent injunction against the Potters. It was not until July 17, 2007, that Tontitown filed its motion to supplement the record with this court. On September 6, 2007, we denied Tontitown's motion to supplement the record. We will not consider a document that is

not in the record. *See Barnett v. Monumental General Insurance Co.*, 354 Ark. 692, 128 S.W.3d 803 (2003). Therefore, we will not consider the permanent injunction, as it is not part of the record. Accordingly, we reject Tontitown's argument that the present appeal is moot. In any event, this appeal from a preliminary injunction order would be governed by an exception to the mootness doctrine. It involves issues that are capable of repetition, but that evade review upon the entry of an order denying or granting a permanent injunction. *See Allison, supra.*

II. Ark. R. Civ. P. 65(e)

We now turn to the Potters' assertion that the order granting the preliminary injunction in this case failed to comply with Rule 65(e) of the Arkansas Rules of Civil Procedure, which states:

> Every order granting an injunction or restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained or mandated; and it is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Id. In determining whether to issue a preliminary injunction or a temporary restraining order pursuant to Rule 65, the trial court must consider two things: (1) whether irreparable harm will result in the absence of an injunction or restraining order, and (2) whether the moving party has demonstrated a likelihood of success on the merits. *Baptist Health v. Murphy*, 362 Ark. 506, 209 S.W.3d 360 (2005) (citing *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 72 S.W.3d 95 (2002)). We review the grant of a preliminary injunction under an abuse-of-discretion standard. *Id.* In *Baptist Health*, we concluded that the circuit court failed to comply with Rule 65(e) because the order granting a preliminary injunction did not contain findings on the issue of likelihood of success on the merits, and we reversed and remanded the case to the circuit court to make findings in accordance with Rule 65(e) on that issue.

In the present case, the December 22, 2006, order states:

> Based upon the pleadings, evidence presented, testimony of the witnesses and arguments of counsel, and for all the reasons stated

> from the bench, incorporated herein by reference, the Court finds as follows:
>
> . . . .
>
> (3) The Separate Defendants Motion for Preliminary Injunction is granted. Plaintiffs are hereby enjoined from performing any construction, improvement or any other work on the subject property which is related in any way to the RV Park until further order of this Court . . . .

The Potters assert that this order is inadequate because it does not contain findings of likelihood of success on the merits nor findings of irreparable harm. Tontitown asserts that the order complies with Rule 65 because of the language "for all reasons stated from the bench, incorporated herein by reference . . . ." Tontitown argues that Rule 65 does not prohibit the incorporation of a trial court's ruling by reference. Tontitown further asserts that this present case is distinguishable from *Baptist Health, supra,* because the appellant in that case did not abstract the circuit court hearing on the motion for preliminary injunction. We agree.

The present case is distinguishable from *Baptist Health, supra.* In *Baptist Health,* the circuit court's order did not incorporate by reference any finding made by the court in a bench ruling. Further, the appellant failed to abstract the hearing before the circuit court on appellee's motion for preliminary injunction. Here, the circuit court's order incorporates its reasons stated from the bench. We also have an abstract of the hearing before the circuit court in which the circuit court gives specific reasons from the bench for finding that Tontitown proved likelihood of success on the merits and irreparable harm, stating:

> On October 6, 2006, when Mr. Potter went to the County Planning Commission and obtained a permit, he knew of the last sentence in that document which says that the county ordinance only applied if the City of Tontitown has no jurisdiction over this property, and if the City of Tontitown does have jurisdiction, the permit is null and void. The City of Tontitown has shown me that it is likely to succeed on the merits in that it has complied with Arkansas law concerning the boundaries and maps. It is well established that the courts will not read a provision that was not included by the General Assembly under section 417 of that statute.
>
> . . . .

> The second requirement for a preliminary injunction is that irreparable harm will occur. The irreparable harm here is that if the injunction is not granted, the plaintiff could establish a vested right. The City argues that if Mr. Potter is allowed to keep investing in this project, he could have a vested right and the City would be harmed, and that the city will not be able to enforce the city ordinances on this property. We all agree that the city ordinances have certain requirements, and if I do not enjoin Mr. Potter, then I do not know what would prevent someone else from disregarding the ordinances.

Based upon these findings, we reject the Potters' argument that Rule 65(e) prohibits a trial court from incorporating by reference its rulings from the bench in an order for preliminary injunction. Because the rulings from the bench are incorporated in the abstract, we are able to determine the circuit court's basis for concluding that Tontitown would ultimately prevail at trial, and whether the circuit court abused its discretion. Therefore, we hold that Rule 65(e) has been satisfied. For the reasons stated below, we find that the circuit court did not abuse its discretion.

III. Success on the merits

For their next point on appeal, the Potters argue that the circuit court abused its discretion by concluding that Tontitown is likely to prevail at trial because Tontitown did not prove that it has a probability of success on the merits in its underlying request for a permanent injunction. Specifically, the Potters argue that Tontitown did not designate its planning jurisdiction, that their property is not within the legal description filed with the county clerk, and that Tontitown did not demonstrate that the Potters' property was within any of the presented maps or that the Tontitown Planning Commission had a regulation that applied to the Potters' development.

A. Designation of planning jurisdiction

We will first address the Potters' assertion that Tontitown did not properly designate its planning jurisdiction because only a legal description was filed with the Washington County Clerk in violation of Ark. Code Ann. § 14-56-413 (Repl. 1998). In response, Tontitown argues that the statute only requires that a description of the boundaries, rather than a planning area map must be filed. Tontitown further asserts that while Arkansas law

requires a city's planning commission to prepare and maintain a planning area map, no statute requires that the map be filed. Tontitown therefore contends that it complied with the statute by filing a metes and bounds legal description of the planning area in the office of the Washington County Circuit Clerk on June 15, 2005.

We review issues of statutory construction de novo, as it is for this court to decide what a statute means. *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). 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. *Ghegan & Ghegan, Inc. v. Barclay*, 345 Ark. 514, 49 S.W.3d 652 (2001). 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 meaning and usually accepted meaning in common language. *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (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. *Ozark Gas Pipeline Corp. v. Arkansas Pub. Serv. Comm'n*, 342 Ark. 591, 29 S.W.3d 730 (2000). When the language of the statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Weiss*, *supra*. 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.*

Ark. Code Ann. § 14-56-413(b)(1) states that "[t]he planning commission shall designate the area within the territorial jurisdiction for which it will prepare plans, ordinances, and regulations." Subsection 14-56-413(b)(2) states that "[a] description of the boundaries of the area shall be filed with the city clerk and with the county recorder." In addition to these requirements, Ark. Code Ann. § 14-56-412 (Repl. 1998) provides:

> The commission shall prepare and maintain a map showing the general location of streets, public ways, and public property and the boundaries of the area within the territorial jurisdiction for which it will prepare plans, ordinances, and regulations. The map shall be known as the planning area map.

Id.

The Potters assert that the word "description" in subsection (b)(2) is ambiguous, and therefore, the trial court should have looked at the language of the statute, the subject matter, the object to be accomplished, and the purpose served. They contend that the object of filing the planning area boundary map at the county clerk's office is to allow the clerk to determine whether or not the applicant for a building permit should apply with the county's planning commission or the city's planning commission, and it would be impractical to require the county recorder to call or visit the Tontitown City Hall every time he or she needed to determine whether plat approval should be obtained from Tontitown.

Here, we agree with Tontitown's contention that the circuit court did not err in its interpretation that the filing of a legal description was sufficient to meet the statutory requirement that Tontitown file a "description of the boundaries." Construing § 14-56-413(b)(2) just as it reads and giving the word "description" its ordinary meaning, we cannot say that the circuit court erred in its interpretation of the statute. *See Weiss, supra.* We do not read into a statute a provision that was not included by the General Assembly. *See Johnson v. Bonds Fertilizer,* 365 Ark. 133, 226 S.W.3d 753 (2006). Here, there is simply no requirement in the statute that the planning area map be filed. We conclude that Tontitown met the requirement of filing a "description of the boundaries" by filing a legal description with the county clerk. Therefore, we hold that the circuit court did not err in its interpretation of § 14-56-413.

B. Whether the property is within legal description

The Potters further argue that we should overturn the circuit court's ruling because Tontitown failed to present any evidence that their property was within the legal description filed with the county clerk. The Potters also assert that Tontitown failed to present any evidence that their property lies within any previously or properly filed planning area boundary map. They contend that Mr. Potter testified at trial that his property lies just south of the 2005 planning area boundary map. Tontitown responds, arguing that the Potters have misread the record. Tontitown asserts that Mr. Potter testified that he thought his property was situated south of the planning area designated on the 1975 and 1990 maps, but that he admitted that his property lies within both the 2001 and 2005 planning-area maps.

At trial, Mr. Potter stated,

> I agree that on Exhibit C, the planning area map filed in 2001, my property lies within the planning area, if I am reading the roads correctly. If I am reading the roads correctly, I agree that my property lies within the planning area as designated on the planning area map from 2005, Exhibit 3. I am sorry, I will not admit that my property lies within the planning area on the planning area map from 2005, Exhibit 3, as I cannot read the dates.

In making its ruling, the circuit court specifically noted that Mr. Potter admitted on both the 2001 map and the 2005 map that his property lies within the boundaries. Therefore, we hold that the circuit court did not abuse its discretion in holding that the property was within the boundaries of the planning area map.[1]

C. Planning commission regulations

Next, the Potters argue that the circuit court abused its discretion in finding that the Tontitown Planning Commission had adopted an ordinance that applied to the Potters' development. The Potters assert that if Tontitown has no ordinances governing the Potters' proposed development, then the Washington County Planning Board's approval of the RV park was valid. In response, Tontitown asserts that the underlying question presented by this case is whether Tontitown has jurisdiction to regulate the Potters' property and the existence, nature, and effect of any specific land-use regulations are beyond the scope of this appeal.

When an appeal reaches a court via an order granting preliminary injunction, the appellate court will not delve into the merits of the case further than is necessary to determine whether the trial court exceeded its discretion in granting the injunction. *Villines v. Harris*, 340 Ark. 319, 11 S.W.3d 516 (2000). The sole question before the appellate court is whether the trial court departed from the rules and principles of equity in making the

[1] The Potters also argue that there was no evidence presented to show that the planning area boundary map was an accurate depiction of the legal description filed with the county clerk or that the legal description was filed with the city clerk. It is well settled that we will not address arguments raised for the first time on appeal. *See McCoy v. Montgomery*, 370 Ark. 333, 259 S.W.3d 430 (2007). Thus, we will not address these issues.

order, and not whether the appellate court would have made the order. *Id.* Therefore, because we are only looking at whether the circuit court abused its discretion in issuing a preliminary injunction, we need not delve into the merits of whether the planning commission had adopted an ordinance that applied to the Potters' development.

IV. Irreparable harm

For their next argument, the Potters assert that the order enjoining them from continuing to construct their RV park should not have been granted because Tontitown failed to present any evidence of irreparable harm. The Potters seem to challenge the circuit court's decision to enjoin their development to prevent them from obtaining a vested right in the property and the circuit court's decision that they had not yet acquired a vested right to develop their property without regard for Tontitown's land-use plan.

Tontitown responds, arguing that it is undisputed that if construction on the RV park is not temporarily halted, the Potters will continue to develop their property in an attempt to garner a vested right. Tontitown contends that it would suffer irreparable harm if this were allowed to occur prior to a final determination of whether Tontitown had territorial jurisdiction over the Potters' land. Further, Tontitown argues that the Potters have not obtained a vested right because they have not acted in good faith and have not completed substantial performance on their land.

A. Vested right

We will first determine whether the Potters have a vested right in the property. The Potters argue that they were constructing their RV park in good faith and that they maintained a substantial use of the RV park prior to the injunction, spending $969,571.20. Tontitown argues that the Potters have not acted in good faith because they began construction of the RV park even though they were aware that the county planning board had given them only conditional approval. Tontitown also contends that the Potters' vested right claim must fail because they have not performed work of a substantial nature, asserting that the Potters have only spread gravel and cleared roadways.

In *Blundell v. City of West Helena*, 258 Ark. 123, 522 S.W.2d 661 (1975), we adopted the rule set forth in *Darlington v. Board of Councilmen*, 282 Ky. 778, 140 S.W.2d 392 (1940), that in order to

obtain a vested right one must prove that the owner has in good faith substantially entered upon the performance of the series of acts necessary to accomplish that end. The burden of proof is upon a property owner who claims rights by virtue of a non-conforming use. *Id.* The mere contemplated use without active steps beyond preliminary work or planning or substantial investment to effectuate it is not sufficient to invest a property owner with property rights in a nonconforming use, or with a right to extend a nonconforming use. *Id.* Preliminary contracts or work which is not of a substantial nature is not sufficient to establish a vested right. *Id.* The mere purchase of property with intention to devote it to a use is not sufficient in spite of preliminary work, such as clearing, grading, and excavating, if that work is not of a substantial nature, or if the owner has not incurred substantial obligations relating directly to the use of the property. *Id.*

In the present case, the Potters had knowledge that the county's approval of their development was conditional, and would be considered null and void if Tontitown was found to have jurisdiction. Yet, they began developing their property anyway. Therefore, we conclude that they did not act in good faith.

We now will turn to the issue of substantial use. In *Blundell*, we held that the first twenty-five spaces of a mobile home park constituted a use of the property under the substantial use test, thereby giving Blundell a vested right. Each of those spaces were either in use or ready to be used. In *Blundell*, the property had paved concrete roads, driveways and patios, and water and sewer lines. Here, there have been no steps taken beyond preliminary work, planning, or substantial investment to effectuate a contemplated use. *See Blundell, supra.* At trial, Mr. Potter presented pictures of gravel that had been laid for road construction. He testified that the park was ready for electricity and that the park was ready to have concrete poured. He further testified that he had begun construction work and moving dirt. Clearly, there has not been work of a substantial nature completed on the property in the present case as there was in *Blundell*, where we found substantial use. The Potters claim to have spent $967,571.20 in construction costs towards their ultimate goal. However, we conclude that the Potters have not met their burden of proving substantial use in this case. *See Blundell, supra.* Even if they had met the substantial use test, they did not do so in good faith. Therefore, we hold that the Potters do not yet have a vested right in their property.

We now turn to the issue of whether the circuit court abused its discretion in finding irreparable harm. As stated above, in determining whether to issue a preliminary injunction or a temporary restraining order pursuant to Rule 65, the trial court must consider two things: (1) whether irreparable harm will result in the absence of an injunction or restraining order, and (2) whether the moving party has demonstrated a likelihood of success on the merits. *See Baptist Health, supra.* Harm is normally only considered irreparable when it cannot be adequately compensated by money damages or redressed in a court of law. *Three Sisters Petroleum, Inc., v. Langley*, 348 Ark. 167, 72 S.W.3d 95 (2002).

In the present case, Tontitown explained that it would suffer irreparable harm if the Potters were to acquire a vested right during the pendency of this case. Specifically, Tontitown asserted that it would be unable to enforce its regulations against the Potters' land; that the purpose behind Ark. Code Ann. § 14-56-413 would be thwarted; and the condition imposed upon the building permit by the Washington County Planning Board would be nullified. As stated above, the circuit court enjoined the Potters' development to prevent them from obtaining a vested right during the pendency of this case, also finding that the Potters had not yet acquired a vested interest in the property. The circuit court stated, "I think that when a city argues that regulations apply and it tries to enforce them, while someone continues to build, the city will be harmed, possibly suffer irreparable harm, if a vested right occurs." We agree that if the Potters had acted in good faith and were allowed to continue developing their property, they could garner a vested right, thereby causing Tontitown irreparable harm. Keeping in mind that we review the grant of a preliminary injunction under an abuse-of-discretion standard, and the circuit court's decision will not be reversed on appeal unless it is clearly erroneous, we hold that the circuit court did not abuse its discretion in finding irreparable harm.

V. Subject-matter jurisdiction

Finally, the Potters argue that the circuit court did not have subject-matter jurisdiction to hear Tontitown's counterclaim because the Potters had filed a complaint in the United States District Court for the Western District of Arkansas in which the Potters sought relief from the same issue that Tontitown sought a declara-

tory judgment.[2] The Potters assert that because there is a pending federal-court action between the same parties involving the same issues, the circuit court lacks jurisdiction. Tontitown responds, arguing that the parties and issues in the state and federal court actions are different, and therefore, the circuit court had jurisdiction to hear Tontitown's counterclaim.

When the pending action is in a jurisdiction served by courts other than the courts of this state, dismissal on the basis of Ark. R. Civ. P. 12(b)(8) is not permitted. *National Bank of Commerce v. Dow Chemical Co.*, 327 Ark. 504, 938 S.W.2d 847 (1997). We have interpreted that statute as applying only to prohibit identical actions from proceeding between identical parties in two courts of this state. *Id.* We have opined that the matter was one of venue, not at all implicated when one of the actions was in a different "jurisdiction," *i.e.*, a federal court which, we said, was like the court of another state. *Id.* As successor to the statute, our Rule 12(b)(8), which is found in F.R.C.P. 12(b) upon which the remainder of our Rule 12(b) was modeled, applies only to actions filed in separate Arkansas courts. *Id.* Thus, this court has consistently held that Rule 12(b)(8) prohibits identical cases from proceeding in different courts within this state. *Id.*

In the present case, the Potters filed a complaint in the circuit court seeking declaration that certain ordinances were invalid. Subsequently, Tontitown filed a counterclaim and a motion for preliminary injunction, asking the circuit court to enjoin the Potters' construction of their RV park under the approval of the county planning commission and asking the court to declare that Tontitown had planning jurisdiction over the Potters' property. The Potters then filed a motion for voluntary dismissal of their complaint, which the circuit court granted. Thereafter, the Potters filed a motion to dismiss Tontitown's counterclaim. The circuit court denied the motion to dismiss, stating from the bench that *Dow Chemical* did not confer him any discretion as to whether or not he could dismiss the case. Therefore, the circuit court denied the motion to dismiss based on Rule 12(b)(8). The Potters rely on *UHS of Ark., Inc. v. Charter Hospital of Little Rock, Inc.*, 297 Ark. 8, 759 S.W.2d 204 (1988), for their proposition that the circuit court erred in denying the motion to

[2] The Potters recognize that we do not usually hear appeals except from final orders and ask us to nevertheless hear this jurisdiction issue. *See Villines v. Harris*, 340 Ark. 319, 11 S.W.3d 516 (2000). We have disposed of this issue by considering it on appeal.

dismiss. However, *UHS* involved two actions in two Arkansas state courts. Here, we are dealing with a case in state court and a case in federal court. Therefore, *UHS* does not apply in this situation.

Here, the two cases involve different parties and different issues. The Washington County Planning Board is a party to the state-court action, but not to the federal-court action. The Tontitown Planning Commission, Tontitown Water and Sewer Commission, the Washington County Election Commission, and Mick Wagner are all defendants in the federal case, but are not named as parties in the case filed in state court. In their complaint to the federal court, the Potters allege: violation of substantive due process; failure to provide procedural due process; taking without just compensation; equal protection clause violation; damages pursuant to 28 U.S.C. §§ 1983, 1985, and 1988; breach of contract; promissory estoppel; and tortious interference. In their complaint to the state court, the Potters sought declaration that three city ordinances are invalid. Tontitown sought a declaratory judgment confirming that the Potters' property is within the city's territorial jurisdiction, as well as a preliminary injunction to prevent the Potters from proceeding with their RV park. Despite the fact that the Potters nonsuited their case, the parties and issues in the state-court case and the federal-court case are different. Based on the fact that the cases are different, coupled with our holding in *Dow Chemical*, we hold that the circuit court did not lack subject-matter jurisdiction to hear this matter, and therefore did not err in dismissing the Potters' motion to dismiss. Accordingly, for the foregoing reasons, we affirm the circuit court's rulings.

Affirmed.

GLAZE, J., not participating.

PULASKI COUNTY *v.*
ARKANSAS DEMOCRAT-GAZETTE, INC.;
Jane Doe, Intervenor

07-669 264 S.W.3d 465

Supreme Court of Arkansas
Opinion delivered October 4, 2007

Karla M. Burnett, Pulaski County Att'y, *Amanda M. Mitchell*, Asst. Pulaski County Att'y, and *Chastity D. Scifres*, Pulaski County Staff Att'y, for appellant.

Williams & Anderson, PLC, by: *Jess Askew, III*, *Clayborne S. Stone* and *Alison Dennington*, for appellee.

J. Blake Hendrix, for intervenor Jane Doe.

JIM GUNTER, Justice. This appeal arises from an order of the Pulaski County Circuit Court ordering certain e-mails to be released because they constitute "public records" under the Arkansas Freedom of Information Act (FOIA), codified at Ark. Code Ann. 25-19-101 et seq. (Supp. 2005). On appeal, Pulaski County argues that the circuit court erred by failing to follow the mandate issued by this court after we remanded the case on July 20, 2007, for an *in camera* review of the e-mails. Jane Doe argues that the circuit court erred in

ordering the release of certain e-mail messages, as it violates her right to privacy. She also maintains that she has standing to raise these issues under the FOIA. We affirm the circuit court's order releasing the e-mails and hold that Jane Doe has waived her privacy rights in this case.

The facts of this case are set forth at length in our July 20, 2007 per curiam opinion. *See Pulaski County v. Arkansas Democrat-Gazette*, 370 Ark. 435, 260 S.W.3d 718 (2007) (per curiam). Throughout the events at issue in this case, Pulaski County was in a contractual relationship with Government e-Management Solutions, Inc. (GEMS). Ron Quillin, Pulaski County Comptroller and Director of Administrative Services, represented Pulaski County in this contractual relationship. Jane Doe represented GEMS. Quillin and Doe entered into a romantic relationship during the course of this business relationship. Quillin was responsible for the flow of public funds from the County to GEMS. On June 4, 2007, Quillin, who had been fired from his position with the County, was arrested for allegedly embezzling approximately $42,000 from Pulaski County.

On June 14, 2007, Appellee Arkansas Democrat-Gazette, Inc., filed a complaint in the Pulaski County Circuit Court, alleging that certain e-mails were public records pursuant to the FOIA. On June 25, 2007, the circuit court ruled that the e-mails were public records and ordered them to be released to the Democrat-Gazette. On appeal, we remanded the case with instructions to the circuit court to review the e-mails *in camera*. On August 2, 2007, the trial court entered its order releasing all of the e-mails with the exception of six graphic, sexually explicit photos and seven e-mails sent on a chain of forwards.[1] Pulaski County now appeals.

I. Jane Doe's issues

At the outset, we turn to the issue of whether Jane Doe has standing to contest the disclosure of the e-mails. Doe asserts that she has standing to raise an FOIA issue because she has a personal stake in the outcome of this proceeding. She argues that if the e-mails are released, she will suffer irreparable damage to her

[1] The Democrat-Gazette has not sought disclosure of either the sexually explicit photos or the forwards; thus, any issue regarding these e-mails is moot. We do not address moot issues. *Alexander v. McEwen*, 367 Ark. 241, 239 S.W.3d 519 (2006).

reputation and the e-mails could be exploited for the prurient interest of others. Further, she asserts that these messages contain personal matters that would constitute an unwarranted invasion of her constitutional right to privacy. In response, the Democrat-Gazette argues that Doe has no standing under the Arkansas FOIA because she is a citizen of Missouri.

The question of standing is a matter of law for this court to decide, and this court reviews questions of law de novo. *Arkansas Beverage Retailers Ass'n, Inc. v. Moore*, 369 Ark. 498, 256 S.W.3d 488 (2007). Only a claimant who has a personal stake in the outcome of a controversy has standing. *Id.* Here, Doe is not attempting to gain access to public records; she is merely trying to block the disclosure of e-mails that she sent and received. Therefore, she has a personal stake in the outcome of this case. Thus, even though she is not a citizen of Arkansas, we hold that she has standing to assert a privacy interest.

We now turn to Doe's constitutional argument. Specifically, Doe argues that disclosure of the e-mails constitutes a violation of her constitutional right of privacy as recognized in an individual's interest in avoiding disclosure of personal matters by government. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 455 (1977); *McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989) (citing *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869 (1977)). As the present appeal is from a bench trial, our 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. *Williams, v. Wayne Farms, LLC*, 368 Ark. 93, 243 S.W.3d 316 (2006). 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 an error has been committed. *Id.* Facts in dispute and determinations of credibility are within the province of the fact-finder. *Id.*

In the instant case, the trial court ruled that Doe had no expectation of privacy when conversing with Quillin on a county computer or the software vendor's business e-mail. We simply cannot say that the trial court erred in this regard because the romantic relationship between Quillin and Doe was indistinguishably intertwined with the business relationship between the County and GEMS. The cases relied on by Doe are simply inapposite, as neither of those cases presents facts as peculiar as

those found in this case. Under the facts of this case, where the messages often contained both business matters and personal issues, Doe, a contractor for the County, waived any right of privacy she may have had.

Before leaving this point, we note that the circuit court found that one particular e-mail exchange between Quillin and Doe sent on March 12, 2006, beginning at 9:44 a.m., is evidence that Doe lost any expectation of privacy. The sexually explicit exchange concludes by Doe's response: "Hey now. This is work email. goofball!" Quillin then responds at 9:58 a.m.: "Delete, delete, delete . . . ." This e-mail exchange proves that Doe knew the risk that the e-mails could become public, yet she continued to e-mail Quillin on the county's computer, and therefore, lost any expectation of privacy.

The mandate rule

Next, we turn to the sole issue raised by Pulaski County, namely that the circuit court violated our mandate by basing its conclusion on the overall context of the relationship between Quillin and Doe rather than the content of the e-mails. A lower court is bound by the judgment or decree of a higher court as law of the case and must carry the decision of the higher court into execution pursuant to the mandate issued by that court. *Pro-Comp Mgmt., Inc. v. R.K. Enters., LLC*, 366 Ark. 463, 237 S.W.3d 20 (2006). On remand, we instructed the circuit court to conduct an *in camera* review to determine if the e-mails "constitute a record of the performance of official functions that are or should be carried out by a public official or employee," thereby making them "public records" pursuant to the FOIA. *See Pulaski County, supra.* The circuit court noted in its order that "[i]t became apparent that a listing of each e-mail would not be expedient." Nevertheless, it appears that the circuit court reviewed each e-mail for content as instructed. Based on the circuit court's order, it is clear to us that the trial court followed our directive, and Pulaski County has put forth no evidence to the contrary. The record simply does not support the County's assertion that the circuit court failed to follow the mandate issued on remand.

The County argues that the circuit court further erred in basing its decision on whether e-mails were subject to disclosure on context rather than content. The record shows that the circuit court reviewed the e-mails based on content, and there is no error in that regard. Further, to the extent that the County is

arguing that the circuit court erred in its factual decisions on whether the e-mails relate solely to personal matters or whether they reflect a substantial nexus with the County's activities, and are therefore public records subject to disclosure, the County has failed to provide convincing argument that the circuit court was clearly erroneous in this regard. We will not consider an argument, even a constitutional one, when the appellant presents no convincing argument in its support. *Childers v. Payne*, 369 Ark. 201, 252 S.W.3d 129 (2007). For these reasons, we will not reach the merits of Pulaski County's arguments.

Affirmed.

DANIELSON and IMBER, JJ., concur in part and dissent in part.

GLAZE, J., dissents.

PAUL E. DANIELSON, Justice, concurring in part, dissenting in part. Despite any claims that the "ship has already sailed," I write to make clear that I disagree with the majority's handling of this case from the very beginning. While I concur with the majority's decision that Pulaski County and the intervenor have not demonstrated that the circuit court's findings were clearly erroneous, I continue to adhere to my original opinion that Pulaski County and the intervenor failed to rebut the statutory presumption that the contested emails constituted public records in the initial hearing before the circuit court. In addition, both Pulaski County and the intervenor, by failing to proffer the contested emails to the circuit court during the initial hearing, failed to make a record sufficient to preserve their arguments for appeal, from the beginning. For these reasons, I concur in part and dissent in part.

Initially, I must point out that, from the beginning, the majority completely lost sight of and ignored the Arkansas Freedom of Information Act (FOIA) statutory scheme and our case law. The remand of this matter to the circuit court for an *in camera* review was erroneous and completely disregarded the rebuttable presumption established by the General Assembly in Ark. Code Ann. § 25-19-103(5)(A) (Supp. 2005).[1] Section 25-19-103(5)(A) defines "public records" and establishes the presumption:

[1] In doing so, the majority completely ignored our long-standing tenet of law that it is the appellant's duty to bring up a record sufficient to demonstrate error. *See, e.g.*, *MIC v. Barrett*, 313 Ark. 527, 855 S.W.2d 326 (1993).

> (5)(A) "Public records" means writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium required by law to be kept or otherwise kept *and that constitute a record of the performance or lack of performance of official functions* that are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. *All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.*

Ark. Code Ann. § 25-19-103(5)(A) (Supp. 2005) (emphasis added). The statute makes very clear that, while presumed a public record, an email will not constitute a public record if it does not constitute a record of an employee's performance or lack of performance of official functions.

Here, the emails at issue were presumed to be public records; thus, it was presumed that the emails were writings required to be kept or otherwise kept *and* were a record of the performance or lack of performance of official functions by a government employee. In order to prohibit the release of the emails, Pulaski County and the intervenor had to rebut that presumption, but they did not.[2] Thus, the emails were presumed to be public records, which were subject to disclosure, and the circuit court correctly so held in the initial hearing. In short, the circuit court was correct the first time.

However, instead of affirming the circuit court's ruling in this matter, the majority remanded, giving Pulaski County and the intervenor a second bite at the apple. That is the point at which this case went awry, and the reason I continue to dissent in part.

Nonetheless, with respect to the merits, and assuming that Pulaski County and the intervenor had attempted to rebut the

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[2] While one might argue that Pulaski County attempted to rebut the presumption when it requested the circuit court to review the emails in the initial hearing, Pulaski County failed to make its record when it failed to proffer the emails it contested and that the circuit court declined, at that time, to review. Thus, the emails were never made a part of the record during the initial hearing. In order to make a record, one must make a proffer. The failure to proffer evidence so that this court can determine prejudice precludes review of the evidence on appeal. *See Duque v. Oshman's Sporting Goods Servs., Inc.*, 327 Ark. 224, 937 S.W.2d 179 (1997). Moreover, as already stated, it is the appellant's duty, and not that of the circuit court, to demonstrate error in the proceedings below and to bring up a record sufficient to demonstrate error. *See, e.g., MIC v. Barrett*, 313 Ark. 527, 855 S.W.2d 326 (1993).

presumption during the initial hearing, I would affirm the circuit court's decision, which was rendered upon remand.[3] I must emphasize that I am in no way stating that *every* email sent from or delivered to a government computer or government email account constitutes a public record under the FOIA, codified at Ark. Code Ann. §§ 25-19-101 – 25-19-109 (Repl. 2002 & Supp. 2005). So the circuit court found in its initial order, wherein it said:

> The Court wants to make clear, however, that the facts in this case are determinative as to the finding that these emails are public records. In no way is this Court finding that all emails on Pulaski County computers are, in fact, public records. In short, those decisions must be made on a case by case basis.

That being said, it is clear to me, *under the facts of this case*, and as the circuit court found, that the emails at issue constituted public records and were subject to disclosure under the FOIA. Thus, in an effort to provide guidance for future FOIA cases and in an effort to prevent similar time delays in such cases, I believe some analysis is necessary to support my position that the circuit court's decision was not clearly erroneous.

As already stated, a public record is a (1) record, required to be kept or otherwise kept, (2) that constitutes a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee. *See* Ark. Code Ann. § 25-19-103(5)(A). The emails at issue were kept, such that the first element of the definition was met. At issue in the instant case, and in most FOIA cases, is whether or not the emails at issue were a record of performance or lack of performance of official functions by Quillin. *Based on the facts of this case*, I would hold that the emails were.

It is further my opinion that, once a public agency has attempted to rebut the presumption that a record was, or records were, a public record, which necessarily requires the introduction of the challenged records into the record, it is incumbent on the circuit court to examine *each* contested record to determine whether or not it constitutes a public record, under the definition

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[3] The same holds true for the proceedings on remand; Pulaski County and the intervenor did not attempt to rebut the presumption, even after being given a second chance to do so by the majority of this court.

in the statute.[4] That is because each record must constitute a record of performance or lack of performance of official functions in order to be disclosed under the FOIA.

In this case, the circuit court, on remand, reviewed the emails and found that the emails reflected on the performance of official functions by Quillin. Further, it found that all of the emails should be released because they constituted a public record of the performance of official functions and because it was impossible to discern which particular email or portion of email was strictly personal and bore no relationship to business. The circuit court, however, did find that certain emails containing explicit photographs were not subject to release and that seven other contested emails were not public records subject to disclosure.[5]

I agree with the circuit court, but for different reasons. Much has been made of whether many of the emails were personal, private, or sexually explicit. That is of absolutely no moment as such designations are simply irrelevant in the context of a FOIA case. A review of the statutory scheme reveals no consideration as to whether the information, the disclosure of which is contested by the public agency, is personal, private, or sexually explicit. The *sole* consideration in determining whether the record is a public record and one subject to disclosure is whether the record itself constitutes a record of the performance or lack of performance of a public official. Any other consideration is erroneous.

A review of the circuit court's findings with respect to the emails in the instant case, the disclosures of which were challenged by Pulaski County and the intervenor, reveals that each email was a recording of Quillin's performance or lack of performance in his official function. Each contested email's content demonstrated Quillin's involvement, outside of work, with an individual whose job was, at least in part, dependent upon Pulaski County's contract with her employer, a contract which was overseen by Quillin.[6] For

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[4] This of course presumes that the agency has proffered the records it does not consider to be public to the circuit court for such a determination, which was clearly not the case during the initial hearing in the case at hand.

[5] The circuit court's decision as to those records has not been challenged by either party, as recognized by the majority.

[6] As I have said, my opinion is premised on the facts of *this* case. Were a public official or employee to have a relationship of sorts with someone not so closely intertwined to the expenditure of public funds, sending emails similar to the ones at issue here, I could not say

that reason, I agree with the circuit court's conclusion and would affirm the order of disclosure rendered by the circuit court, as the majority does.[7]

Our General Assembly has clearly pronounced the necessity of the FOIA to review public business and how it is conducted:

> It is vital in a democratic society that *public business* be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this chapter is adopted, making it possible for them or their representatives to learn and to report fully the activities of their public officials.

Ark. Code Ann. § 25-19-102 (Repl. 2002) (emphasis added). As we have said, our role in determining whether something constitutes a "public record" is limited to interpreting the FOIA statute. *See, e.g.*, *Fox v. Perroni*, 358 Ark. 251, 188 S.W.3d 881 (2004). To that end, we liberally construe the FOIA to accomplish its broad and laudable purpose that public business be performed in an open and public manner. *See Arkansas Dep't of Fin. & Admin. v. Pharmacy Assocs., Inc.*, 333 Ark. 451, 970 S.W.2d 217 (1998).

In the present day and age, the internet and electronic technology are prevalent and their use is ever increasing in government business, which results in issues such as the one in the instant case. For that reason, the General Assembly has clearly contemplated that public records may exist in electronic form. Whether the records at issue are in electronic or paper form, our role remains the same. We are limited to reviewing and interpreting the FOIA statutes, as it is not our job to create public policy. *See, e.g.*, *Brewer v. Poole*, 362 Ark. 1, 207 S.W.3d 458 (2005).

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that those emails would constitute a public record under section 25-19-103(5)(A), rendering them subject to disclosure. Here, it is the fact that each email's content demonstrated a relationship between Quillin and someone employed by a county vendor, whose account and contract were overseen by Quillin, that rendered each email between Quillin and the intervenor records of Quillin's performance or lack of performance of official functions.

[7] While recognizing that the issue is not before us, I would have also ordered the disclosure of what have been termed the "sexually explicit" emails, under the facts of this case. As already stated, there is no mention or exception for sexually-explicit records contained within the FOIA. Thus, they too constituted a record of Quillin's performance or lack of performance, for the same reasons as the other emails.

In sum, the majority's erroneous actions in this case via its initial *per curiam* order, which gave Pulaski County and the intervenor yet another chance to rebut the statutory presumption and which they failed to do yet again, has resulted in a delay in this case of more than three months and counting since the original request for disclosure. This clearly flies in the face of the purpose of Arkansas's FOIA. Nonetheless, it is my opinion, were I to reach the merits, that based on the exceedingly clear language of the statute and the uncontroverted facts of this case, the contested emails at issue, excepting the seven emails excluded by the circuit court from disclosure, were indeed records of Quillin's performance or lack of performance of official functions and, therefore, constituted public records subject to disclosure under the FOIA. As a result, the circuit court's findings were not clearly erroneous. However, because I continue to believe that Pulaski County and the intervenor failed to rebut the statutory presumption during the initial hearing in this matter and failed to bring up a proper record for review after that hearing, I must respectfully dissent in part and concur in part.

IMBER, J., joins.

TOM GLAZE, Justice, dissenting. The Arkansas Democrat-Gazette made its request for the Pulaski County email records generated by its employee, Ron Quillan, three and a half months ago. The newspaper still has not received them. The FOIA law is designed so the custodian of the records shall, within twenty-four hours of the receipt of a request for the examination or copying of records, make efforts to the fullest extent possible to determine whether the records are exempt from disclosure and make efforts to notify the persons making the request and the subject of the record of that decision. *See* Ark. Code Ann.. § 25-19-105(c)(3)(A) (Repl. 2002); *see also* Ark. Code Ann. § 25-19-107(b) (Repl. 2002) (setting out the process for expediting judicial review for those whose requests for records have been denied). Pulaski County has done nothing but delay access to the records, contrary to the intent of the Act.

As pointed out in Justice Paul Danielson's opinion, the majority court exacerbated the delays in this case when it handed down a 4-3 *per curiam* opinion on July 20, 2007, remanding the matter to the circuit court for an *in camera* review. Justice Danielson is correct in saying that the majority completely lost sight of and ignored the FOIA's statutory scheme and our case law, when

Pulaski County never attempted to rebut the circuit court's findings and ruling that the emails in question were public records.[1]

In my view, this simple case became complex when the majority court attempted to place a square peg in a round hole. In essence, what the majority has done is to permit a public employee to place pornographic material on a public computer, where it is presumed to be a public record, but, by allowing the employee to call the material "personal" or "private," has enabled that public employee to subvert the purpose and intent of the Act. Such an employee's inappropriate conduct should not be protected under any circumstances. If the majority had ruled, as it should have, that salacious photographs and material placed on the county's computer by a county employee during working hours constitute public records, the taxpayers could readily learn how that employee performs his work and conducts the public's business. It also is reasonable to believe that, when such inappropriate conduct is subject to public exposure, that abuse will end.

The Freedom of Information Act provides that "[i]t is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy." *See* Ark. Code Ann. § 12-19-102 (Repl. 2002). The majority's overly prolonged treatment of this case has completely subverted the true intent of the Arkansas Freedom of Information Act; indeed, instead of meeting the goals and objectives of the FOIA, this court's actions have resulted in an absurd application of the Act's purpose.

Oh, the irony of it all!

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[1] Justice Danielson's opinion appears to show a willingness to assume Pulaski County made some attempt to rebut the presumption of public records at the initial hearing. I disagree with any such interpretation of the facts.

BRADLEY VENTURES, INC., d/b/a AQ Chicken;
Cypress Insurance Co. *v.* FARM BUREAU MUTUAL
INSURANCE CO. of ARKANSAS

06-1494 264 S.W.3d 485

Supreme Court of Arkansas
Opinion delivered October 4, 2007

The Trammell Law Firm, Trammell Rogers, PLC, by: *Gill A. Rogers*, for appellant Cypress Insurance Co.

Taylor Law Firm, by: *Timothy J. Myers*, for appellant Bradley Ventures, Inc., d/b/a AQ Chicken.

Laser Law Firm, by: *Andy L. Turner* and *Steven B. Duke*, for appellee.

PAUL E. DANIELSON, Justice. Appellants Bradley Ventures, Inc., d/b/a AQ Chicken, and Cypress Insurance Company appeal from the circuit court's order granting summary judgment in favor of Farm Bureau Mutual Insurance Company. Appellants argue that the circuit court erred in granting summary judgment because a genuine issue of material fact still remained as to whether or not a fire at the AQ Chicken restaurant was a result of intentional actions or activities involving an illegal purpose, either of which would have excused Farm Bureau from providing insurance coverage. Bradley Ventures and Cypress also assert that, while Farm Bureau insisted it had no duty to defend its insured, the Trybulecs, the insurance company was not excused from its duty to defend simply because the complaint contained pleadings for punitive damages. We reverse and remand the circuit court's order.

The record in this case reveals that on July 19, 2004, the AQ Chicken restaurant in Bentonville, Arkansas, was destroyed by a fire that resulted in property damage, loss of income, and other consequential damages for Bradley Ventures. In connection with this incident, Joseph James Trybulec, Jr., was charged in Benton County with arson. The Benton County prosecutor negotiated a

plea agreement with Trybulec and, on July 22, 2004, in exchange for a reduction from the charge of arson, a Class Y felony, Trybulec pled guilty to the charge of reckless burning, a Class D felony. The circuit court noted the plea agreement and entered an order of probation for Trybulec on July 8, 2005.

At the time of the fire, Trybulec lived with his parents, Joseph James Trybulec, Sr., and Mary Beth Trybulec. The Trybulecs held a homeowners' insurance policy with Farm Bureau which carried a $100,000 personal liability limit; however, the policy excluded personal liability coverage when bodily injury or property damage was caused by intentional acts or claims arising from activities involving an illegal purpose. The policy specifically stated:

> Under Personal Liability Coverage and Medical Payments to Others Coverage, we do not cover:
>
> (5) bodily injury or property damage caused by intentional acts or at the direction of you or any covered person. The expected or unexpected results of these acts are not covered.
>
> . . . .
>
> (17) claims which arise from activities involving an illegal purpose.

On July 18, 2005, Bradley Ventures filed a complaint for damages against Trybulec, as well as three John Does, claiming that the fire at AQ Chicken was caused by the negligence of Trybulec, alone or in concert with others, and resulted in the total loss of the restaurant. In response, Farm Bureau filed a complaint for declaratory judgment on October 11, 2005, seeking a judgment from the circuit court that it had no duty to defend or pay indemnity benefits under the homeowners' policy issued to Joseph James Trybulec, Sr., and Mary Beth Trybulec for: (1) the intentional acts alleged in the complaint filed by Bradley Ventures; (2) the allegations in the complaint filed by Bradley Ventures that are based upon activities involving an illegal purpose; or (3) the punitive-damage claim alleged in the complaint filed by Bradley Ventures. On February 28, 2006, Cypress Insurance Company moved to intervene, claiming that, as the insurer of AQ Chicken, it had an interest in the outcome and final judgment in the Benton County case filed by Bradley Ventures against Trybulec. The circuit court entered an order permitting Cypress to intervene on March 9, 2006.

On March 7, 2006, Farm Bureau filed a motion for summary judgment claiming that there were no material issues of fact in dispute and that it was entitled to a judgment as a matter of law that, based upon Trybulec's plea of guilty to reckless burning, Trybulec's actions were admittedly intentional and Farm Bureau owed no duty to defend and indemnify Trybulec under his parents' homeowners' insurance policy for any results of those actions. In addition, Farm Bureau urged that it also owed no duty to defend or indemnify Trybulec because the complaint filed by Bradley Ventures arose from activities involving an illegal purpose. Finally, Farm Bureau asserted it owed no duty to defend and indemnify Trybulec for the punitive-damage claim of Bradley Ventures. In Farm Bureau's brief in support of its motion for summary judgment, it concluded that Trybulec was collaterally estopped from arguing that he did not intentionally cause the fire in question because he had pled guilty to reckless burning, which requires an intentional act.

The circuit court granted summary judgment in favor of Farm Bureau on September 12, 2006, finding that Farm Bureau had no duty to indemnify Joseph James Trybulec, Sr., Mary Beth Trybulec, and/or Joseph James Trybulec, Jr. Furthermore, the order stated that Farm Bureau had no duty to defend Joseph James Trybulec, Sr., Mary Beth Trybulec, and/or Joseph James Trybulec, Jr., or pay any damages whatsoever that may be incurred as a result of a fire loss which occurred on or about July 19, 2004.

Bradley Ventures and Cypress each filed a timely notice of appeal with the court of appeals.[1] The court of appeals certified the case to our court on August 30, 2007, and we accepted that certification on September 3, 2007.

On appeal, Bradley Ventures argues that the circuit court erred in granting summary judgment in favor of Farm Bureau because a genuine issue of material fact still remained as to whether Trybulec intentionally started the fire that took place at the AQ Chicken restaurant or whether the fire was caused by activity involving an illegal purpose. It is Bradley Ventures' contention that those issues were not "actually litigated" simply because there was a plea agreement reached. In addition, Bradley Ventures urges that Farm Bureau's alternative theory for summary judgment, that

[1] The Trybulecs did not personally file an appeal in this matter. Hereinafter, Bradley Ventures and Cypress will be jointly referred to as "Bradley Ventures."

it did not have a duty to defend any of the Trybulecs because punitive damages were alleged and their policy specifically excluded coverage for punitive damages, is incorrect as Arkansas law provides there is a duty to defend even though ultimately there may not be a duty to indemnify.[2] The issue that must be decided by this court is whether or not summary judgment was appropriate in this case.

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. *See City of Farmington v. Smith*, 366 Ark. 473, 237 S.W.3d 1 (2006). 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 id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *See id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *See id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *See id.*

"Actually litigated"

Bradley Ventures first argues that Farm Bureau may not escape the duty to defend its insured before the liability of the insured is determined, and that the homeowners' policy held by the Trybulecs provided that the duty to defend and indemnify existed unless it is determined that the damages were a result of an intentional act or an activity involving an illegal purpose. It further contends that, simply because Trybulec agreed to plead guilty to a lesser crime than he was originally charged with, the elements of his intent and his purpose were not actually litigated and, as such, collateral estoppel does not apply to prevent Bradley Ventures from arguing that Trybulec acted negligently, rather than intentionally, in causing the fire.

[2] In its written order, the circuit court summarily granted Farm Bureau's motion for summary judgment, thereby making it impossible for this court to determine on what specific grounds the motion was granted.

Farm Bureau argues that Trybulec was engaged in two intentional acts at the time of the fire: (1) criminally trespassing on Bradley Venture property; and (2) intentionally causing the fire to the AQ Chicken restaurant. Farm Bureau asserts that the best evidence of Trybulec's mental state at the time of the fire was his guilty plea to the offense of reckless burning, especially considering that the circuit court followed procedural safeguards pursuant to Rule 24 of the Arkansas Rules of Criminal Procedure before accepting his guilty plea. In addition, Farm Bureau contends that even if the fire was an accident, coverage would still be excluded under the "illegal-purpose" exclusion of the policy because Trybulec admittedly did not have permission to be on the property.

Reckless burning in Arkansas does require an element of intent:

> (a) A person commits the offense of reckless burning if the person purposely starts a fire or causes an explosion, whether on his or her own property or property of another person, and thereby recklessly:
>
> (1) Creates a substantial risk of death or serious physical injury to any person;
>
> (2) Destroys or causes substantial damage to an occupiable structure of another person; or
>
> (3) Destroys or causes substantial damage to a vital public facility.

Ark. Code Ann. § 5-38-302(a) (Repl. 2006).

While it is undisputed that Trybulec pled guilty to the offense of reckless burning, his plea was negotiated and agreed to in exchange for the charge being reduced from arson. The question before this court is whether or not that plea precluded the argument in a subsequent civil case that Trybulec did not intentionally start the fire. Farm Bureau's position remains that the argument was precluded and, as such, the insurance policy it issued to the Trybulecs will not cover any of the claims arising from the fire.

The doctrine of collateral estoppel, or issue preclusion, bars the relitigation of issues of law or fact actually litigated by the parties in the first suit, provided that the party against whom the earlier decision is being asserted had a full and fair opportunity to

litigate the issue in question and that issue was essential to the judgment. *See Zinger v. Terrell*, 336 Ark. 423, 985 S.W.2d 737 (1999). Arkansas law provides that the following elements must be present in order to establish collateral estoppel: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) the issue must have been actually litigated; (3) the issue must have been determined by a final and valid judgment; and (4) the issue must have been essential to the judgment. *See Parker v. Johnson*, 368 Ark. 190, 244 S.W.3d 1 (2006).

The only element of collateral estoppel in question in the current case is the second. Therefore, we must determine whether the issues of intentional act and illegal purpose were "actually litigated" when Trybulec pled guilty to reckless burning. In *Zinger v. Terrell, supra*, we noted that the long-standing case law in Arkansas provides that a judgment in a criminal prosecution is neither a bar to a subsequent civil proceeding founded upon the same facts nor proof of anything except its rendition. While this court ultimately decided that it was time "to overrule our caselaw and join the prevailing view that a prior criminal conviction for murder acts as a bar to relitigating the same issue for the same defendant in civil court," that decision only created a narrow exception for a murder conviction. *See id.*; *see Johnson v. Union Pac. R.R.*, 352 Ark. 534, 104 S.W.3d 745 (2003). It is also important to note that the first-degree murder conviction in *Zinger* had been the result of an actual jury trial, not a plea agreement as in the instant case. Furthermore, *Zinger* did not overrule *Washington National Ins. Co. v. Clement*, 192 Ark. 371, 91 S.W.2d 265 (1936), in which this court held that a criminal prosecution for driving while intoxicated did not bar a subsequent civil proceeding founded on the same facts, and was not proof of anything in such civil proceeding except the mere fact of its rendition. *See Zinger v. Terrell, supra.* Finally, comment b. to the Restatement (Second) of Judgments § 85 (1982), in discussing *actual adjudication*, provides in relevant part:

> A defendant who pleads guilty may be held to be estopped in subsequent civil litigation from contesting facts representing elements of the offense. However, under the terms of this Restatement such an estoppel is not a matter of issue preclusion, because *the issue has not actually been litigated*, but is a matter of the law of evidence beyond the scope of this Restatement.

(Emphasis added.)

Typically, collateral estoppel is relied upon by a defendant to preclude a plaintiff from relitigating an issue that has previously been decided adversely to the plaintiff. *See Johnson v. Union Pacific Railroad, supra.* In the instant case it is the defendant that was precluded from presenting a defense, an offensive use of collateral estoppel. This court has noted that the offensive use of collateral estoppel is more controversial, but has held it should be available in limited cases. *See id.*

In *Johnson v. Union Pac. R.R., supra,* this court discussed *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322 (1979), a case out of the United States Supreme Court which addressed the offensive use of collateral estoppel:

> In *Parklane Hosiery,* the Court defined offensive collateral estoppel as occurring 'when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party.' The Court concluded that trial courts should be given broad discretion in determining when offensive collateral estoppel applies. This conclusion was based on the Court's determinations that the offensive use of collateral estoppel does not promote judicial economy in the same way that defensive estoppel does, and that its use may be unfair to a defendant. By way of illustration only, the Court observed that the offensive use of collateral estoppel may be unfair (1) where the defendant in the first action is sued for small or nominal damages and thus may not have had great incentive to defend vigorously; (2) where the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favor of the defendant; and (3) where the second action affords the defendant procedural opportunities unavailable in the first action that could cause a different result. The Court then held:
>
> We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

352 Ark. at 545-46, 104 S.W.3d at 751 (internal citations omitted).

In the instant case, Trybulec was first charged with arson, a Class Y felony. In exchange for his guilty plea, Trybulec's charge was reduced to reckless burning, a Class D felony. When a defendant is given the option to plead guilty to a lesser offense rather than proceeding to trial at the risk of being found guilty by a jury of a more serious offense, seemingly that defendant has a serious motivation to enter a guilty plea. This is especially true when the alleged crime is a less serious offense and there is not a strong incentive to litigate. *See, e.g.*, *Allstate Ins. Co. v. Kovar*, 842 N.E.2d 1268 (Ill. App. 2006). It is unfair to allow collateral estoppel to be asserted when the defendant, here Trybulec, was not sufficiently motivated to challenge the allegations made by the State. This court will not apply the offensive use of collateral estoppel when it is unfair to the defendant. *See Johnson v. Union Pac. R. R.*, *supra*.[3]

Based upon the above, we hold that a guilty plea in a criminal case is not equivalent to a criminal conviction that has been "actually litigated." We hold that "actually litigated" means actually litigated. Because the issue of intent was not actually litigated, a genuine issue of material fact still remained as to whether Trybulec intentionally started the fire at AQ Chicken, and summary judgment was not appropriate. As for Farm Bureau's contention that any testimony that raised a question as to Trybulec's intent was only provided by his "self-serving, ever-changing testimony," this court has repeatedly held that the duty of resolving conflicting testimony and determining the credibility of witnesses is left to the discretion of the fact-finder. *See Boyd v. State*, 369 Ark. 259, 253 S.W.3d 456 (2007).

Finally, while Farm Bureau may be correct in its contention that Trybulec never disputed that he did not have permission to be on the premises at the time of the fire, that is not analogous to the issue of trespass or any other illegal purpose having been actually litigated. Furthermore, his plea to reckless burning was not a final and valid judgment on the issues of trespass

[3] While there is split authority and varying rationalizations used regarding this issue, several jurisdictions have also held that collateral estoppel does not apply when a conviction is based on a guilty plea. *See Picaso v. Tucson Unified Sch. Dist.*, 154 P.3d 364 (Ariz. App. 2007); *Allstate Ins. Co. v. Kovar*, 842 N.E.2d 1268 (Ill. App. 2006); *Mrozek v. Intra Financial Corp.*, 699 N.W.2d 54 (Wis. 2005); *State Farm Fire & Casualty Co. v. Connolly*, 852 A.2d 227 (N.J. Super. 2004).

or illegal purpose, nor were those issues essential to that plea; therefore, collateral estoppel does not apply to the issues of trespass or illegal purpose. *See Parker v. Johnson, supra.* As a result, we hold that a genuine issue of material fact still remained as to whether the fire arose from an activity involving an illegal purpose because that issue was never actually litigated and, as such, summary judgment was not appropriate.

Duty to Defend

For its last point, Bradley Ventures insists that the circuit court's summary judgment may not be affirmed regardless of Farm Bureau's assertion both to the circuit court and to this court that it owed no duty to defend the Trybulecs because the original complaint contained pleadings for punitive damages and their insurance policy contained a provision specifically excluding coverage of punitive damages. Bradley Ventures argues that Arkansas law provides there is a duty to defend even if ultimately there may not be a duty to indemnify. Farm Bureau responds that claims for punitive damages were specifically excluded by the policy and, as such, it owed no duty to defend such a claim and summary judgment was appropriate.

As previously noted, the circuit court summarily granted summary judgment in its written motion; therefore, we cannot determine the basis for the ruling. While it seems more likely that the motion was granted based upon Trybulec's guilty plea to the charge of reckless burning, we must address this last argument as well because the issue regarding Farm Bureau's duty to defend the punitive-damage claim was also raised in the motion.

An argument analogous to the argument made in the instant case by Farm Bureau was made by Appalachian Insurance Company in *Thomas v. Appalachian Insurance Co.*, 335 So. 2d 789 (La. Ct. App. 1976), and discussed by this court in *Home Indemnity Co. v. Marianna*, 291 Ark. 610, 727 S.W.2d 375 (1987). In *Thomas*, the insured, a police officer, was sued only for punitive damages for "intentionally and maliciously" using excessive force in arresting the plaintiff. Appalachian refused to defend because the policy excluded coverage as to punitive damages. While conceding that punitive damages did not come within the coverage of the policy, the court rejected Appalachian's argument:

> We cannot say that plaintiff's petition unambiguously excludes coverage for damages allegedly caused plaintiff. The petition al-

> leges a claim within the scope of the Civil Rights Act, Title 42 of the United States Code, Section 1983. Although plaintiff prayed for punitive damages only, the federal district court is not restricted to such an award. The plaintiff may be granted any relief the court believes he is entitled to, even if he has not demanded such relief in his pleading. Plaintiff's petition contains allegations, which if proven, would amply support the federal courts granting of compensatory damages.
>
> An insurer should not be allowed to escape its responsibility to defend on a mere technicality based on the type of relief prayed for by a plaintiff, where the insured can be held liable for other damages under the petition. Furthermore, the obligation of the insurer to defend is broader than its liability for damage claims

335 So. 2d at 792 (internal citations omitted).

In the instant case, the complaint against Trybulec prayed not only for punitive damages, but for compensatory damages as well. The circuit court would not have been limited to awarding punitive damages and may have chosen not to award them at all. The duty to defend is broader than the duty to pay damages. *See Home Indemnity Co. v. Marianna, supra.* Farm Bureau may not escape its duty to defend Trybulec simply because punitive damages were alleged in the original complaint; therefore, that argument does not provide this court with an alternative reason to affirm summary judgment.

Because summary judgment was not appropriate, we reverse and remand the circuit court's order.

Reversed and remanded.

GLAZE, J., not participating.

MEDICAL LIABILITY MUTUAL INSURANCE COMPANY *v.* ALAN CURTIS ENTERPRISES, INC.; Alan Curtis , LLC; and Evergreene Properties of North Carolina LLC, d/b/a Crestpark Inn of Forrest City

07-991 264 S.W.3d 545

Supreme Court of Arkansas
Opinion delivered October 4, 2007

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 Garnett Thomas Eisele 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 September 26, 2007. The certifying court requests that our court answer one question of law which may be determinative of a cause now pending in the certifying court, and it appears to the certifying court that there is no controlling precedent in the decisions of the Arkansas Supreme Court. The law in question involves whether an insurer may, after it is determined by declaratory judgment that the insurer owes no further duty to defend or to pay any judgment that results from claims asserted in a lawsuit against its insured relying on a reservation of rights letter and recoup its costs, including attorney's fees, expended on its insured's behalf to provide a defense of the lawsuit.

After a review of the certifying court's analysis and explanation of the need for this court to answer the question of law

presently pending in that court, we accept certification of the following question: After it is determined by declaratory judgment that the insurer, Medical Liability Mutual Life Insurance Company (MLMLIC) owes no further duty to defend or to pay any judgment that results from claims asserted in a lawsuit against its insured, may MLMLIC, relying on a reservation of rights letter, recoup its costs, including attorney's fees, expended on its behalf to provide a defense of the lawsuit?

This per curiam order constitutes notice of our acceptance of the certification of question of law. For purposes of the pending proceeding in the Supreme Court, the following requirements are imposed:

A. Time limits under Rule 4-4 will be calculated from the date of this *per curiam* order accepting certification. The plaintiff in the underlying action, Medical Liability Mutual Insurance Company, is designated the moving party and will be denoted as the "Petitioner," and its brief is due thirty days from the date of this *per curiam*; the defendants, Alan Curtis Enterprises, Inc., Alan Curtis, LLC, and Evergreene Properties of North Carolina LLC, d/b/a Crestpark Inn of Forrest City, shall be denoted as the "Respondents," and their brief shall be due thirty days after the filing of Petitioner's brief. Petitioner may file a reply brief within fifteen days after Respondents' brief is filed.

B. The briefs shall comply with this court's rules as in other cases except for the brief's content. Only the following items required in Rule 4-2(a) shall be included:

(3) Point of appeal which shall correspond to the certified question of law to be answered in the federal district court's certification order.

(4) Table of authorities.

(6) Statement of the case which shall correspond to the facts relevant to the certified question of law as stated in the federal district court's certification order.

(7) Argument.

(8) Addendum, if necessary and appropriate.

(9) Cover for briefs.

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

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 Petitioner and Respondents.

Request granted.

Brian ROBINSON *v.* STATE of Arkansas

CR 07-887 262 S.W.3d 140

Supreme Court of Arkansas
Opinion delivered October 4, 2007

Grant DeProw, for appellant.

No response.

PER CURIAM. Appellant Brian Robinson, by and through his attorney, has filed a motion for rule on clerk. The court treats these motions as Motion for Belated Appeal. His attorney, Grant DeProw, states in the motion that the record was tendered late due to a mistake on his part.

Because DeProw has admitted fault, this motion is granted pursuant to *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). A copy of this opinion will be forwarded to the Committee on Professional Conduct.

GUNTER, J., concurs.

JIM GUNTER, Justice, concurring. I agree with the disposition and write to call for reconsideration of Rule 5. Our stated purpose of Rule 5 was to eliminate unnecessary delay in the docketing of appeals. We also point out that the rule was expected to allow "lawsuits to proceed as expeditiously as possible." *Alexander v. Beaumont*, 275 Ark. 357, 629 S.W.2d 300 (1982). Rule 5 has done anything but accomplish this purpose.

While our Rule 5 was adopted as a civil measure, we have held that it applies to both civil and criminal cases. *Roy v. State*, 367 Ark. 178, 238 S.W.3d 117 (2006). Rule 5(b)(1) provides in pertinent part:

> (1) If any party has designated stenographically reported material for inclusion in the record on appeal, the circuit court, by order entered before expiration of the period prescribed by subdivision (a) of this rule or a prior extension order, may extend the time for filing the record only if it makes the following findings:
>
> (C) All parties have had the opportunity to be heard on the motion, either at a hearing or by responding in writing;

Id. We have made it clear that there must be strict compliance with the requirements of Rule 5(b), and that we do not view the granting of an extension as a mere formality. *McGahey v. State*, 370 Ark. 525, 262 S.W.3d 141 (2007). However, in the past, we have routinely granted the motion for belated appeal after receiving an amended order reflecting that all parties had an opportunity to be heard. *See, e.g.*, *State v. Lalota*, letter order granting rule on clerk, CACR06-821, Mar. 14, 2007; and *Tobias v. Clark*, letter order granting rule on clerk, CA07-16, Mar. 8, 2007.

In this case, appellant timely filed his notice of appeal. Although the record was timely tendered, our clerk refused to accept the record, because the circuit court's order granting appellant an extension of time to file the record made no reference to all parties having an opportunity to be heard. By *per curiam* order dated September 13, 2007, we remanded this case to the trial court for compliance with Rule 5(b)(1)(C). Now, counsel for appellant admits fault, and admits that he did not notify the State of his motion or request a hearing on the matter. Now that we have that information, we can proceed after denying the appellant a speedy disposition of his appeal, quite contrary to the purpose espoused in applying Rule 5.

Our court should not put itself into a position of raising issues on behalf of a party not objecting. Rule 5 should offer an avenue to allow the criminal appeal to proceed while the Court tends to its supervision of the trial court and the appellant's counsel. For these reasons, I concur.

Gregory M. SMALL *v.* STATE of Arkansas

CR 06-1364 264 S.W.3d 512

Supreme Court of Arkansas
Opinion delivered October 4, 2007

Appellant, pro se.

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

PER CURIAM. A jury found appellant Gregory M. Small guilty of rape, attempted rape, and sexual assault in the second degree, and imposed consecutive sentences on the charges of 240 months', 144 months', and 108 months' imprisonment, for an aggregate sentence of 492 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed the judgment. *Small v. State*, CACR 04-1390 (Ark. App. June 22, 2005). Appellant timely filed in the trial court a pro se petition for postconviction relief under Ark. R. Crim. P. 37.1,[1] which was denied without a hearing. This court granted appellant's request for belated appeal of that decision. *Small v. State*, CR 06-1364 (Ark. Jan. 11, 2007) (per curiam). The parties have now filed their briefs and appellant's appeal of the order denying postconviction relief is before us.

Appellant raises twelve points of error on appeal. In each of those points, appellant asserts that the trial court erred in failing to find ineffective assistance of counsel. The bases of appellant's claims of ineffective assistance are as follows: (1) that counsel failed to call three witnesses; (2) that counsel failed to object to the prosecution's delay in filing charges against appellant; (3) that counsel failed to preserve for appeal the issue of insufficiency of the evidence to support three separate offenses under the theory that the crimes were a single continuing course of conduct; (4) that counsel failed to properly challenge the sufficiency of the prosecution's investigation; (5) that counsel failed to object to perjured testimony; (6) that counsel failed to challenge the sufficiency of the evidence on the basis there was no DNA evidence; (7) that counsel failed to "make a motion" to show that the victim's prior sexual conduct was relevant; (8) that counsel failed to request a jury instruction as to alternative sentencing; (9) that counsel failed to object to comments by the prosecution stating that appellant was a rapist and the jury must convict him; (10) that counsel failed to object to the victim's testifying during the trial from a position that was not within appellant's line of sight; (11) that counsel failed to object to the suppression of certain statements by appellant's father; (12) that counsel failed to convey a counteroffer to the prosecution on a plea offer.

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[1] Appellant filed his original petition on September 8, 2005, and an amended petition on December 1, 2005. From the record before us, it appears that the trial court considered both the original petition and the amended petition prior to providing its findings.

Appellant attempts to argue an additional claim in his reply brief. However, we do not address the merits of a question where the argument is raised for the first time in a reply brief. *State v. McCormack*, 343 Ark. 285, 34 S.W.3d 735 (2000). Moreover, the trial court provided no ruling on the issue. Failure to obtain a ruling on an issue at the trial court level precludes review on appeal. *See Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006); *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000).

The trial court rejected appellant's claims of ineffective assistance in a written order, listing findings of facts and conclusions of law as to each. The court reviewed the allegations in the petition, the file and records in the case, and denied the petition without a hearing.

In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

The *Strickland* standard is a two-part test. To prevail on a claim of ineffective assistance of counsel under the standard, a petitioner must first show that counsel's performance was deficient, with errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and second, the petitioner must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Noel v. State,* 342 Ark. 35, 26 S.W.3d 123 (2000).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* The petitioner claiming ineffective assistance of counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Burton v. State*, 367 Ark. 109, 238 S.W.3d 111 (2006). The petitioner must show that, but for counsel's

errors, the fact-finder would have had a reasonable doubt respecting guilt and that the decision reached would have been different absent the errors. *Id.*

Appellant first claims that the trial court erred in failing to find that trial counsel was ineffective for failure to call three witnesses. The trial court found that the witnesses had been proffered at a pretrial hearing and excluded. The court further found that the evidence would have been excluded as irrelevant and hearsay, would not have affected the outcome of the trial, and, even if the evidence were admissible, that the decision as to whether the witnesses should be called was a tactical one. Appellant contends that the evidence was necessary to impeach the victim and that there was no hearing concerning whether these witnesses could testify.

The objective in reviewing an assertion of ineffective assistance of counsel concerning the failure to call certain witnesses is to determine whether this failure resulted in actual prejudice which denied the petitioner a fair trial. *Hill v. State*, 292 Ark. 144, 728 S.W.2d 510 (1987) (per curiam). An attorney's decision not to call a particular witness is largely a matter of professional judgment, and the fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not, itself, proof of counsel's ineffectiveness. *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001). Trial counsel must use his or her best judgment to determine which witnesses will be beneficial to his client and, in assessing the attorney's decision not to call a particular witness, it must be taken into account that the decision is largely a matter of professional judgment that experienced advocates could endlessly debate. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). It is incumbent on the petitioner to name the witness, provide a summary of the testimony, and establish that the testimony would have been admissible into evidence. *Weatherford v. State*, 363 Ark. 579, 215 S.W.3d 642 (2005) (per curiam).

The trial court was not clearly erroneous in finding that appellant's petition did not establish that the testimony at issue would have been admissible or that the evidence would have been beneficial to appellant's case. Appellant contends on appeal that counsel should have called a friend of the victim's named Amanda, the victim's former foster parent, Kay Johnson, and an individual named Nancy Blevens. In his amended petition, appellant asserted that a number of family members could verify statements made to them by the victim concerning the first witness, Amanda. In those

statements, the victim indicated that Amanda had told the victim that Amanda's own brother had molested her. Appellant asserts that the second witness, Ms. Johnson, would testify as to other instances where the victim had alleged she had been sexually molested. The third witness, Ms. Blevens, would purportedly have testified as to the appearance of appellant's genitals. Appellant did not establish the testimony that the first witness would have provided, that the testimony of the second witness would have been admissible, or, if the third witness had been called, that the testimony would have changed the outcome of the trial.

Appellant did not provide any statement or affidavit from Amanda to establish what her testimony would have been. While appellant apparently contends that Amanda would verify the statements that he claims were made by the victim to third parties, appellant's petition contains no facts to support that Amanda would indeed have done so. Without having provided the substance of Amanda's testimony, appellant failed to establish that the testimony would have had any bearing on the outcome of the trial.

Appellant contends that the testimony of Ms. Johnson would establish that the victim had made accusations as to molestation by other individuals. The record shows that defense counsel requested a hearing on admissibility of this and other testimony that would be excluded under Ark. Code Ann. § 16-42-101 (Repl. 1999). The hearing terminated without Ms. Johnson testifying, but the court cautioned that it would not admit such inflammatory testimony simply to challenge the credibility of the witness, and that it did not consider such evidence relevant. This court has upheld exclusion of precisely this type of evidence in similar circumstances, holding that it was indeed not relevant to the proceedings. *See State v. Townsend*, 366 Ark. 152, 233 S.W.3d 680 (2006). Appellant did not show that the testimony would have been admitted, if offered.

The summary that appellant included in his petition of the testimony that Ms. Blevens would have provided was simply that she would have described appellant's genitals as to size and shape. Such testimony would not have significantly contradicted the victim's testimony at trial for impeachment, as appellant asserts. The victim's description of appellant's penis was brief and very general, with little detail. Even had Ms. Blevens testified, the discrepancy in testimony was not sufficient to alter the outcome of the trial.

Appellant next alleges ineffective assistance for counsel's failure to object to the prosecution's delay in bringing the charges, because the prosecution waited approximately seven months after accusing him before filing the charges. In his petition, appellant alleged that this amounted to prosecutorial misconduct, that the delay was intended to provide a tactical advantage, and that his right to due process under the Fifth Amendment required dismissal of the charges under those circumstances. The State urges that appellant has cited no authority in his brief for his position. But, in appellant's original petition, he did cite *Scott v. State*, 263 Ark. 669, 566 S.W.2d 737 (1978). *Scott* stands for the proposition that the prosecution cannot delay filing charges simply for the purpose of gaining a tactical advantage over the accused, and, where prejudice occurs from the delay, the charges must be dismissed. *Id.* at 674, 566 S.W.2d at 740.

In order for appellant to show that counsel could have raised a successful objection on this basis, however, he was required to establish in his petition that counsel could have shown that prejudice occurred from the delay. Counsel is not ineffective for failing to make an argument that is meritless. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Appellant contends that he was prejudiced because his father, Martin Small, died during the delay. He alleges that Martin Small was a key witness in his defense. But he does not disclose any testimony that Martin Small could have provided that was of any significant help to his defense.

Appellant contends that his father made a statement to police that characterized the victim as untruthful and related an occasion where the victim stated that the incident with appellant had not happened, that she had lied. Appellant asserts he was prejudiced because his father was unable to provide this testimony at trial. But, at trial, the jury heard a telephone deposition by appellant's grandmother, who was present when this event occurred, that related the statement by the victim. Appellant's grandmother and his brother, who was also the victim's father, provided testimony at trial that the victim had been disciplined for lying. Martin Small's testimony, given his relationship to the appellant, would not likely have been any more persuasive than the evidence that was presented at trial. In light of the other evidence available as proof, appellant did not show that trial counsel could have successfully argued that appellant was prejudiced by any delay.

Appellant argues in his next point on appeal that trial counsel failed to preserve for appeal the issue of sufficiency of the evidence to support three separate offenses under the theory that the crimes were a single continuing course of conduct. The trial court found that any motion for merger of the counts would have been denied because the evidence presented showed a series of events occurring at separate times, not a single event.

The trial court was not clearly erroneous in finding that any challenge to the separate counts would not have been meritorious. The victim testified to separate instances of fondling of her genitals by appellant with his fingers, an attempt by appellant to penetrate her anus with his penis, and of penetration of her mouth by appellant's penis on more than one occasion. While it declined to consider this specific argument, the court of appeals upheld the evidence as sufficient to support each of the counts in its opinion on direct appeal. This court has held that rape is not defined as a continuing offense, and where the prosecutrix testifies as to multiple acts of rape of a different nature, separate in point of time, there is no continuing offense. *Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997). In *Rains*, that analysis was applied where one of the counts was based upon a charge involving sexual contact, as does the sexual assault count here. In *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003), we held that the same reasoning as in a rape case should apply in a case where one count involved violation of a minor. The trial court did not err in applying the analysis to the counts in this case.

Appellant contends that because these separate instances all occurred in one night, they were a single continuing offense. Yet, we have considered conduct occurring within a span of two hours, and held that where the acts were of a different nature, a separate impulse was necessary and there were separate offenses. *Ricks v. State*, 327 Ark. 513, 940 S.W.2d 422 (1997). Each of the acts here was of a different nature, and was separate in point of time. The three counts did not constitute a single continuing offense.

In his next point, appellant argues that counsel failed to properly challenge the sufficiency of the prosecution's investigation, contending that counsel failed to move to have the charges dismissed and failed to seek a directed verdict. The trial court found that the claim was not cognizable in a proceeding on a Rule 37.1 petition, and that what investigation to undertake was within the prosecution's discretion.

The record shows that counsel did challenge the sufficiency of the evidence presented. Trial counsel requested a directed verdict at the conclusion of the State's case and renewed the motion following the final submission of evidence. As already noted, the court of appeals upheld the evidence presented at trial as sufficient. The State asserts, correctly, that appellant has cited no authority for his contention that counsel could have somehow challenged the charges on the basis that the prosecution's investigation was not adequate. This court will not consider an argument that presents no citation to authority or convincing argument. *Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2002).

Moreover, appellant did not meet his burden to show that counsel could have successfully argued the point if counsel had no authority for the proposition. Trial counsel did challenge the investigation at trial through argument and presentation of witnesses. Appellant now contends those witnesses were not interviewed by the prosecution. The jury here simply found the prosecution's witness more credible and their case more compelling, and the trial court did not err in denying relief on this point.

In his next point, appellant argues that counsel was ineffective for failure to object to what he characterizes as perjured testimony by a police officer. The disputed testimony was that two witnesses, appellant's son and grandmother, were unavailable. The trial court found that appellant had not met his burden to show prejudice as he failed to show that the outcome of the trial would have been any different. We agree.

This court has held that claims of prosecutorial misconduct are not cognizable in a proceeding pursuant to Rule 37.1. *Howard*, 367 Ark. at 27, 238 S.W.3d at 32. Here, however, appellant did state his claim as one for ineffective assistance of counsel rather than an independent claim based upon violation of his right to due process. Appellant's claim must fail because we are unable to determine that the police officer did indeed make the alleged statement in his testimony. But, even assuming the police officer made such a statement concerning the availability of the two witnesses and that counsel had successfully objected to that statement so as to exclude it, appellant did not make a showing in the petition that this would have changed the outcome of his trial.

Our review of the record failed to reveal any testimony of the officer at trial. The officer testified on behalf of the defense during the pretrial hearing on admissibility of evidence under

section 16-42-101, but he did not make the claimed statement at that time. Appellant does not cite to the record to identify where in the testimony the alleged statement occurs. In any event, we agree with the trial court that appellant did not show how he would have been prejudiced by the statement, if it were made. Trial counsel did present appellant's grandmother and son as witnesses. If the allegedly false statement were admitted at trial, the credibility of the statement could have been contested through those witnesses.

Appellant next alleges ineffective assistance of counsel for failure to argue lack of DNA evidence in challenging the sufficiency of the evidence. Appellant fails to cite any authority for his assertion that DNA evidence should have been required to provide sufficient evidence to convict on the charges. Moreover, that position is at odds with our case law. It is well settled that the uncorroborated testimony of a rape victim is sufficient to support a conviction if the testimony satisfies the statutory elements of rape. *Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005). As the court of appeals held in appellant's direct appeal, the same reasoning applicable to a rape charge supports a conviction through uncorroborated testimony on a sexual assault charge, provided the statutory elements are likewise met.

Appellant next argues that trial counsel was ineffective because he failed to file a motion to show that the victim's prior sexual conduct was relevant. Appellant contends that counsel did not move for admission of the evidence and no hearing was conducted as to its admission under the rape shield statute. The trial court found that counsel had filed such a motion and the court had held the proffered evidence was not admissible following a hearing. Despite appellant's contention to the contrary, the record supports the trial court's findings. The record includes a transcript of a hearing on a motion concerning application of the rape shield statute that indicates that counsel made the very argument raised by appellant, and that the trial court correctly ruled that the evidence was highly prejudicial, not relevant and, therefore, inadmissible.

In his petition, appellant cited *Wicoff v. State*, 321 Ark. 97, 900 S.W.2d 187 (1995), in support of his argument. But, in *Wicoff*, trial counsel had not filed a motion for a hearing on the victim's prior sexual conduct, and also failed to call witnesses to impeach the victim's testimony. We indicated in *Wicoff* that the

failure to file the motion alone might not have been sufficient under the circumstances to establish ineffective assistance, and only because it was coupled with the attorney's failure to call witnesses who were available to impeach the victim's testimony were we able to find that the trial court had erred in determining that counsel was not ineffective. Here, trial counsel filed a motion, which was denied, and presented witnesses to impeach the victim and to provide testimony concerning the victim's exposure to pornographic video tapes. Unlike *Wicoff*, counsel in this case was able to provide evidence in support of his argument that the victim was lying and had sufficient knowledge to provide details of a sexual encounter. Appellant did not make a showing that he was prejudiced, even had counsel erred as he asserted.

Appellant next alleges trial counsel erred in failing to request that the jury be instructed as to alternative sentencing. The trial court found that appellant had been convicted of three Class Y felonies and that alternative sentencing was not available to him. While the court incorrectly concluded that attempted rape and second degree sexual assault were Class Y felonies, we nevertheless agree that appellant did not show that he would have been prejudiced by the asserted error.

For claims of ineffective assistance in the sentencing phase, in cases that do not involve the death penalty, a defendant who has received a sentence less than the maximum sentence for the offense cannot show prejudice from the sentence itself. *State v. Smith*, 368 Ark. 620, 249 S.W.3d 119 (2007). Rape was a Class Y felony for which alternative sentencing was not available under Ark. Code Ann. § 5-4-301 (Repl. 2006). Attempted rape was a Class A felony under Ark. Code Ann. § 5-3-203 (Repl. 1997) and second degree sexual assault was a Class B felony under Ark. Code Ann. § 5-14-125 (Supp. 2001). Appellant did not receive the maximum sentence for any of those charges as provided in Ark. Code Ann. § 5-4-401 (Repl. 2006).

Moreover, as the State points out, appellant did not receive the minimum sentence as to any of the charges. Both the verdict forms and the closing arguments made clear that the jury did not have to impose any sentence, but could have simply fined appellant for the Class A and Class B felony charges. Had the jury received any instructions concerning the availability of alternative sentencing, appellant could not show that the result would have been any different under these circumstances.

Appellant asserts in his next point that trial counsel was ineffective for failing to object to certain statements by the prosecution made during closing arguments. The trial court found that the alleged statements were not so prejudicial as to influence the outcome of the trial and that the instruction to the jury that closing arguments were not evidence would have cured any error. We agree that appellant made no showing of error or prejudice.

Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the wide range of permissible professional legal conduct. *Howard*, 367 Ark. at 44-45, 238 S.W.3d at 44. Appellant alleged in his amended petition that the prosecution had made the statement to the jury that "the defendant was a rapist and that they must convict him of all the charges." Near the end of his final argument, the prosecutor told the jury that the only question was whether they believed the victim, and that, if so, "then that man is a rapist." The statement was not an egregious misstatement.

The court of appeals held that the testimony of the victim provided sufficient evidence to support a conviction on the rape charge. The statement by the prosecution was therefore a reasonable inference that could be drawn from the evidence presented. Any objection would not have had merit, and there was neither error by counsel nor prejudice to the defense resulting from counsel's failure to make that objection.

Next, appellant argues that counsel was ineffective because he failed to object to the victim's testifying from a position that was not within appellant's line of sight. Appellant alleges that those circumstances denied him his right to confront the witness, and that counsel was ineffective for failing to raise the issue so that a specific finding could be made by the trial court. Yet, the record indicates that the victim was able to point to the defendant from the stand and describe his clothing. While appellant alleged in his amended petition that the bench obstructed his view of the victim so that he could not see the victim as she testified, the victim clearly could see the appellant. Appellant has not alleged that he made counsel aware that his view was obstructed or that counsel's own view of the witness was obstructed, and it does not appear from the record that counsel could have been aware of those

circumstances unless appellant called the matter to his attention. Counsel could not be ineffective for failing to raise the objection based upon circumstances that were neither obvious nor brought to his attention by his client.

Moreover, even were counsel aware of the purported obstruction to appellant's view of the witness, appellant did not meet his burden to show that an objection would have been successful, or that, even if successful, the resulting repositioning would have altered the outcome of the trial. Appellant acknowledges the limitations set forth on his right to confront a child witness as set forth in *Smith v. State*, 340 Ark. 116, 8 S.W.3d 534 (2000). The victim was not required by the Confrontation Clause to be placed in a position where the accused could establish eye contact. At most, a successful objection would have resulted in the court positioning appellant so that he could better view the witness. From the record of the pretrial hearings it is apparent appellant's defense from the onset was an attack on the victim's credibility, and careful observation would not have altered those tactics. Because the victim was ten years old at the time of trial, the court would not have required the victim to be placed so as to be forced to establish eye contact with appellant. Even if there were a constitutional violation and trial counsel failed to raise an objection to it, appellant did not make a showing that he would have been prejudiced by it.

Appellant next alleges that counsel was ineffective for failing to object to the suppression of certain statements by appellant's father. The trial court found that the statements were hearsay, subject to the court's discretion, and properly excluded. While appellant did not in his petition and does not in his brief indicate what specific statements are at issue, he indicates that the statements were made to the investigating officer who testified at the rape shield statute hearing. In response to questioning by the defense, the officer testified that appellant's father made statements about the victim's prior sexual conduct and stated that the victim would lie.

As previously discussed, trial counsel did contest exclusion of the statements. Counsel asserted at the pretrial hearing on applicability of the rape shield statute that he should at least be allowed to cross examine the victim concerning the prior sexual conduct. The trial court in the pretrial hearing specifically ruled that the statements were hearsay because appellant's father had

died and could not be called as a witness, and further cautioned that statements concerning prior conduct must be excluded under the rape shield statute. The trial court found that the statements were so inflammatory as to outweigh any relevancy.

Appellant provided no basis in his petition by which trial counsel might have successfully countered the trial court's findings on these issues. He argued that the statements, apparently referring to the statements concerning prior sexual conduct, were not false and that counsel could have provided testimony to that effect. But, the trial court specifically found that the statements would have been excluded, whether the victim denied them or not, because they were inflammatory. A showing of the truthfulness of the statements would have had no effect on the trial court's decision. Appellant failed to make a showing that any further objection by counsel would have had merit.

In appellant's last point, he contends that trial counsel failed to convey to the prosecution a counteroffer that he proposed in response to a plea offer. The trial court found that plea negotiations did not have any bearing on the outcome of the trial. Plea negotiations may have some bearing as to a defendant's sentence, but, in this case, appellant did not make a showing in his petition of any prejudice concerning his sentence.

Appellant contended in his petition that the State made an offer the day before the trial. By proposing a counteroffer, appellant rejected the State's offer. Appellant asserted that counsel failed to convey this counteroffer to the prosecution. While appellant asserted that he would have accepted the original offer if his counteroffer were not accepted, appellant did not allege that he provided that instruction along with his counteroffer when it was conveyed to counsel. Nor did appellant provide any information in the petition as to what sentence was to be recommended in either the State's offer or the counteroffer. But, in any event, appellant did not, and cannot, claim that the State would have accepted any counteroffer, or that the original offer, or any other offer, would have been extended by the State following the proposal of the counteroffer. Appellant therefore failed to show that he was prejudiced by any failure of counsel to convey the counteroffer to the prosecution.

The trial court was not clearly erroneous in determining that the petition and record of the case show that appellant was entitled

to no relief. The record now before us conclusively shows that the petition was without merit. Accordingly, we affirm the trial court's denial of postconviction relief.

Affirmed.

Gary Lonnie WILLIAMS *v.* STATE of Arkansas

CR 07-945 264 S.W.3d 546

Supreme Court of Arkansas
Opinion delivered October 4, 2007

Motion for Rule on Clerk; remanded.

Robert A. Newcomb, for appellant.

No response.

PER CURIAM. Appellant Gary Lonnie Williams, by and through his attorney, Robert A. Newcomb, brings the instant motion for rule on clerk after the clerk of this court refused to accept the record in this case due to noncompliance with Ark. R. App. P. – Civ. 5(b). The clerk refused the filing because there was no finding in the order by the circuit court that "[a]ll parties have had the opportunity to be heard on the motion, either at a hearing or by responding in writing" as required by Rule 5(b)(1)(C). Williams admits that there is a violation of Rule 5; nevertheless, he asks this court to grant the instant motion because there has been substantial compliance with Rule 5.

Rule 5(b)(1)(C) provides in part:

> (b) *Extension of time.*
>
> (1) If any party has designated stenographically reported material for inclusion in the record on appeal, the circuit court, by order entered before expiration of the period . . . may extend the time for filing the record only if it makes the following findings:
>
> . . . .
>
> (C) All parties have had the opportunity to be heard on the motion, either at a hearing or by responding in writing[.]

This court has made it very clear that we expect strict compliance with the requirements of Rule 5(b), and that we do not view the granting of an extension as a mere formality. *See, e.g.*, *Russell v. State*, 368 Ark. 439, 246 S.W.3d 856 (2007) (per curiam); *Roy v. State*, 367 Ark. 178, 238 S.W.3d 117 (2006) (per curiam). The order of extension in this case makes no reference to the findings of the circuit court required under Rule 5(b)(1)(C). Accordingly, we remand this matter to the circuit judge for compliance with Rule 5(b)(1)(C).

Remanded.

Gary ZOLLIECOFFER *v.* Virginia POST

07-194 265 S.W.3d 114

Supreme Court of Arkansas
Opinion delivered October 11, 2007

[Rehearing denied November 8, 2007.]

Barham Law Office, P.A., by: *R. Kevin Barham*, for appellant.

Craig L. Cook, for appellee.

JIM HANNAH, Chief Justice. Altus mayoral candidate Gary Zolliecoffer appeals a November 15, 2006 order of the

Franklin County Circuit Court granting relief in a pre-election challenge filed post election by opponent candidate Veronica Post. In the circuit court's order, Zolliecoffer was declared ineligible to run as a candidate in the Altus mayoral race, and the Franklin County Election Commission was prohibited from certifying any votes cast for Zolliecoffer.[1] Zolliecoffer attempts to appeal only the circuit court's order prohibiting the Election Commission from certifying votes cast in his favor. We hold that the circuit court lacked subject-matter jurisdiction to consider a pre-election challenge filed post election and reverse and dismiss the case. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(4).

On November 7, 2006, an election was held for the office of mayor of Altus. The parties have stipulated that Zolliecoffer received 136 votes and Post received 126 votes in the election. The votes, however, have not yet been certified. On November 9, 2006, Post filed a petition for writ of mandamus, a petition for a writ of prohibition, and a declaratory judgment action. She asserted that Zolliecoffer was a convicted felon and ineligible to run for public office.[2] She specifically asked that he "be declared ineligible for the election by the 'Commissioners' and removed as a candidate from the ballot." As legal authority, Post cited *Tittle v. Woodruff*, 322 Ark. 153, 907 S.W.2d 734 (1995); *State v. Craighead County Bd. of Election Comm'rs*, 300 Ark. 405, 779 S.W.2d 169 (1989); and Ark. Code Ann. § 7-5-207(b) (Repl. 2000). She also asserted that if she did not prevail under the above authority, she would prevail under Ark. Code Ann. § 7-5-801 (Repl. 2000), because this is a post-election contest based on Zolliecoffer's ineligibility.

"[E]lection cases are governed entirely by statute." *Simes v. Crumbly*, 368 Ark. 1, 4, 242 S.W.3d 610, 612 (2006). There are "two types of election cases provided for by statute: pre-election, eligibility challenges and post-election, election con-

[1] Post sought and obtained a writ of prohibition to stop the election commission from certifying the votes. We note that "a writ of prohibition may only be directed to a court or adjudicative committee that is proceeding wholly without jurisdiction; it cannot be directed, as a writ of mandamus can, to a ministerial officer." *State v. Craighead County Bd. of Election Commr's*, 300 Ark. 405, 411, 779 S.W.2d 169, 172 (1989).

[2] The circuit court found that in pleading guilty to burglary and grand larceny in 1965, Gary Zolliecoffer was a convicted felon even though no formal judgment of conviction was entered.

tests." *Willis v. Crumbly*, 368 Ark. 5, 10-11, 242 S.W.3d 600, 604 (2006). In *Helton v. Jacobs*, 346 Ark. 344, 349-50, 57 S.W.3d 180, 184 (2001), we discussed the two types of election cases:

> The procedure followed by Tyler for Jacobs's removal from the ballot was a petition for writ of *mandamus* and declaratory judgment, which is the procedure this court endorsed in *State v. Craighead County Bd. of Election Comm'rs*, 300 Ark. 405, 779 S.W.2d 169 (1989), for pre-election attacks on a candidate's eligibility to stand for election and for removal of that ineligible candidate's name from the ballot. *See* Ark. Code Ann. § 7-5-207(b) (Repl. 2000). *See also Tittle v. Woodruff*, 322 Ark. 153, 907 S.W.2d 734 (1995). Upon removal, that person is no longer a candidate. An election contest, on the other hand, is a right of action "conferred on any *candidate* to contest the certification of nomination or the certificate of vote as made by the appropriate officials in any election." Ark. Code Ann. § 7-5-801(a) (Repl. 2000) (emphasis added). It is a "post-election contest between two competing candidates." *Jacobs v. Yates*, 342 Ark. at 250, 27 S.W.3d at 738. *See also Rubens v. Hodges*, 310 Ark. 451, 837 S.W.2d 465 (1992); *McClendon v. McKeown*, 230 Ark. 521, 323 S.W.2d 542 (1959).

Thus, a party who wishes to challenge a candidate's eligibility to stand for election must bring a pre-election challenge by way of a petition for writ of mandamus and declaratory judgment. Here Post filed a petition for writ of mandamus and declaratory judgment, and she states plainly in her petition that she is seeking to have Zolliecoffer declared ineligible; however, she filed the petition post election rather than pre election. Arkansas Code Annotated section 7-5-207(b) provides in pertinent part as follows:

> No person's name shall be printed upon the ballot as a candidate for any public office in this state at any election unless the person is qualified and eligible at the time of filing as a candidate for the office to hold the public office for which he is a candidate.

In *Craighead County,* this court stated that section 7-5-207(b) "created a right in the people to the proper administration of election laws by prohibiting the inclusion of ineligible candidates on the ballot." 300 Ark. at 411, 779 S.W.2d at 172. This court further held that "an action for mandamus and declaratory relief is the proper method of enforcing the right set out in Ark. Code Ann. § 7-5-207(b), which prohibits the inclusion of an ineligible candidate on an election

ballot." *Id.* at 412, 779 S.W.2d at 173. However, "this statutory procedure only allows pre-election challenges to a candidate's eligibility." *Pederson v. Stracener*, 354 Ark. 716, 719, 128 S.W.3d 818, 820 (2003). In *Pederson*, we further stated:

> Because election contests are purely statutory, and the statutes do not provide for a post-election petition for a writ of mandamus and complaint for declaratory judgment to challenge a candidate's eligibility, the trial court was without jurisdiction to hear the matter. Because this case is decided on jurisdiction, there is no need to consider the remaining issues. This case is reversed and dismissed.

Id. at 718, 128 S.W.3d at 819. Likewise, the circuit court in this case lacked jurisdiction to consider a pre-election challenge filed post election, and this case must be reversed and dismissed for a lack of subject-matter jurisdiction. We note that neither party raised the issue of subject-matter jurisdiction; however, subject-matter jurisdiction is always open, cannot be waived, can be questioned for the first time on appeal, and can be raised by this court. *Cincinnati Ins. Co. v. Johnson*, 367 Ark. 468, 241 S.W.3d 264 (2006).

As we already noted, Post attempted in her petition to additionally rely on Ark. Code Ann. § 7-5-801, but she alleged a right to a post-election challenge of Zolliecoffer's eligibility. An election contest under section 7-5-801 "is an adversarial proceeding between a successful and an unsuccessful candidate." *Rubens v. Hodges*, 310 Ark. 451, 454, 837 S.W.2d 465, 467 (1992). The parties stipulated that Zolliecoffer obtained the most votes. The petition filed by Post did not institute a post-election contest under section 7-5-801. As we noted in *Pederson, supra*, the circuit court was without jurisdiction to hear a post-election challenge to eligibility, and the remedy for usurpation of office lies with the state under quo warranto. *See Pederson, supra.*

IMBER, J., not participating.

Linda STROMWALL, on Behalf of Herself and all Others Similarly Situated *v.* Jerre VAN HOOSE, Individually and as Mayor of the City of Springdale; David Hinds, Individually and as Fire Chief of the City of Springdale; the City of Springdale, Arkansas; the Arkansas Municipal League; Mark Hayes, General Counsel of the Arkansas Municipal League; and Don Zimmerman, Executive Director of the Arkansas Municipal League

06-1111 265 S.W.3d 93

Supreme Court of Arkansas
Opinion delivered October 11, 2007

The Evans Law Firm, P.A., by: *Marshall Dale Evans* and *Stephanie Dzur*; *Hirsch Law Firm, P.A.*, by: *E. Kent Hirsch*, for appellants.

Harrington, Miller, Neihouse & Kieklak, P.A., by: *Thomas N. Kieklak*, for appellees.

DONALD L. CORBIN, Justice. This appeal arises from an illegal-exaction claim brought by Appellant Linda Stromwall, on behalf of herself and all others similarly situated, against Appellees Jerre Van Hoose, individually and as mayor of the City of Springdale; David Hinds, individually and as fire chief of the City of Springdale; the City of Springdale, Arkansas; the Arkansas Municipal League (AML); Don Zimmerman, executive director of the AML; and Mark Hayes, general counsel of the AML. Appellant appeals both the Washington County Circuit Court's order denying her motion to proceed pursuant to Ark. R. Civ. P. 23.2 and denying in part, granting in part her motion to proceed pursuant to Ark. Const. art. 16, § 13, as well as the court's order granting summary judgment in favor of Appellees and dismissing the case. On appeal, Appellant raises five arguments for reversal: the circuit court erred in (1) dismissing the illegal-exaction claim as to the taxpayers within 498 of the 499 municipalities participating in the Arkansas Municipal League's Municipal Legal Defense Program (MLDP); (2) denying her motion to

proceed against the AML, an unincorporated association, pursuant to Rule 23.2; (3) considering the merits in the certification decision; (4) granting summary judgment when issues of fact remained to be decided; and (5) failing to make findings of fact and conclusions of law. Because this case involves both constitutional and statutory interpretation, as well as an issue of first impression, jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(2) and (b)(1). We affirm the circuit court's orders.

The present suit originated from Appellant's objection to a November 1, 2002 settlement agreement entered in the case of *Bitner v. City of Springdale*, United States District Court, Western District of Arkansas, Case No. 01-5164. Appellant objected to the settlement based upon her contention that the payment of punitive damages and the payment of the individual defendant's personal liability was an illegal exaction. Appellant's request to intervene in the matter was denied.

Following the settlement, Appellant filed the present action alleging an illegal exaction. Appellant's complaint argued that (1) payment of the *Bitner* settlement was an illegal exaction, and (2) all premiums paid by Arkansas municipalities since November 4, 1997, to the AML for the MLDP are illegal exactions because the MLDP is a dry-hole contract.

On May 5, 2005, Appellant filed a motion to approve notice and proceed pursuant to article 16, section 13, and a motion to proceed pursuant to Rule 23.2. Following a February 21, 2006 hearing, the circuit court denied her motion to proceed pursuant to Rule 23.2 and granted her motion to approve notice and proceed pursuant to article 16, section 13 only to the extent that this case would proceed against Springdale, Van Hoose, Hinds, and the AML. The court denied Appellant's motion as to her claim against all other municipalities in Arkansas and denied the putative defendant class representing the AML. This ruling was entered into record on February 24, 2006.[1] On March 9, 2006, Appellant made a request for findings of fact and conclusions of law pursuant to Ark. R. Civ. P. 52. The circuit court never acted on this motion.

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[1] This order was modified by the circuit court on April 25, 2006, to include a Ark. R. Civ. P. 54(b) certification. Appellant filed a timely notice of appeal of this order on May 4, 2006.

On March 30, 2006, Appellees filed a motion for summary judgment arguing, in part, that no genuine issues of material fact existed because the MLDP is an authorized association of municipalities under Arkansas law, appropriations by Arkansas municipalities to the MLDP are not contrary to law, and the *Bitner* settlement agreement was not in violation of the law. Appellant responded that material issues of fact existed and submitted an affidavit to support her answer.

A hearing was held on June 19, 2006. At the close of the hearing, the circuit court announced that it would grant summary judgment. This ruling was entered into the record on July 10, 2006. That same day, Appellant filed an amended and supplemental notice of appeal from the circuit court's April 25 and July 10 orders.

I. Illegal Exaction and Arkansas Rule of Civil Procedure 23.2

Appellant's first two arguments for reversal are: the circuit court erred in (1) dismissing the illegal-exaction claim as to taxpayers within 498 of the 499 municipalities participating in the MLDP; and (2) denying her motion to proceed against the AML, an unincorporated association, pursuant to Rule 23.2. These arguments are intrinsically intertwined, and as such, they are best discussed in conjunction with one another.

In dealing with issues of constitutional interpretation, this court performs a de novo review because it is for this court to determine what a constitutional provision means. *See Weiss v. Maples*, 369 Ark. 282, 253 S.W.3d 907 (2007). Similarly, our review of a circuit court's interpretation of rules and regulations is de novo. *See Price v. Thomas Built Buses, Inc.*, 370 Ark. 405, 260 S.W.3d 300 (2007). In the absence of showing that the circuit court erred in its interpretation of the law, the interpretation will be accepted as correct on appeal. *See id.*; *Weiss*, 369 Ark. 282, 253 S.W.3d 907.

Appellant first argues that the circuit court erred in dismissing her illegal-exaction claim based upon its finding that she was inadequate to represent all taxpayers throughout the state. Article 16, section 13 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.

An illegal exaction is defined as any exaction that either is not authorized by law or is contrary to law. *See Brewer v. Carter*, 365 Ark. 531, 231 S.W.3d 707 (2006). An illegal-exaction suit under article 16, section 13 is, by its nature, a class action as a matter of law. *See McGhee v. Ark. State Bd. of Collection Agencies*, 360 Ark. 363, 201 S.W.3d 375 (2005). An illegal-exaction suit is a constitutionally created class of taxpayers, and suit is brought for the benefit of all taxpayers. *Id.* Specifically, every inhabitant of the area affected by the alleged illegal exaction is a member of the class. *See Worth v. City of Rogers*, 351 Ark. 183, 89 S.W.3d 875 (2002). Lastly, it is well established that article 16, section 13 is self-executing and imposes no terms or conditions upon the right of the citizen to file suit to prevent an illegal exaction. *See McGhee*, 360 Ark. 363, 201 S.W.3d 375.

Here, Appellant pursued her illegal-exaction claim on behalf of all taxpayers of each municipality participating in the MLDP.[2] At the hearing on the issue, the circuit court explained that Appellant could pursue her illegal-exaction case over Springdale and the AML because she was suing them on a claim requesting that they refund to Springdale money which was illegally paid, but ruled that there is not a class nor an action against the AML on behalf of all other cities because of the circuit court's ruling that Rule 23.2 requirements were not met. Specifically, the circuit court found:

> 1. The proposed plaintiff class representative for the proposed class of taxpayers from 499 Arkansas municipalities which participate in the [MLDP] is inadequate to represent the proposed taxpayer class because she is only a resident of Springdale, Arkansas.
>
> 2. The proposed class representative may represent only the taxpayers of the City of Springdale, Arkansas, even though all proposed taxpayers from the 499 municipalities pay taxes used to pay into the [MLDP].
>
> 3. The claim may be pursued only for the City of Springdale's payments to the [MLDP].

[2] Specifically, she defined her class as: All citizens of Arkansas municipalities who contributed to the general treasury thereof and whose municipality participated in the MLDP since November 4, 1997.

> 4. The claims of the taxpayers of the 498 remaining municipalities may not be pursued herein under Art. 16, § 13 of the Constitution of Arkansas.

Appellant claims that this was wrong because the Arkansas Constitution's illegal-exaction provision defines the class to include all of the victims of an illegal exaction. Moreover, she argues that the court's ruling that she was not adequate to represent all taxpayers was an attempt to define and limit the class, which cannot be done because a class action under article 16, section 13 is self-executing and a class as a matter of law. Thus, it is not the role of the trial judge to define the class. Appellant concludes that the lawsuit against the AML is defined by article 16, section 13, and she is a proper class representative of all taxpayers whose money was misappropriated by the MLDP, not just those taxpayers who happen to reside in Springdale.

This court has made it clear that taxpayers who are the victims of an illegal exaction form a class as a matter of law under article 16, section 13 because an illegal-exaction claim is by its nature in the form of a class action. *See McGhee*, 360 Ark. 363, 201 S.W.3d 375. Plainly speaking, all taxpayers who are wronged under the alleged illegal exaction are members of the class, and the class is not subject to the rules generally governing class actions. *See Worth*, 351 Ark. 183, 89 S.W.3d 875 (explaining that an illegal-exaction case is not governed by Ark. R. Civ. P. 23). Therefore, Appellant's adequacy of representation is not an issue. Moreover, the plain language of article 16, section 13 is clear — any citizen may bring suit on behalf of himself and other taxpayers to prevent enforcement of illegal exactions.

Here, it is undisputed that Appellant was a taxpayer who paid taxes used to pay into the MLDP. Therefore, in accordance with article 16, section 13, she was capable of bringing this suit on behalf of *all* taxpayers, including those taxpayers in the other 498 municipalities who also paid taxes used to pay into the MLDP. Thus, the circuit court erred in finding Appellant to be an inadequate representative to pursue the illegal-exaction claim against the remaining 498 municipalities. Specifically, Appellant's adequacy of representation of the plaintiff class is not an issue because this is an illegal-exaction case under article 16, section 13.

However, in this case, we are faced with a second issue. Specifically, rather than naming all 499 municipalities as parties to the suit, Appellant sought to proceed pursuant to Rule 23.2 in her

action brought under article 16, section 13. In her motion, she explained that the complaint was filed against an unincorporated association, the AML, comprised of more than 499 members, and that Springdale was an adequate representative of the AML. Moreover, Appellant explained that when an action is brought against the members of an unincorporated association as a class, the proper method of proceeding is to name the members as representative parties by a particular representative that will represent the interests of the association and its members.

Although actions by and against members of unincorporated associations as a class have long been recognized in Arkansas, nothing within our case law reveals an instance where an appellant brought an illegal-exaction claim pursuant to article 16, section 13 against an unincorporated association as a class under Rule 23.2. However, in illegal-exaction cases, Rule 23 can provide guidance in how to manage the conduct of the class action. *See Worth*, 351 Ark. 183, 89 S.W.3d 875. Thus, it follows that Rule 23.2 may also provide guidance in managing the class action as it relates to a proposed defendant class.[3]

Arkansas Rule of Civil Procedure 23.2 states:

> An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

This court has explained that suits brought against members of an unincorporated association may be maintained as class actions by naming certain members as representatives of the class if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. *See Fausett & Co., Inc. v. Bogard*, 285 Ark. 124, 685 S.W.2d 153 (1985). Furthermore, it is clear

[3] It should be noted that Rule 23.2 is a separate rule from Rule 23. *See Arkansas County Farm Bureau v. McKinney*, 334 Ark. 582, 976 S.W.2d 945 (1998). Nevertheless, for the issue now before this court, it would be illogical not to follow this court's prior analysis of illegal-exaction class actions as it relates to our rules of civil procedure.

from Rule 23.2 that the party wishing to proceed under Rule 23.2 bears the burden of showing that the representative parties will fairly and adequately protect the interests of the association and its members.

As already stated, Appellant's adequacy of representation is not an issue in an illegal-exaction proceeding under article 16, section 13. However, in regards to the defendant class, under Rule 23.2, Appellant had the burden of showing that Springdale was an adequate representative of the AML and its members. In the present case, during the hearing on the issue, the court explained that there was no evidence that Springdale had been representative of the AML or that it had ferociously defended all members of that association. Thus, the circuit court concluded that Appellant failed to meet her burden to establish her right to proceed under Rule 23.2. Specifically, the court found that, although Springdale is a member of the AML and participates in the MLDP, Springdale would not adequately represent the defendant class, the members of the AML who also participate in the MLDP.

Now, on appeal, Appellant asserts that Springdale's situation is exactly that of the other 498 municipal members with regard to the common issues of liability of the association for the illegal exaction such that Springdale's stake in the outcome is the same as the other association members, thus demonstrating that there would not be a superior choice of representative.[4] Moreover, she argues that Springdale presented no evidence that it would not be adequate, but merely denied that it would fairly and adequately represent the members and the association. Appellant claims that if this flat denial of adequacy is sufficient then there would never be a representative party through whom one may sue an association under Rule 23.2.

Appellant's argument has a fatal flaw — she had the burden to show adequacy of representation. The circuit court found that she failed to meet this burden. Specifically, the court explained:

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[4] Appellant also argues that the circuit court may be correct in its ruling that she could not proceed under Rule 23.2 because Ark. Code Ann. § 4-28-507 (Repl. 2001) gives nonprofit associations such as the AML the legal capacity to sue or be sued in their own names, and therefore Appellant could proceed with her individual action against the AML. Upon review, this argument was not made before the circuit court and as such cannot be addressed on appeal. *See McCoy v. Montgomery*, 370 Ark. 333, 259 S.W.3d 430 (2007).

> there has not been any evidence that the City of Springdale has been a representative of the Arkansas Municipal League and has ferociously defended all of the members of that association. Simply because the City of Springdale defends itself is a far cry from saying, well, we're going to defend all of these other cities out there, and we're going to take the lead, and we're going to look out for their interests and we're going to make sure that their interests are protected. That has not been shown to this court.

The court did not err in reaching this conclusion, as the little evidence that was presented by Appellant related to Springdale's strong defense in a previous suit.

Because Appellant failed to meet her burden of showing that Springdale was an adequate representative of the AML, the circuit court did not err in denying her motion to proceed pursuant to Rule 23.2. Therefore, despite its erroneous finding that Appellant was an inadequate representative, the circuit court did not err in dismissing the illegal-exaction claim as to taxpayers within 498 of the 499 municipalities participating in the MLDP because those municipalities could not be made parties to the suit through Rule 23.2. Specifically, because Appellant did not name any of the other municipalities and because the circuit court properly denied her request to proceed under Rule 23.2, they were not parties to this action, and thus those municipalities' taxpayers are also not proper parties in this illegal-exaction claim. Thus, the circuit court was correct in concluding that Appellant could only represent herself and Springdale taxpayers in her illegal-exaction claim against Springdale, Van Hoose, Hinds, and the AML. *See Thomas v. Avant,* 370 Ark. 377, 260 S.W.3d 266 (2007) (holding that it is axiomatic that this court can affirm a circuit court if the right result is reached even if for a different reason).

II. Consideration of Merits

Appellant's next argument is that the circuit court erred in considering the merits in the certification decision. Specifically, she claims that the dismissal of the claims against the 498 remaining municipalities at the class-certification hearing required a determination of the merits of those claims, which is error at the certification stage of the proceedings. Appellant does not cite to any legal authority for this proposition. As such, this

argument cannot be addressed on appeal. *See Ormond Enters., Inc. v. Point Remove Wetlands Reclamation & Irr. Dist.*, 369 Ark. 250, 253 S.W.3d 449 (2007) (holding that this court refuses to consider arguments not supported by convincing argument or citation to legal authority).

III. Summary Judgment

Appellant also argues that the circuit court erred in granting summary judgment when issues of fact remained to be decided. In granting summary judgment on the allegations contained in both the second and third amended complaints,[5] the circuit court found:

> 1. There are no material facts in dispute, and Defendants' Motion for Summary Judgment is ripe for ruling by this Court.
>
> 2. Plaintiff alleges that this is a public funds illegal exaction case. Specifically, that the expenditure of monies by Springdale to join the [MLDP] is and was an illegal exaction. Further, that the expenditure of monies by Springdale and the [MLDP] to settle the *Bitner v. City of Springdale, et al* suit was an illegal action.
>
> 3. A.C.A. § 14-54-101 permits Arkansas cities and towns to create and join the [MLDP].
>
> 4. The expenditure of monies outlined in paragraph [2] above is and was lawful and is not an illegal exaction.

Furthermore, during the summary judgment hearing, the circuit court stated that it did not "find that these appropriations to the defense fund are contrary to law and that they have a right to set up this association" under Ark. Code Ann. § 14-54-101 (Repl. 1998).

Now, on appeal, Appellant contends that (1) she stated a case for an illegal use of public funds; (2) issues of fact exist as to the amount of illegal payment of punitive damages; (3) the MLDP is a dry-hole contract and therefore an illegal exaction; and (4) all necessary parties are before the court.

The law is well settled that 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

[5] The only difference between the second and third amended complaints was the addition of Zimmerman and Hayes as named defendants.

entitled to judgment as a matter of law. *See, e.g.*, *Gallas v. Alexander*, 371 Ark. 106, 263 S.W.3d 494 (2007). 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 id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *See id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *See id.* Our review focuses not only on the pleadings, but also on the affidavits and documents filed by the parties. *See id.*

a. Illegal Use of Public Funds

First, Appellant argues that she stated a case for an illegal use of public funds because her claim is that the cities have misused public funds in connection with the MLDP. Specifically, she asserts that if, as the AML claims, there is no contractual obligation or obligation otherwise to provide a defense in exchange for revenue paid over to the MLDP, then the payment is illegal since it is the misapplication of public funds without any assurance that the taxpayers will reap any benefit from the expenditure of these funds.

In response to this argument, Appellees argue that the MLDP is a lawful association of Arkansas cities and towns, authorized under section 14-54-101. They further contend that because there exists statutory authorization to associate through the MLDP for the promotion of their general welfare and to join for the purchase of services, including legal services, the circuit court correctly found that appropriations to the MLDP are not an illegal exaction. Lastly, Appellees argue that the circuit court's finding is consistent with the Eighth Circuit's holding in *O'Brien v. City of Greers Ferry*, 873 F.2d 1115 (8th Cir. 1989), that there is statutory authority for payment of such fees.

Section 14-54-101 permits municipalities to "[a]ssociate with other municipalities for the promotion of their general welfare" and to "[j]oin with other municipalities in the purchase of equipment, supplies, or services." Ark. Code Ann. § 14-54-101(4) and (5). Although the present issue has never been addressed by this court, this statute has been interpreted to allow municipalities to join together in the purchase of services, such as

legal services. *O'Brien*, 873 F.2d 1115.[6] Thus, municipal funds can be used to pay attorney's fees for public officials and employees who are not charged with a criminal offense, and who are sued in their official capacity. *Id.*

In the present case, Appellant's illegal-exaction claim consisted of two parts. First, she alleged that the expenditure of monies by Springdale to join the MLDP is and was an illegal exaction. Second, she claimed that the expenditure of monies by Springdale and the MLDP to settle the *Bitner* case was an illegal exaction. Upon review, the circuit court did not err in finding that both of these expenditures were lawful, and that neither constituted an illegal exaction. First, and foremost, an illegal exaction is an exaction that is either not authorized by law or is contrary to law. *See Brewer*, 365 Ark. 531, 231 S.W.3d 707. That is simply not the case here. Specifically, Springdale is authorized by section 14-54-101 to participate in an association, such as the AML, for the promotion of the general welfare of the city and to join with other municipalities to purchase services. The MLDP is a subset of such an association and provides beneficial services, i.e., legal services, for the promotion of Springdale's general welfare. Moreover, the expenditure of monies to settle the *Bitner* case was not an illegal exaction because the payment of a settlement was allowed by the MLDP's terms and conditions. As such, viewing the evidence in the light most favorable to Appellant, the circuit court did not err in granting summary judgment because no material issues of fact exist as to Appellant's claim that there was an illegal use of public funds.

b. Illegal Payment of Punitive Damages

Appellant's second argument is that issues of fact exist as to the amount of illegal payment of punitive damages. Essentially, this is a challenge to the *Bitner* settlement. Here, the circuit court found that the settlement expenditure by Springdale and the MLDP was lawful and not an illegal exaction. This finding was not in error as no genuine issues of material fact exist as to the settlement.

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[6] Although Eighth Circuit decisions are not binding on this court, *see Heinemann v. Hallum*, 365 Ark. 600, 232 S.W.3d 420 (2006), they may be used to provide guidance in situations, such as this, where our court has never addressed an issue before it.

Specifically, and despite Appellant's arguments to the contrary, the settlement was not a payment of punitive damages in violation of Arkansas law.

First, Appellant does not cite to any authority besides her own speculation as support for her argument. This court will not consider arguments that are unsupported by citation to legal authority or convincing argument. *See Ormond Enters., Inc.*, 369 Ark. 250, 253 S.W.3d 449. Second, as discussed above, the *Bitner* settlement was authorized by the MLDP's terms and conditions, and our public policy favors settlement of litigation. *See Douglas v. Adams Trucking Co., Inc.*, 345 Ark. 203, 46 S.W.3d 512 (2001) (explaining that without question, the law favors the amicable settlement of controversies). Lastly, the language of the settlement agreement clearly indicates that the plaintiff in *Bitner* released the compensatory and punitive claims against Springdale, Van Hoose, and Hinds prior to entry of the final order and judgment. Thus, no issues of material fact exist that would require reversal of the circuit court's order granting summary judgment.

c. Dry-hole Contract

Appellant's next argument is that the MLDP is a dry-hole contract, and therefore an illegal exaction. Additionally, she claims that because this is a contract, the parol evidence rule limits admission of matters not within the written agreement.[7]

Initially, Appellant argues that the program is a contract. In support of this, she focuses on the use of the word "agreement" throughout the MLDP's terms and conditions. We are unper-

[7] Appellant also argues that *O'Brien*, 873 F.2d 1115, is not controlling precedent and that res judicata and collateral estoppel do not apply. As previously discussed, *O'Brien* is not controlling or binding on this court, but we may look to it for guidance. Appellant's res judicata and collateral estoppel arguments were actually issues brought up by Appellees in their motion for summary judgment based upon Appellant's attempt to intervene in the *Bitner* case. The record is devoid of any explicit ruling as to these issues, such that they cannot be considered on appeal. *See Beverly Enters.-Ark., Inc. v. Thomas*, 370 Ark. 310, 259 S.W.3d 445 (2007). Nevertheless, res judicata does not apply because she was not a party to the previous action and collateral estoppel does not apply because she was denied intervention such that the issue of whether the settlement agreement was an illegal exaction was not part of the *Bitner* case. *See Martin v. Pierce*, 370 Ark. 53, 257 S.W.3d 82 (2007) (explaining that res judicata bars litigation if both suits involve the same parties or their privies); *Parker v. Johnson*, 368 Ark. 190, 244 S.W.3d 1 (2006) (explaining that the doctrine of collateral estoppel bars the relitigation of issues of law or fact actually litigated by the parties in the first suit).

suaded by Appellant's "agreement" argument. The use of the word "agreement" does not render something a contract; rather, the essential elements to a contract are competent parties, subject matter, legal consideration, mutual agreement, and mutual obligations. *See Stewart v. Combs*, 368 Ark. 121, 243 S.W.3d 294 (2006). Appellant has failed to show any of these things.

The MLDP is a program within the AML that provides legal services to those municipalities who opt to join the program. Municipalities are authorized to associate for the promotion of their general welfare, including the purchase of services such as those provided here by the MLDP. As we stated in *City of Marianna v. Arkansas Municipal League*, 291 Ark. 74, 722 S.W.2d 578 (1987), municipalities have the option of joining the program and it is not required. There, we held that the MLDP was not an insurance contract. *Id.* Upon our review, it is clear to this court that the MLDP is not a contract at all. Rather, it is a program within a constitutionally valid association. *See* Ark. Code Ann. § 14-54-101; *O'Brien*, 873 F.2d 1115.

Appellant also argues that the fact that this program is charging its members taxpayer money in return for the possibility of services and the possibility of indemnity makes it look like a contractual arrangement, valid, ultra vires or otherwise, such that it falls squarely within the illegal-exaction prohibitions of *Barnhart v. City of Fayetteville*, 335 Ark. 57, 977 S.W.2d 225 (1998).[8] Specifically, she argues that *Barnhart* is the controlling precedent in this case because it deals with public contracts. She contends that in this case, as in *Barnhart*, there is the possibility that services might not be received because of the agreement's lack of mutuality, which creates a dry hole. Specifically, she argues that the contract is illegal and unenforceable since a dry hole is created because the MLDP has the right to unilaterally terminate the program and no obligation to defend or pay damages.

This argument fails. *Barnhart* is distinguishable from the present case because there the city's agreement to unconditionally guarantee the obligations of another city and county was in violation of article 16, section 1 of the Arkansas Constitution, and therefore was unauthorized and ultra vires. In this case, Springdale

[8] It should be noted that Appellant is actually relying upon the holding in the first *Barnhart* case, *Barnhart v. City of Fayetteville*, 321 Ark. 197, 900 S.W.2d 539 (1995), which was summarized in *Barnhart*, 335 Ark. 57, 59, 977 S.W.2d 225, 226.

had the statutory authority to join an association for the purposes of promoting the general welfare of the municipality and to purchase services. *See* Ark. Code Ann. § 14-54-101; *O'Brien*, 873 F.2d 1115. Thus, the alleged illegal exaction in this case is wholly different than the illegal exaction found to exist in *Barnhart*, and the MLDP is not a dry-hole contract.

Appellant next argues that the parol evidence rule precludes this court from considering Appellees' allegation that the MLDP includes services not within its written contract. Specifically, she maintains that the Hayes affidavit contains inadmissible parol evidence because it attempts to vary the terms of the agreement. Finally, she asserts that an issue of fact exists as to whether there is indeed any consideration in return for the money paid to the MLDP and that issue cannot be dismissed on summary judgment.

This argument fails. Parol evidence may not be admitted to alter, vary, or contradict the written contract, but it may be admitted to prove an independent, collateral fact about which the written contract was silent. *See Alexander v. McEwen*, 367 Ark. 241, 239 S.W.3d 519 (2006). Here, the MLDP is not a contract; consequently, the parol evidence rule is not a factor.

d. All Necessary Parties are Before the Court

Appellant's last argument is that all necessary parties are before the court. This issue was raised by Appellees in their motion for summary judgment. Specifically, they argued that Appellant failed to join all the necessary parties to this action, specifically the plaintiff in *Bitner* because he is the holder of the sum of money claimed to have been illegally exacted. Therefore, according to Appellees, no relief could be accorded to the class among the named parties. Now, on appeal, Appellant argues that all necessary parties are before the court because the plaintiff in *Bitner* had no possibility of being required to refund any of the monies received in the settlement, and thus was not a necessary party under Ark. R. Civ. P. 19(a).

This is a moot issue as the court correctly determined that the expenditure of monies was not an illegal exaction. As a general rule, appellate courts of this state will not review issues that are moot. *See Potter v. City of Tontitown*, 371 Ark. 200, 264 S.W.3d 473 (2007); *Allison v. Lee County Election Comm'n*, 359 Ark. 388, 198 S.W.3d 113 (2004). To do so would be to render advisory

opinions, which this court will not do. *Id.* Generally, a case becomes moot when any judgment rendered would have no practical legal effect upon a then-existing legal controversy. *Id.* There are two recognized exceptions to the mootness doctrine. *Id.* The first one involves issues that are capable of repetition, but that evade review. And the second one concerns issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation. *Id.* The issue of joinder does not fall within any of these exceptions. Consequently, because the case was properly dismissed, it does not matter whether or not the plaintiff in *Bitner* should have been joined to the action.

e. Conclusion

The circuit court did not err in granting summary judgment because there are not material facts in dispute and there was not an illegal exaction of public funds. A review of the record reveals that Appellant simply failed to meet proof with proof and did not demonstrate material issues of fact as to (1) an illegal use of public funds, and (2) the amount of illegal payment of punitive damages. Additionally, Appellant's dry-hole contract argument also fails since the MLDP is not a contract because it was within the purview of section 14-54-101 for municipalities to create and join the MLDP to promote the general welfare of their respective municipalities. Finally, Appellant's joinder argument is moot as the circuit court properly granted summary judgment as no issues of fact exist and it was originally Appellees' contention that the plaintiff in *Bitner* should have been a named party in this case.

IV. Findings of Fact and Conclusions of Law

Appellant's final argument is that the circuit court erred by failing to make findings of fact and conclusions of law pursuant to Ark. R. Civ. P. 52. Specifically, Appellant, citing *BPS, Inc. v. Richardson*, 341 Ark. 834, 20 S.W.3d 403 (2000), claims that once a timely request for findings of fact and conclusions of law is filed affecting the court's decision whether to certify a suit as a class action, the circuit court is required to enter written findings of fact and conclusions of law analyzing the class criteria and reasoning for the court's decision. She contends that she presented her motion for specific findings of fact and conclusions of law, and the circuit court ignored this request and made no findings or conclusions as required by Rule 52(b).

This argument is without merit. First, the cases cited in support of her proposition are based upon Rule 23 certification. This court has made clear that Rule 23.2 is not a subset of Rule 23. *See McKinney*, 334 Ark. 582, 976 S.W.2d 945. It is a completely separate rule that incorporates provisions of Rule 23 only to the extent provided in Rule 23.2. *Id.* Second, Rule 23.2 does not require class certification in order to proceed under that rule. *Id.* As such, Appellant's request pursuant to Rule 52 was in error and the circuit court did not err in denying her request.

Affirmed.

Elizabeth Diann FRANCIS *v.*
PROTECTIVE LIFE INSURANCE COMPANY, a corporation;
and Chrysler Financial Corporation

07-206 265 S.W.3d 117

Supreme Court of Arkansas
Opinion delivered October 11, 2007

[Rehearing denied November 8, 2007.]

Sam Sexton III, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, PLLC, by: *John K. Baker* and *P. Benjamin Cox*, for appellee Protective Life Insurance Company.

Watts, Donovan & Tilley, P.A., by: *Richard N. Watts, Debbie S. Denton*, and *Staci Dumas Carson*, for appellee Chrysler Financial Corporation.

ANNABELLE CLINTON IMBER, Justice. This case comes to us on petitions for review filed by Appellees Protective Life Insurance Company ("Protective Life") and Chrysler Financial Corporation ("Chrysler"). The Circuit Court of Johnson County granted summary judgments in favor of Protective Life and Chrysler and against Elizabeth Diann Francis ("Elizabeth"). On appeal, the Arkansas Court of Appeals reversed the circuit court's summary-judgment orders. *Francis v. Protective Life Ins. Co.*, 98 Ark. App. 1, 249 S.W.3d 828 (2007). We granted the petitions for review filed pursuant to Rule 2-4 of our Rules of the Supreme Court. We dismiss this appeal for lack of jurisdiction.[1]

On April 14, 2002, Elizabeth and her husband, Terrill K. Francis, purchased a vehicle from Breeden Dodge in Fort Smith. Financing was provided at the time of the transaction, pursuant to a retail installment contract, now held by Chrysler. Elizabeth and her husband also purchased credit life insurance from Protective Life at the time of the transaction. Protective Life was to pay the remaining debt on the vehicle loan in the event that Terrill passed away before the loan was paid in full. The sales transaction, financing, and insurance were all handled by an employee in the finance and insurance department at Breeden Dodge.

Terrill died on January 6, 2003. Shortly thereafter, Elizabeth filed a claim with Protective Life: Protective Life responded by letter, informing Elizabeth that the insurance policy should not have been issued and that coverage would be denied. In support of its decision to deny coverage, Protective Life quoted the applica-

[1] As a threshold issue, we note Protective Life's contention in its brief that the appeal should be sent back for rebriefing because of Elizabeth's failure to abstract. No abstract was provided in this case because no hearings were held and no testimony was taken. Protective Life claims that Elizabeth was not excused from abstracting the affidavits and responses to requests for admissions, as these documents are analogous to testimony. However, Protective Life cites us to a case decided pursuant to an old version of our rule on abstracting. Our current rule provides that "[p]leadings and documentary evidence shall not be abstracted." Ark. Sup. Ct. R. 4-2(a)(5) (2007). The discovery documents at issue here were submitted as exhibits attached to pleadings. Such evidence is appropriately included in the addendum, pursuant to Ark. Sup. Ct. R. 4-2(a)(8) (2007).

tion signed by Terrill on April 14: "I am not insurable for *any* coverage if I now have, or during the past 2 years have been seen, diagnosed or treated (including medication) for: (a) A condition, disease or disorder of the brain, heart, lung(s), liver, kidney(s), nervous system or circulatory system . . . ." (emphasis in original). The letter stated that Protective Life had obtained medical records indicating Terrill was seen at least eleven times, as late as February 13, 2002, for Severe Chronic Obstructive Pulmonary Disease (COPD). The treatment included hospitalization, prescription medications, and use of oxygen. On April 8, 2003, Protective Life refunded the $1026.40 premium paid on the policy, with a check made out to Chrysler as creditor.

Elizabeth filed a complaint in the Johnson County Circuit Court on June 6, 2003. She alleged breach of contract against Protective Life, claiming it was obligated to pay the amount due on the vehicle loan pursuant to the insurance policy. She contended that the Breeden Dodge employee who handled the transaction knew of her husband's lung condition, because Terrill used oxygen and an inhaler during the transaction and also stated that he would need room in the vehicle for his oxygen tanks. Terrill also told the employee that he was a disabled veteran, to which the employee allegedly responded, "It's no problem, they'll cover you." Elizabeth claimed that this knowledge was imputed to Protective Life by virtue of its agency relationship with the Breeden Dodge employee. She also alleged that, pursuant to the retail installment contract, Chrysler was subject to all claims and defenses she could assert against Breeden Dodge.[2] Elizabeth claimed that the negligence and misrepresentations of the Breeden Dodge employee, relating to the insurance coverage, could be asserted against Chrysler. She requested a declaratory judgment against Chrysler that no further debt was due under the retail installment contract.

Chrysler filed a motion to dismiss, pointing out that it was not a party to the insurance policy, and that any misconduct on the part of Breeden Dodge with respect to the issuance of the policy would be imputed to Protective Life, not Chrysler. The circuit court granted Chrysler's motion on April 6, 2005.

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[2] The contract stated, "Notice: Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof."

Protective Life filed an answer to Elizabeth's complaint, as well as a counterclaim for rescission of the insurance policy, arguing that, by signing the application for insurance, Terrill made material misrepresentations about his health. Protective Life then filed a motion for summary judgment on its counterclaim. On June 1, 2005, the circuit court granted Protective Life's summary-judgment motion. The insurance policy was thereby rescinded, and Elizabeth's complaint against Protective Life was dismissed.

At that point, the only remaining claim in the case was a counterclaim filed by Chrysler, alleging that Elizabeth breached the retail installment contract by failing to pay the remaining debt on the vehicle loan. Chrysler filed a motion for summary judgment on its counterclaim, which was granted on November 1, 2005. However, the order granting Chrysler's summary-judgment motion incorrectly referred to Chrysler as a defendant and dismissed Elizabeth's complaint against Chrysler, which the court had previously done in the April 6 order granting Chrysler's motion to dismiss. Therefore, an amended and substituted order was filed by facsimile on November 3. This order correctly referred to Chrysler as the counterclaimant and granted summary judgment against Elizabeth. A judgment was also filed by facsimile on November 3, awarding Chrysler the sum of $22,786.60, with interest at a rate of six percent per annum, or, alternatively, ordering Chrysler to take possession of the vehicle in the event Elizabeth failed to pay the sum awarded to Chrysler. Hard copies of the judgment and amended order were filed on November 10, each with a notation in the bottom right-hand corner that read, "Replaces fax filed 11-3-05." The only difference between the faxed copies and the hard copies was in the assessed rate of post-judgment interest. On the hard copy of the judgment, the interest rate was written in as ten percent; whereas, on the faxed copy of the judgment, the interest rate was written in as six percent.

Elizabeth filed a notice of appeal on December 9, 2005. She stated that she was appealing from the November 10 order and the prior orders entered on April 6, June 1, and November 1, 2005. As the December 9 notice of appeal was filed fewer than thirty days following the November 10 order but more than thirty days following the November 3 order, this case presents a jurisdictional question. Both Protective Life and Chrysler filed motions in the Arkansas Court of Appeals to dismiss the appeal on the jurisdictional issue. The court of appeals attempted to certify the matter to this court, but we declined to accept the certification.

The Arkansas Court of Appeals decided, in a 4-2 opinion, that it had jurisdiction over the case. *Francis v. Protective Life Ins. Co.*, *supra*. Also, in addressing the merits of the appeal, it reversed the circuit court's grant of summary judgment to both Protective Life and Chrysler, holding there was a genuine issue of material fact as to whether the statements of the Breeden Dodge employee assuring Terrill of insurance coverage were misrepresentations that would estop Protective Life from denying coverage and that could be asserted against Chrysler. *Id.* Both Protective Life and Chrysler assert in their petitions for review that the appeal should have been dismissed for lack of jurisdiction. We agree.

Pursuant to Ark. R. App. P. – Civil 4(a) (2007), a notice of appeal must be filed within thirty days of the entry of the judgment, decree, or order from which the appeal is taken. In this case, the jurisdictional issue turns on a determination of which date the final order and judgment were "entered" — either November 3, when faxed, or November 10, when the hard copies were submitted. Subsection (d) of Appellate Rule 4 specifies that a judgment or order is considered entered when it is filed in accordance with Administrative Order Number 2(b). Ark. R. App. P. – Civil 4(d) (2007). Likewise, Rule 58 of our Rules of Civil Procedure provides that "[a] judgment or decree is effective only when so set forth and entered as provided in Administrative Order No. 2." Ark. R. Civ. P. 58 (2007). Subsections (b)(2) and (b)(3) of Administrative Order Number 2 provide, in pertinent part:

> (2) The clerk shall denote the date and time that a judgment, decree or order is filed by stamping or otherwise marking it with the date and time and the word "filed." A judgment, decree or order is entered when so stamped or marked by the clerk, irrespective of when it is recorded in the judgment record book.
>
> (3) If the clerk's office has a facsimile machine, the clerk shall accept facsimile transmission of a judgment, decree or order filed in such manner at the direction of the court. The clerk shall stamp or otherwise mark a facsimile copy as filed on the date and time that it is received on the clerk's facsimile machine during the regular hours of the clerk's office or, if received outside those hours, at the time the office opens on the next business day. *The date stamped on the facsimile copy shall control all appeal-related deadlines pursuant to Rule 4 of the Arkansas Rules of Appellate Procedure – Civil.* The original judgment, decree or order shall be substituted for the facsimile copy within fourteen days of transmission.

Administrative Order Number 2 (b)(2) and (b)(3) (emphasis added).

The language of the Administrative Order is clear. When an order or judgment is faxed to the clerk's office, it is file-stamped, and the date marked on the faxed copy controls all deadlines relevant to an appeal. The court of appeals, however, found that the original copies of the order and judgment were never substituted for the faxed copies as required by subsection (b)(3). The majority concluded that, because of a lack of compliance with Administrative Order Number 2, the November 10 order and judgment constituted the only valid order and judgment from which to appeal.

In addressing the jurisdictional question, the court of appeals declined to heed the guidance of a Reporter's Note to Administrative Order Number 2. The Reporter's Note reads as follows: "To ensure the permanency of official court records, the original judgment, decree or order must be substituted for the facsimile copy within 14 days of transmission, but this step does not have any bearing on the effectiveness of the faxed document or the time for taking an appeal." The majority was correct in noting that Reporter's Notes are not binding precedent, but this court has held they may offer guidance as to a rule's meaning or intent. *See Velek v. State (City of Little Rock)*, 364 Ark. 531, 222 S.W.3d 182 (2006). We believe the court of appeals erred in refusing to acknowledge the intent of Administrative Order Number 2 as reflected in the Reporter's Note.

Moreover, we are not convinced that the court of appeals properly characterized the filings of the order and judgment as noncompliant. Original copies arguably were submitted on November 10, pursuant to subsection (b)(3) of Administrative Order Number 2. The hard copies are identical to the faxed copies, with the exception of the interest rate, which was filled in by hand on the typed judgments. In addition, the hard-copy order and judgment both display the notation "Replaces fax filed 11-3-05," indicating they were meant to serve as substitutes pursuant to Administrative Order Number 2, subsection (b)(3).

■ In light of the Administrative Order and the Reporter's Note, we hold that the November 3 order and judgment constitute the final, appealable order. For us to hold otherwise would require a finding that the November 10 order amended the November 3 order, replacing it as the final, appealable order. This we cannot do. The November 10 judgment is clearly *nunc pro tunc*, and the November 3 and 10 orders are identical.

Arkansas Rule of Civil Procedure 60 and case law extending back over 150 years give circuit courts the authority to correct a clerical mistake in an order at any time with a *nunc pro tunc* order, used to "make the record speak now what was actually done then." *See* Ark. R. Civ. P. 60 (2007); *Lord v. Mazzanti*, 339 Ark. 25, 2 S.W.3d 76 (1999); *Bridwell v. Davis*, 206 Ark. 445, 447, 175 S.W.2d 992, 994 (1943). A circuit court is permitted to enter a *nunc pro tunc* order when the record is being made to reflect that which occurred but was not recorded due to a misprision of the clerk. *Rossi v. Rossi*, 319 Ark. 373, 892 S.W.2d 246 (1995). This court has defined a true clerical error, one that may be corrected by *nunc pro tunc* order, as "essentially one that arises not from an exercise of the court's judicial discretion but from a mistake on the part of its officers (or perhaps someone else)." *Luckes v. Luckes*, 262 Ark. 770, 772, 561 S.W.2d 300, 302 (1978).

In the instant case, the hand-written entry of an interest rate of six percent on the November 3 judgment, which was changed to ten percent on the November 10 judgment, can be said to be a true clerical error. The interest rate was fixed by statute. *See* Ark. Code Ann. § 16-65-114 (Repl. 2005). This court has previously held that, where the amount on which post-judgment interest was computed was not in line with a judgment notwithstanding the verdict, the correction of that amount was accomplished by *nunc pro tunc* order. *See Southern Farm Bureau Cas. Ins. Co. v. Robinson*, 238 Ark. 159, 379 S.W.2d 8 (1964). In that case, the error was obviously clerical because the court had already determined the correct amount, in its grant of the motion for judgment notwithstanding the verdict, and the amount stated in the order did not conform to the prior order. *Id.* Similarly, in the case at bar, the post-judgment interest rate was already determined by statute. The insertion of a six percent interest rate on the November 3 judgment was obviously a clerical error, that is, one arising not from an exercise of the court's judicial discretion but from a mistake. Thus, the correction of the post-judgment interest rate, so as to reflect the ten percent interest rate fixed by statute, was accomplished by the November 10 *nunc pro tunc* judgment.

An appeal from a *nunc pro tunc* order may challenge only those corrections made in the *nunc pro tunc* order; it may not challenge issues in the original order that could have been appealed earlier. *See Kindiger v. Huffman*, 307 Ark. 465, 821 S.W.2d 33

(1991). We have dismissed appeals as untimely when appellants, after the time for appealing from the original order had expired, attempted to appeal issues not addressed in or corrected by the *nunc pro tunc* order. *See id.*; *Holt Bonding Co., Inc. v. State*, 353 Ark. 136, 114 S.W.3d 179 (2003). In the instant case, the interest rate was the only change made in the November 10 *nunc pro tunc* judgment and order, but Elizabeth's appeal does not concern the interest rate correction. Under our prior precedent, we must dismiss as untimely the appeal of all other issues.

Elizabeth nonetheless makes one final argument on the jurisdictional question. She asserts that she was not properly notified of the judgment and order filed by facsimile on November 3. Based on this allegation, she contends the November 10 filings were the only orders from which she could appeal because, to her knowledge, those were the only orders that existed. As to this argument, we conclude that Elizabeth has failed to show prejudice. Rule 60(b) of our Rules of Civil Procedure provides that a circuit court "may at any time, with prior notice to all parties, correct clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission." Ark. R. Civ. P. 60(b) (2007). Though Elizabeth failed to cite us to this rule, it clearly requires that notice be given to the parties before a court corrects a clerical error. Despite the notice requirement, a *nunc pro tunc* order will not be set aside as having been entered without notice to a party where no prejudice is shown. *See Holt Bonding Co., Inc. v. State, supra*; *Luckes v. Luckes, supra.* Moreover, we have held that, when a *nunc pro tunc* order reflects an accurate correction of the clerical error, there can be no prejudice. *Luckes v. Luckes, supra.* When the *nunc pro tunc* order is correct, "[n]othing would be gained by setting aside the order and immediately re-entering it." *Id.* at 772, 561 S.W.2d at 302. In the instant case, Elizabeth cannot show she was prejudiced by the November 10 *nunc pro tunc* judgment, because it accurately reflects the correct interest rate.

In an attempt to show prejudice, Elizabeth's counsel points out that he had no way of knowing that an order and judgment were entered on November 3, because he did not receive copies of the November 3 filings and because his copies of the November 10 order and judgment did not contain the notation "Replaces fax filed 11-3-05." According to her counsel, Eliza-

beth's notice of appeal was filed late through no fault of his own, but because the circuit court failed to keep him informed about the filings in the case. We disagree. We have held that a lawyer and litigant must exercise reasonable diligence in keeping up with the happenings of a case. *See Arkco Corp. v. Askew*, 360 Ark. 222, 200 S.W.3d 444 (2004); *Arnold v. Camden News Publishing Co.*, 353 Ark. 522, 110 S.W.3d 268 (2003). By the exercise of reasonable diligence so as to keep up with the filings in the case, Elizabeth and her counsel would have known about the order and judgment entered on November 3 and the notation on the November 10 order and judgment. Thus, we must reject Elizabeth's claim that the notice of appeal was filed late through no fault of her own.

Appeal dismissed.

GEORGIA-PACIFIC CORPORATION *v.*
James Allen CARTER; Janice Carter; David Bowie;
Barbara Bowie; John L. Surrett; Rose Surrett; Marilyn Woods;
and City of Crossett

07-105 265 S.W.3d 107

Supreme Court of Arkansas
Opinion delivered October 11, 2007

McMath Woods P.A., by: *Samuel E. Ledbetter*; *Gibson & Keith, PLC*, by: *C.C. "Cliff" Gibson, III*; and *King & Spalding*, by: *J Kevin Buster* and *Carmen R. Toledo*, for appellant.

Richard H. Mays Law Firm, by: *Richard H. Mays*, for appellees James Allen Carter, et al.

Hamilton & Hamilton, PLLC, by: *James A. Hamilton* and *Timothy R. Leonard*, for appellee City of Crossett.

PAUL E. DANIELSON, Justice. Appellant Georgia-Pacific Corporation appeals from the circuit court's order granting limited class certification to appellees James Allen Carter, Janice Carter, David Bowie, Barbara Bowie, John L. Surrett, Rose Surrett, and Marilyn Woods, individually and as representatives of residents and property owners of West Crossett, Arkansas (hereinafter "the

property owners").[1] It asserts three points on appeal: (1) that class certification was improper because the property owners did not show that common issues predominated over individual issues; (2) that class certification was not the superior method to adjudicate the controversy; and (3) that the property owners failed to come forward with any evidence to support class certification. We reverse and remand the circuit court's order.

On April 20, 2004, the property owners filed a class-action complaint against Georgia-Pacific and the City of Crossett for "damages and injunctive relief arising out of vapors, gasses, odors, and other forms of hazardous, noxious, toxic and/or harmful substances and contamination issued and emitted from the industrial wastewater treatment system that the defendants Georgia-Pacific Corporation and the City of Crossett, Arkansas, have operated throughout the West Crossett community over a period of many years, and which harmful substances and contamination have migrated through the air to and into the property, homes and persons of the plaintiffs, where such substances and contamination have occasioned injury, harm and inconvenience as set for[th] hereinafter." The complaint alleged six counts, including negligence, gross negligence, nuisance, trespass, strict liability, and damages, and requested injunctive relief.

Following a motion for certification of the class by the property owners, the circuit court held a hearing, after which it issued its order granting limited class certification. In its order, the circuit court certified for class-action treatment "the plaintiffs' private nuisance claims against G.P.:"

> This Court, for reasons given herein, limits this certification to those private nuisance claims which, as of the date of the complaint, impacted the class members' use and enjoyment of their property and thereby unfavorably affected its value. This Court does not certify personal injury claims. Those potential class members choosing to assert personal injury claims may opt out.

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[1] While the City of Crossett was also a defendant in this case, the claim against it was not included in the class certification. The City did file a brief in the instant case, but only to state the City's position that it was in agreement with the circuit court's order, as it pertained to the City. In its order, the circuit court held in abeyance the property owners' claim against the City. That decision was not appealed by Georgia-Pacific and, thus, is not before this court.

In addition, the circuit court held in abeyance any determination on the class-action status of the property owners' claims against the City of Crossett:

> The City remains a party, but a determination of the class action status of plaintiffs' claim against the City is held in abeyance for reasons of judicial economy pending the outcome of the private nuisance claim against G.P. After all, it is undisputed that only two percent of the materials which enter and are discharged by the G.P. treatment system come from the City. Additionally, plaintiffs' complaint alleges that the private nuisance is caused by a treatment system solely owned and operated by G.P. There is no allegation of ownership or control of G.P.'s system by the City. Therefore, common sense requires the inverse condemnation claim to be held in abeyance pending the outcome of plaintiffs' claims against G.P. If, however, the City through the course of this litigation assumes partial responsibility for the alleged nuisance, or if G.P. asserts with justification that the City shares responsibility for this problem, then this Court will revisit this issue. Additionally, the plaintiffs' request for injunctive relief will be considered when and if a jury decides the common and prevailing issue of law and fact against G.P.

The circuit court then went on to analyze the "six factors" for class certification, making specific findings.

With respect to numerosity, the circuit court found that the property owners claimed 300 potential class members, a number which the circuit court found made joinder impractical. In addition, the circuit court found that the proposed class group was not amorphous, but was sufficiently ascertainable and defined to meet the requirements of Ark. R. Civ. P. 23. It further found that the complaint alleged a geographical area that was sufficiently defined to satisfy the requirement of numerosity.

With respect to commonality, the circuit court found that the property owners' allegation that their damages resulted from a "single albeit continuous course of action in the operation of its waste water treatment facility" was the set of facts common to all the property owners' claims and Georgia-Pacific's liability. As to typicality, the circuit court observed that the injury to the named property owners allegedly resulted from Georgia-Pacific's continuous and current operation of its waste water treatment facility. The circuit court noted that it had considered the depositions of several named plaintiffs and found that the class representatives' claims were sufficiently similar to those of the putative class to

satisfy both the commonality and typicality requirements. It further stated that any variances in damages and the number of plaintiffs that may ultimately recover was unimportant.

With respect to superiority, the circuit court noted that there was no truly efficient method to adjudicate the claims before it. Nonetheless, the circuit court found that class certification was the clearly superior method of disposing of the numerous claims. The circuit court continued, stating:

> The common predominating question is does G.P.'s waste water treatment system constitute a private nuisance. If the fact finder answers this question no, then G.P. has no liability to any class members. If the answer is yes, then the cases can be splintered off for adjudication of the individual issues. . . .

Finally, as to adequacy, the circuit court found that counsel was presumed competent and that no attempt to make a contrary showing had been made. In addition, the circuit court found that based on the depositions of the named plaintiffs and others, the plaintiffs had demonstrated sufficient interest in the litigation to serve as class representatives. The circuit court concluded, stating:

> This Court class certifies the plaintiffs' private nuisance claims against G.P. on account of any alleged interference with the use and enjoyment of the class members' property which may be caused by the current operation of G.P.'s waste water treatment system.

Georgia-Pacific now appeals.

We have held that circuit courts are given broad discretion in matters regarding class certification and that we will not reverse a circuit court's decision to grant or deny class certification absent an abuse of discretion. *See Beverly Enters.-Arkansas, Inc. v. Thomas*, 370 Ark. 310, 259 S.W.3d 445 (2007). When reviewing a circuit court's class-certification order, we review the evidence contained in the record to determine whether it supports the circuit court's decision. *See id.* We do not delve into the merits of the underlying claims at this stage, as the issue of whether to certify a class is not determined by whether the plaintiff has stated a cause of action for the proposed class that will prevail. *See id.*

Rule 23(a-b) of the Arkansas Rules of Civil Procedure sets forth the prerequisites for a class action:

> (a) *Prerequisites to Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1)

> the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties and their counsel will fairly and adequately protect the interests of the class.
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> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. At an early practicable time after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. For purposes of this subdivision, "practicable" means reasonably capable of being accomplished. An order under this section may be altered or amended at any time before the court enters final judgment. An order certifying a class action must define the class and the class claims, issues, or defenses.

Ark. R. Civ. P. 23(a-b) (2007). Interpreting this rule, we have held that, in order for a class-action suit to be certified, the party seeking certification must establish each of the following six factors: (1) numerosity; (2) commonality; (3) predominance (4) typicality; (5) superiority; and (6) adequacy. *See, e.g., Valley v. National Zinc Processors, Inc.*, 364 Ark. 184, 217 S.W.3d 832 (2005).

Georgia-Pacific argues, as an initial matter, that the circuit court failed to analyze the predominance requirement and, therefore, reversal is justified. In addition, Georgia-Pacific asserts that this is a mass toxic-tort case and that numerous individual issues far outweigh and outnumber any common issues. It contends that even as to the limited private-nuisance claims certified for class treatment, it is clear that individual issues predominate. In essence, Georgia-Pacific contends that because a private-nuisance claim is asserted, such would necessarily require an analysis of the impact, if any, of its waste water treatment system on each class member's use and enjoyment of his or her property, thereby rendering the claim improper for class-action treatment.

The property owners respond that the circuit court did address the predominance issue. They maintain that all of the claims of the named plaintiffs and of the class arise from one

common origin: the emissions originating from the Georgia-Pacific waste water treatment system that migrate to the properties of the plaintiffs and the class members within the designated geographic area. They further contend that the common threshold liability issue is whether Georgia-Pacific's current operation of its system unreasonably or unlawfully interferes with the use and enjoyment of their properties.

We must first address whether the circuit court adequately addressed the requirement of predominance. It is our opinion that the circuit court did. While not set forth in a separate analysis, a review of the circuit court's order reveals that the circuit court specifically found as follows:

> The common predominating question is does G.P.'s waste water treatment system constitute a private nuisance. If the fact finder answers this question no, then G.P. has no liability to any class members. If the answer is yes, then the cases can be splintered off for adjudication of the individual issues.

Thus, we cannot say that the circuit court failed to make a specific finding with respect to the predominance requirement, as claimed by Georgia-Pacific.

We turn, then, to whether common issues predominate over individual issues in the instant case. In *Beverly Enterprises-Arkansas v. Thomas, supra*, we observed that the starting point in examining the predominance issue is whether a common wrong has been alleged against the defendant. If a case involves preliminary, common issues of liability and wrongdoing that affect all class members, the predominance requirement of Rule 23 is satisfied even if the circuit court must subsequently determine individual damage issues in bifurcated proceedings. *See Johnson's Sales Co., Inc. v. Harris*, 370 Ark. 387, 260 S.W.3d 273 (2007). We have recognized that a bifurcated process of certifying a class to resolve preliminary, common issues and then decertifying the class to resolve individual issues, such as damages, is consistent with Rule 23. *See id.* In addition, we have said that:

> The predominance element can be satisfied if the preliminary, common issues may be resolved before any individual issues. In making this determination, we do not merely compare the number of individual versus common claims. Instead, we must decide if the issues common to all plaintiffs "predominate over" the individual issues, which can be resolved during the decertified stage of bifurcated proceedings.

Asbury Auto. Group, Inc. v. Palasack, 366 Ark. 601, 610, 237 S.W.3d 462, 469 (2006) (quoting *Van Buren Sch. Dist. v. Jones*, 365 Ark. 610, 620, 232 S.W.3d 444, 452 (2006)).

A review of our case law reveals that we have distinguished between class actions involving mass-tort claims and toxic-tort claims, the latter of which is presented in the instant case. For instance, in *International Union of Electrical, Radio & Machine Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988), this court rejected the theory that an alleged non-instantaneous mass-tort action could never be the object of a class action. We further quoted, in *Summons v. Missouri Pacific Railroad*, 306 Ark. 116, 813 S.W.2d 240 (1991), from one law review article, noting that its exhaustive review of all the considerations led to the conclusion that the class action involved was the superior manner of deciding the typical mass-tort case:

> In mass tort cases involving claims for personal injury, which pose daunting problems of causation and remedy, the price of individual justice is notoriously high. Because they typically involve complex factual and legal questions, mass tort claims are exceedingly, if not prohibitively, expensive to litigate. The questions of whether the defendant's conduct failed to satisfy the governing standard of liability frequently entail interrelated technological and policy issues that require extensive discovery, expertise, and preparation to present and resolve adequately. Equally demanding are the causation issues in mass tort cases, such as whether the plaintiff's condition was caused by exposure to the substance in question or to some other source of the same disease risk.
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> The case-by-case mode of adjudication magnifies this burden by requiring the parties and courts to reinvent the wheel for each claim. The merits of each case are determined de novo even though the major liability issues are common to every claim arising from the mass tort accident, and even though they may have been previously determined several times by full and fair trials. These costs exclude many mass tort victims from the system and sharply reduce the recovery for those who gain access. Win or lose, the system's private law process exacts a punishing surcharge from defendant firms as well as plaintiffs.
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> . . . .
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> These conditions generally disadvantage claimants. Because defendant firms are in a position to spread the litigation costs over the

> entire class of mass accident claims, while plaintiffs, being deprived of the economies of scale afforded by class actions, can not, the result will usually be that the firms will escape the full loss they have caused and, after deducting their attorney's shares, the victims will receive a relatively small proportion of any recovery as compensation. As a consequence, the tort system's primary objectives of compensation and deterrence are seriously jeopardized.
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> . . . .
>
> Because of their cost-spreading advantages, a defendant firm typically can afford not only to invest more in developing the merits of the claim than the opposing plaintiff attorney, but also to finance a "war of attrition" through costly discovery and motion practice that depletes the adversary's litigation resources. The consequences of redundantly litigating common questions thus skews the presentation of the merits, promotes abusive strategic use of procedure, needlessly consumes public resources, and ultimately drains away a large amount of the funds available to redress by judgment or settlement, victim losses.

306 Ark. at 126-27, 813 S.W.2d at 245-46 (quoting David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind. L.J. 561 (1987)).

That being said, mass-tort actions present unique certification problems because they generally involve numerous individual issues as to the defendant's conduct, causation, and damages. *See Baker v. Wyeth-Ayerst Labs. Div.*, 338 Ark. 242, 992 S.W.2d 797 (1999). However, courts typically distinguish between mass-accident cases, where injuries are caused by a single, catastrophic event occurring at one time and place, and toxic-tort or products-liability cases, where the injuries are the result of a series of events occurring over a considerable length of time and under different circumstances. *See id.* Class certification is more common in mass-accident cases than in toxic-tort or products-liability cases, due to the enormity and complexity of the individual issues presented by toxic-tort or products-liability cases. *See id.*

In *Baker*, which involved a class-action suit against the manufacturers of several diet drugs, alleging negligence, products liability, failure to warn, and breach of express and implied warranties, we noted that we too have been more inclined to approve class certification in mass-accident cases than in products-

liability or toxic-torts cases. *See id.* We did not, however, hold that class certification should be denied in all products-liability or toxic-torts cases. *See id.* Instead, we held that class certification was improper in the *Baker* case because the numerous and complex individual issues predominated over the common issues. *See id.*

The same holds true in the instant case, just as Georgia-Pacific claims. We have defined "nuisance" as "conduct by one landowner that unreasonably interferes with the use and enjoyment of the lands of another and includes conduct on property that disturbs the peaceful, quiet, and undisturbed use and enjoyment of nearby property." *Goforth v. Smith*, 338 Ark. 65, 79, 991 S.W.2d 579, 587 (1999). The general rule is that in order to constitute a nuisance, the intrusion must result in physical harm, as distinguished from unfounded fear of harm, which must be proven to be certain, substantial, and beyond speculation and conjecture. *See id.*

Thus, while the action of the tortfeasor is a relevant consideration in determining a nuisance, it is the interference with a property owner's use and enjoyment that is the determining factor. Indeed,

> [u]nlike most other torts, nuisance is not centrally concerned with the nature of the conduct causing the damage, but with the nature and relative importance of the interests interfered with or invaded. Thus, courts have said that nuisance is a field of tort liability, rather than a type of tortious conduct, a result rather than a theory of recovery, or an effect rather than a cause of tort liability, so that conduct antecedent to the interference may be irrelevant. Further, according to one view, there is, in fact, no such thing as a tort of nuisance, that is, that nuisance is not a separate tort in itself, but instead is a type of damage, and plaintiffs may recover in nuisance despite the otherwise nontortious nature of the conduct which creates the injury.

58 Am. Jur. 2d *Nuisances* § 64 (2007) (footnotes omitted).

Here, with respect to their nuisance claim, the property owners alleged that "[t]he chemicals, gasses, vapors and contaminants that are emitted from the defendants' System and migrate to the plaintiffs' persons and properties . . . and the adverse consequences that they cause to the plaintiffs' persons and property, constitute an unreasonable interference with plaintiffs' use and enjoyment of their property, creates a hazard to the health and

welfare of the plaintiffs, and diminishes the utility, value and function of plaintiffs' property *for many purposes* and has caused plaintiffs injuries and damages." (Emphasis added.) We hold that it is evident, from the property owners' claims and from the sheer nature of a claim for private nuisance, that individual issues exist in the instant case as to whether and to what extent Georgia-Pacific's operation of its waste water treatment system caused consequences to, and constituted an unreasonable interference with, the property owners' use and enjoyment of their property. For this reason, we cannot say that a common question of law or fact predominates over individual issues, and we reverse and remand the circuit court's order granting limited class certification. *See, e.g., Aprea v. Hazeltine Corp.*, 247 A.D.2d 564, 669 N.Y.S.2d 61 (1998) (finding that no predominance was present and affirming the supreme court's denial of plaintiffs' motion for class certification, which alleged nuisance, negligence, and trespass, in a class action on behalf of all residents and property owners who had been injured as a result of the alleged unlawful discharge of toxic chemicals by the defendant); *Ford v. Murphy Oil U.S.A., Inc.*, 703 So. 2d 542 (La. 1997) (finding no predominance in an action by thousands of residents who lived near four petrochemical plants and who claimed physical and property damages as a result of continuous emissions, combined and individual, of the defendant companies, where each class member would have to offer different facts to establish that certain defendants' emissions, either individually or in combination, caused them specific damages on yet unspecified dates, and where the causation issue was even more complicated considering the widely divergent types of personal, property, and business damages claimed and considering each plaintiffs' unique habits, exposures, length of exposures, medications, medical conditions, employment, and location of residence or business). Accordingly, because we can find no common question of law or fact, which predominates over individual issues, we reverse and remand the circuit court's order granting limited class certification. Because we reverse and remand on the issue of predominance, there is no need to address Georgia-Pacific's remaining points on appeal. *See, e.g., Southwestern Bell Tel. Co. v. Pipkin Enters., Inc.*, 359 Ark. 402, 198 S.W.3d 115 (2004).

Reversed and remanded.

GLAZE, J., not participating.

Larry D. SELMON *v.* METROPOLITAN LIFE INSURANCE COMPANY

06-1340 264 S.W.3d 547

Supreme Court of Arkansas
Opinion delivered October 11, 2007

Harrill & Sutter, PLLC, by: *Luther Oneal Sutter, II*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, PLLC, by: *Byron Freeland*, for appellee.

PER CURIAM. Appellant Larry D. Selmon appeals from the circuit court's denial of his claim for disability benefits under his former employer's ERISA welfare benefit plan. Appellant

raises several points on appeal including a challenge to the circuit court's denial of his motion for jury trial. Both Appellee's brief and the circuit court's order denying the motion for jury trial indicate that a hearing was held on the motion on March 2, 2005. However, Appellant did not abstract the hearing and no transcript of the hearing appears in the record. The notice of appeal reflects that while Appellant designated the entire record of the proceedings below as the record on appeal, he also noted that no transcripts from the court reporter were necessary because "[n]o hearings on any substantive issue was [sic] held by the trial court." Additionally, in the abstract, Appellant indicates that no testimony was abstracted because the case was decided "primarily upon briefs of the parties and the administrative record."

Under Ark. Sup. Ct. R. 4-2(a)(5) the abstract should consist of the following:

> an impartial condensation, without comment or emphasis, of only such material parts of the testimony of the witnesses and colloquies between the court and counsel and other parties as are necessary to an understanding of all questions presented to the Court for decision.

Ark. Sup. Ct. R. 4-2(a)(5) (2007). Accordingly, even if no witnesses testified at the hearing on Appellant's motion for jury trial, the arguments by counsel, or "colloquies," to the court are necessary for our analysis of the court's decision on the motion. For that reason, Appellant's abstract is deficient.

■ Not only is the abstract deficient, but the record is also incomplete because it does not contain a transcript of the hearing. As we recently stated in *Gilbert v. Moore*, 362 Ark. 657, 210 S.W.3d 125 (2005), pursuant to Ark. R. App. P. – Civil 6(c) where the parties in good faith abbreviated the record by agreement or without objection from opposing parties, this court "shall not affirm or dismiss the appeal on account of any deficiency in the record without notice to the appellant and reasonable opportunity to supply the deficiency." Ark. R. App. P. – Civil (6)(c) (2007). Further, pursuant to Rule 6(e), this court can *sua sponte* direct the parties to supply any omitted material by filing a certified, supplemental record. *See* Ark. R. App. P. – Civil 6(e); *Gilbert v. Moore, supra.*

We recognize that the record presently before us is abbreviated due to the materials requested by Appellant in his notice of appeal and designation of the record, but Appellee failed to object

to the abbreviated record; nor did Appellee file a designation of any additional materials it believed should have been included in the record. Thus, Appellee tacitly consented to the record. *See id.*

Pursuant to Rule 6(c) and (e), we order Appellant to supply this court with a certified, supplemental record that includes a transcript of the hearing held before the circuit court on March 2, 2005, within sixty (60) days of the issuance of this opinion. Appellant is further ordered to file a substituted brief that includes an abstract of the relevant "colloquies between the court and counsel" that are essential to this court's understanding of the case and issue presented as required by Ark. Sup. Ct. R. 4-2(a)(5) and (a)(8) (2007).

RUNNING M FARMS, INC. and S&K Company, Inc. *v.* FARM BUREAU MUTUAL INSURANCE COMPANY of ARKANSAS, INC.

07-212 265 S.W.3d 740

Supreme Court of Arkansas
Opinion delivered October 25, 2007

Crisp, Boyd & Poff & Burgess, LLP, by: *Mark C. Burgess*, for appellants.

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

TOM GLAZE, Justice. This case is the third appeal arising from a lawsuit over a crop-hail insurance policy. *See Farm Bur. Mut. Ins. Co. v. Running M Farms*, 366 Ark. 480, 237 S.W.3d 32 (2006), and *Farm Bur. Mut. Ins. Co. v. Running M Farms*, 348 Ark. 313, 72 S.W.3d 502 (2002). At issue in the instant appeal is the trial court's award of attorney's fees to counsel for the appellants, Running M Farms and S&K Company, Inc. (collectively referred to as "Running M").

In March of 1997, Running M purchased crop-hail insurance from the appellee in this case, Farm Bureau Mutual Insurance Co. ("Farm Bureau"). In April of 1997, Running M's young wheat crop was badly damaged by a hail storm. However, when Running M filed a claim under its crop-hail policy with Farm Bureau, the insurance company initially denied coverage. After a reinspection of the crops, Farm Bureau offered to settle the matter for $6,900. Running M declined the offer and filed suit, alleging that Farm Bureau had breached its contract and caused damages in the amount of $124,000 to both farms. *See Farm Bur. Mut. Ins. Co. v. Running M Farms*, 348 Ark. 313, 72 S.W.3d 502 (2002) (*Running M I*).

Running M filed several amended complaints during the course of this litigation, adding various claims for extra-contractual damages, fraud, bad faith, and tortious interference with a business expectancy. The case was originally scheduled to go to trial on August 23, 1999, but after Farm Bureau filed a pleading entitled "Confession of Judgment," admitting liability under the insurance policy in the amount of $76,000, the matter was continued, and a new trial was scheduled for June of 2000. *Running M I*, 348 Ark. at 316, 72 S.W.3d at 504.

Farm Bureau subsequently filed a motion to withdraw its confession of judgment on the basis that the parties were in dispute regarding the effect of the confession and that it was not possible to avoid a trial. The trial court granted Farm Bureau's request, and the case proceeded to trial on June 22, 2000. The jury, however, was unable to reach a verdict, and the trial court declared a mistrial. Following the mistrial, Farm Bureau filed a motion for judgment notwithstanding the verdict. The trial court denied Farm Bureau's motion, and Farm Bureau appealed. *Running M I*, 348 Ark. at 316-17, 72 S.W.3d at 504-05. On appeal, however, this court determined that the trial court's denial of Farm Bureau's motion for JNOV was not a final, appealable order. *Id.* at 321-22, 72 S.W.3d at 508.

After the mistrial and the first appeal, Farm Bureau again confessed judgment of $76,500. *Farm Bureau Ins. Co. v. Running M Farms*, 366 Ark. 480, 484, 237 S.W.3d 32, 35 (2006) (*Running M II*). A second trial took place in 2004, and the jury, on special interrogatories, found in Running M's favor on both its contract and tort claims. The trial court awarded Running M the contract damages previously confessed by Farm Bureau, as well as the damages assessed by the jury on the tort claims. However, the

court declined to award Running M its attorney's fees or the statutory 12% penalty pursuant to Ark. Code Ann. § 23-79-208 (Repl. 2005). *Id.* at 484, 237 S.W.3d at 35-36.

Farm Bureau appealed, and this court reversed the jury's verdicts on Running M's tort claims. Running M also cross-appealed, arguing that the trial court erred in declining to award attorney's fees. This court agreed, holding that "the attorney's fee and penalty attaches if the insured is required to file suit, even though judgment is confessed before trial. A good faith denial of liability is no defense to the claim for attorney's fee and penalty." *Id.* at 495, 237 S.W.3d at 43 (citing *Equitable Life Assurance Society v. Gordy*, 228 Ark. 643, 647, 309 S.W.2d 330, 333 (1958)). Thus, this court held that Running M was entitled to the 12% penalty and reasonable attorney's fees, and we reversed and remanded for the circuit court to award a 12% penalty based on the confessed judgment for breach of contract and to determine reasonable attorney's fees. *Id.*

The case then returned to the circuit court, and the circuit court entered an order on February 5, 2007. In that order, the court noted that, on August 17, 1999, Farm Bureau confessed judgment on the plaintiffs' claim for contract damages. Pursuant to the confession of judgment, the court awarded Running M Farms judgment in the amount of $45,000 against Farm Bureau for contract damages; $16,800 for attorney's fees related to the contract claim; $5,400 for the 12% penalty pursuant to Ark. Code Ann. § 23-79-208; and prejudgment interest in the amount of $5,520.40 for the time period from August 1, 1997, until August 17, 1999, the date on which Farm Bureau confessed judgment. The court also awarded S&K Company $31,500 in contract damages; $11,760 in attorney's fees; $3,780 for the 12% penalty; and prejudgment interest of $3,864.28.

In awarding fees, the court, citing *Phelps v. U.S. Credit Life Ins. Co.*, 340 Ark. 439, 10 S.W.3d 854 (2000), noted that the fee provided for in Ark. Code Ann. § 23-79-208 was allowed only to reimburse an insurance policyholder or beneficiary for expenses incurred in enforcing the contract and to compensate him in engaging counsel thoroughly competent to protect his interest. The court also noted that it was basing its decision as to a "reasonable" fee on the factors set out in *Phelps, supra.* Running M filed a timely notice of appeal, and now urges that the trial court erred in its award of attorney's fees.

In its first argument on appeal, Running M contends that the trial court erred in awarding attorney's fees based on a percentage of the plaintiffs' recovery, as opposed to an award based upon the number of hours worked by counsel and legal staff. Running M and its attorneys, the Texarkana law firm of Crisp, Jordan & Boyd, L.L.P., had a contingency fee agreement whereby counsel would receive anywhere from one-third to one-half of the amount recovered by the plaintiff, depending on whether the matter went to trial or not.

Our court has held that attorneys' fees are not allowed except where expressly provided for by statute. *Harris v. City of Fort Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006); *Chrisco v. Sun Indus.*, 304 Ark. 227, 800 S.W.2d 717 (1990). An award of attorney's fees will not be set aside absent an abuse of discretion by the trial court. *Harris, supra.* Given the trial judge's close familiarity 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. *See FMC Corp. v. Helton*, 360 Ark. 465, 202 S.W.3d 490 (2005); *Chrisco, supra.*

Arkansas Code Annotated § 23-79-208(a)(1) (Repl. 2004) provides for attorney's fees in insurance cases as follows:

> In all cases in which loss occurs and the . . . insurance company . . . liable therefor shall fail to pay the losses within the time specified in the policy after demand is made, the person, firm, corporation, or association shall be liable to pay the holder of the policy or his or her assigns, in addition to the amount of the loss, twelve percent (12%) damages upon the amount of the loss, together with all reasonable attorney's fees for the prosecution and collection of the loss.

This court has interpreted § 23-79-208 as providing that "[i]n the event an insurer wrongfully refuses to pay benefits under an insurance policy, the insured may recover the overdue benefits, twelve percent (12%) damages upon the amount of the loss, and reasonable attorneys' fees." *Phelps v. U.S. Credit Life Ins. Co.*, 340 Ark. at 442, 10 S.W.3d at 856 (quoting *Northwestern Nat'l Life Ins. Co. v. Heslip*, 309 Ark. 319, 326-27, 832 S.W.2d 463, 467 (1992)).

Moreover, our court has held that the reasonableness of the attorney's fee is determined by examining the following factors: (1) the experience and ability of the attorney; (2) the time and labor required to perform the service properly; (3) the amount in

controversy and the result obtained in the case; (4) the novelty and difficulty of the issues involved; (5) the fee customarily charged for similar services in the local area; (6) whether the fee is fixed or contingent; (7) the time limitations imposed upon the client in the circumstances; and (8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney. *Newcourt Financial v. Canal Ins. Co.*, 341 Ark. 452, 17 S.W.3d 83 (2000); *Southall v. Farm Bureau Mut. Ins. Co. of Ark.*, 283 Ark. 335, 676 S.W.2d 228 (1984). While courts should be guided by the foregoing factors, there is no fixed formula in determining the reasonableness of an award of attorney's fees. *See Newcourt Financial, supra*; *Shepherd v. State Auto Prop. & Cas. Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993).

On appeal, Running M argues that the trial court erred in awarding fees on a contingency basis, citing *Equitable Life Assurance Society of the United States v. Rummell*, 257 Ark. 90, 514 S.W.2d 224 (1974), for the proposition that "reasonable attorney's fees" should not be contingent on the outcome of the case. Running M also cites *Fuller v. Hartford Life Insurance Co.*, 281 F.3d 704 (8th Cir. 2002) (interpreting Ark. Code Ann. § 23-79-208), in which the Eighth Circuit awarded attorney's fees totaling $125,000 on a plaintiff's award of $500,000. The attorney in *Fuller* had submitted two affidavits: the first one set out an hourly rate of $350 for an estimated 250-300 hours worked on the case, plus additional hours by an associate attorney and a paralegal; the second affidavit set forth the contingent fee agreement whereby the expected fee would be one-third of the $500,000 insurance policy limits. The Eighth Circuit affirmed the district court's award of $125,000 (although it noted the award was "very generous"), concluding that the trial court had properly taken into account the appropriate factors to consider in determining the reasonableness of the attorney's fees pursuant to § 23-79-208. *Fuller*, 281 F.3d at 708-09 (citing *Shepherd v. State Auto Prop. & Cas. Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993)). Running M urges that, based on the *Fuller* case, even where there might be a fixed contingency fee agreement, the court should still consider all eight factors when determining a reasonable attorney's fee.

As mentioned above, Running M and its counsel had a contingency-fee agreement for attorney's fees. On appeal, Running M further asserts that the trial court effectively viewed that contingency-fee contract as an "absolute ceiling on the attorney's fees to be awarded." Here, it cites *Blanchard v. Bergeron*, 489 U.S. 87

(1989), in which the Supreme Court held that the existence of a contingency-fee agreement should not serve as a cap on reasonable attorney's fees. However, *Blanchard* involved a suit brought pursuant to 42 U.S.C. § 1983. The central theme of the Court's opinion was that civil-rights cases frequently involve non-monetary compensation, and to limit attorney's fees solely to a percentage of the monetary awards recovered might put undue pressure on counsel to pursue money damages and to forego "important civil and constitutional rights that cannot be valued solely in monetary terms." *Blanchard*, 489 U.S. at 95.

The policy concerns that are present in a civil-rights action are simply not present in a case such as the one at hand. Thus, Running M's reliance on this and other civil-rights cases is inapposite. Contrary to the Supreme Court's reluctance to impose a cap in civil-rights cases, this court has held that, in insurance cases involving § 23-79-208, "the fee awarded should not exceed the amount that the client is responsible for paying, otherwise the statute would be susceptible to abuse." *Phelps*, 340 Ark. at 443, 10 S.W.3d at 857. While our court has stated that the existence of a contingency fee is but one of the factors for the trial court to consider, *see id.*, there is no indication in the trial court's decision that the existence of the contingency-fee agreement dominated over the other factors or that the court viewed the contingency-fee agreement as a "cap" on the amount it could award. Indeed, the court explicitly stated that it found the fee awarded to be reasonable based on a consideration of *all* of the eight factors.

Other than the number of hours worked on the case, Running M does not specifically point to any other factor that it claims would support a larger attorney's fee. However, among the factors to consider are the time required to perform the service properly, as well as the amount in controversy and the result obtained in the case. We note that the only issue on which Running M ultimately prevailed was the contract damages. Running M was awarded $76,500 in contract damages — the same amount for which Farm Bureau confessed judgment. Had Running M accepted this confession of judgment and settlement, it would have avoided much of the time and expense involved in this case. While we certainly understand that many factors must have gone into counsel's decision to pursue the matter through multiple trials and appeals, we nonetheless cannot say that the trial court abused its discretion in its determination of what constituted a "reasonable" attorney's fee.

In its second point on appeal, Running M argues that, assuming the trial court based its award of attorney's fees on the existence of the contingency-fee agreement, then the court erred in only awarding one-third of the recovery in attorney's fees. Running M points to the fee agreement, which provides that, in the event the matter is not settled until after the completion of a trial, counsel would be entitled to receive fifty percent of the amount recovered. Because this case went to trial twice, Running M argues that it is entitled to a fifty-percent attorney's fee.

However, as noted above, there is nothing in the trial court's order that indicates that the court was guided solely by the contingency-fee agreement. Instead, the court determined that the amount of the attorney's fee was reasonable based on all eight of the factors enumerated by this court in countless cases. Because the trial court did not award the attorney's fee on the basis of the contingency-fee contract, there is no merit to Running M's contention that it should have been awarded the fifty-percent fee provided for in the agreement.

Finally, Running M argues that the trial court erred in its calculation of prejudgment interest. The trial court awarded prejudgment interest for the time period from August 1, 1997, until August 17, 1999, the date on which Farm Bureau first confessed judgment. On appeal, however, Running M argues that the trial court should have awarded additional prejudgment interest for the time from June 11, 2000, until January 22, 2004, which represents the time from the date on which the trial court allowed Farm Bureau to withdraw its confession of judgment until the date on which the confession of judgment was reinstated following the remand after the first appeal. Running M argues that it is entitled to this additional amount of prejudgment interest because it did not concede to Farm Bureau's withdrawal of its confession of judgment, and therefore did not waive its claim for these additional prejudgment interest amounts.

Prejudgment interest is compensation for recoverable damages wrongfully withheld from the time of the loss until judgment. *Reynolds Health Care Servs., Inc. v. HMNH, Inc.*, 364 Ark. 168, 217 S.W.3d 797 (2005); *Perkins v. Cedar Mountain Sewer Improvement District*, 360 Ark. 50, 199 S.W.3d 667 (2004). Thus, in determining whether Running M is entitled to the additional prejudgment interest it claims, the first question to be addressed is whether it was entitled to recover damages that were "wrongfully withheld" from the time of the loss until judgment. *See Reynolds Health Care, supra.*

Here, the trial court found that, based on Farm Bureau's confession of judgment, the insurer owed Running M the $76,500 that it confessed. However, the question is whether, in withdrawing its confession of judgment, Farm Bureau "wrongfully withheld" those monies.

Farm Bureau's motion to withdraw its confession appears neither in the record nor in the Addendum before us. Therefore, it is unclear why the insurer withdrew its confession of judgment. The only mention of Farm Bureau's reasons is found in *Running M I*, where this court noted that Farm Bureau "subsequently filed a motion to withdraw its confession of judgment on the basis that the parties were in dispute regarding the effect of the confession and that it was not possible to avoid a trial." *Running M I*, 348 Ark. at 316-17, 72 S.W.3d at 504-05.

In its brief, Running M offers no proof or argument that Farm Bureau's withdrawal of its confession of judgment was wrongful; it asserts only that it "did not concede to the withdrawal of the confession of judgment." Moreover, it cites to no authority that would support this court's drawing of an inference that the withdrawal was in any way wrongful. It is a well-settled principle of appellate law that we will not make a party's argument for him. *See Kinchen v. Wilkins*, 367 Ark. 71, 238 S.W.3d 94 (2006); *Arkansas Dep't of Human Servs. v. Schroder*, 353 Ark. 885, 122 S.W.3d 10 (2003). Accordingly, we conclude that Running M is not entitled to reversal on this issue.

Affirmed.

ARKANSAS GAME and FISH COMMISSION, Sheffield Nelson, Sanford "Sonny" Varnell, Freddie Black, Brent Morgan, John Benjamin, George Dunklin, Jr., Ronald Pierce, and Kimberly G. Smith, and Scott Henderson, Director of the Arkansas State Game and Fish Commission, in their Official Capacities *v.* Bill MILLS, White County Circuit Court Judge

07-227 265 S.W.3d 760

Supreme Court of Arkansas
Opinion delivered October 25, 2007

James F. Goodhart and *Angela R. Echols*, Arkansas Game & Fish Comm'n, for appellants.

Butler, Hicky & Harris, by: *Phil Hicky*, for appellees.

TOM GLAZE, Justice. On August 16, 2006, Respondents John Tarlton Morrison and Cynthia Morrison, husband and wife, William Price Morrison, Jr., and Gray J. Morrison, husband and wife, Joseph McCaughan Morrison and Brandon G. Morrison, husband and wife, Carl Eugene Morrison, III, and Nancy Morrison, husband and wife, William Todd Carlisle and Carolyn Morrison Carlisle, husband and wife, Westley Cooper Morrison and Grace Ann F. Morrison, husband and wife, (herein after the "Morrison Family"), filed a lawsuit in White County Circuit Court against the Arkansas Game and Fish Commission, Sheffield Nelson, Sanford "Sonny" Carnell, Freddie Black, Brent Morgan, John Benjamin, George Dunklin, Jr., Ronald Pierce, and Kimberly G. Smith, and Scott Henderson, Director of the Arkansas Game and Fish Commission, in their representative capacities, (hereinafter "AGFC"), seeking an injunction enjoining the AGFC from leasing, conveying, encumbering or otherwise transferring the mineral rights to land located in White and Prairie Counties. The complaint requested that the circuit court reform four (4) warranty deeds so that the Morrison Family could maintain the mineral interest in the land. AGFC filed a motion to dismiss, contending Ark. Code Ann. § 16-60-103 & Ark. Code Ann. § 16-106-101(d) mandated that the actions against the AGFC and its commissioners be filed only in Pulaski County. Moreover, contending that there was a five-year statute of limitations pursuant to Ark. Code Ann. § 16-56-111(a), AGFC argued that the Morrison Family no longer had a cause of action as the complaint was filed six years after the contract at issue had been executed. The circuit court entered an order finding that, because this was a dispute over a contract, a deed, and real estate in White and Prairie Counties, this action could be properly filed in White County Circuit Court. Additionally, the circuit court concluded that the statute of limitations

did not begin to run on the issue of mutual mistake until the mistake was discovered or until the facts proved laches. Therefore, the circuit court held that the Morrison Family's cause of action was not barred by the statute of limitations.

Now, AGFC bring this petition for writ of prohibition in this court, contending that the White County Circuit Court was entirely without authority or jurisdiction to make this decision. We deny the petition for writ of prohibition.

A writ of prohibition is issued to prevent or prohibit the lower court from acting wholly without jurisdiction. *Hatfield v. Thomas*, 351 Ark. 377, 379, 93 S.W.3d 671, 672 (2002). The purpose of the writ of prohibition is to prevent a court from exercising a power not authorized by law when there is no adequate remedy by appeal or otherwise. *Id.* Thus, a writ of prohibition lies only where it is apparent on the face of the record that (1) the circuit court is wholly without jurisdiction *and* (2) there is no other adequate remedy. *Id.*

Writs of prohibition are prerogative writs, extremely narrow in scope and operation, and they are to be used with great caution and forbearance. *Id.* Prohibition should issue only in cases of extreme necessity. *Id.* A characteristic of prohibition is that it does not lie as a matter of right but as a matter of sound judicial discretion. *Id.* When considering a petition for writ of prohibition, jurisdiction is tested on the pleadings, not the proof. *Nucor-Yamato Steel Co. v. Circuit Court for the Osceola District of Mississippi County,* 317 Ark. 493, 878 S.W.2d 745 (1994). Again, a writ of prohibition is appropriate only when there is no other remedy, such as an appeal, available. *Pike v. Benton Circuit Court,* 340 Ark. 311, 10 S.W.3d 447 (2000).

A review of the pleadings reveals that the writ of prohibition is not warranted. First, the circuit court was not wholly without jurisdiction in denying the motion to dismiss. Arkansas Code Annotated section 16-60-101 (Repl. 2005) provides:

> Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof, is situated, except as provided in § 16-60-116(d):
>
> (1) *The recovery of real property, or of an estate or interest therein;*
>
> (2) The partition of real property;

> (3) The sale of real property under a mortgage, lien, or other encumbrance or charge; and
>
> (4) An injury to real property.

Id. (Emphasis added.) Moreover, Ark. Code Ann. § 16-60-103 (Repl. 2005) states:

> The following actions must be brought in the county in which the seat of government is situated:
>
> . . . .
>
> (3) All actions against the state and all actions against state boards, state commissioners, or state officers on account of their official acts, *except that if an action could otherwise be brought in another county or counties under the venue laws of this state, as provided in § 16-60-101 et seq.*, then the action may be brought either in Pulaski County or the other county or counties[.]

(Emphasis added.) The plain language of these statutes provides the circuit court with the authority to conclude that venue was proper in White County; that is, the circuit court was not wholly without jurisdiction to determine that the action could be maintained in White County and not Pulaski County.

[redacted] Relying on Ark. Code Ann. § 16-106-101(d) (Repl. 2006), AGFC argues that Pulaski County is the only place for proper venue. That section states,

> (d) All actions for debts due the State of Arkansas, all actions in favor of any state officer, state board, or commissioner, in their official capacity, all actions which are authorized by the provisions of this code or by law to be brought in the name of the state, and all actions against the board, commissioner, or state officer for or on account of any official act done or omitted to be done shall be brought and prosecuted in the county where the defendant resides.

As pointed out by the Morrison Family, this statute was enacted in 1871 by Act 48. However, Ark. Code Ann. § 16-60-103(3) was amended to include the exception as set forth in Act 806 of 2001, which, as quoted above, states that the action may be brought in a county other than Pulaski County if the action could otherwise be

brought in another county as provided by § 16-60-101 *et seq.* While we are not to reach the underlying merits in a petition for writ of prohibition, we can certainly recognize the express authority given to the circuit court by § 16-60-103, as amended, in determining that venue may lie in a county other than Pulaski. Moreover, our case law relied on by AGFC is inapposite to the instant appeal. Specifically, for the proposition that this writ should be granted, AGFC cites *Daniels v. Weaver*, 367 Ark. 327, 240 S.W.3d 95 (2006); *Ark. Game & Fish Comm'n v. Harkey*, 345 Ark. 279, 45 S.W.3d 829 (2001); *Willis v. Circuit Court of Phillips Cty.*, 342 Ark. 128, 27 S.W.3d 372 (2000); *Valley v. Bogard*, 342 Ark. 336, 28 S.W.3d 269 (2000); *Tortorich v. Tortorich*, 333 Ark. 15, 968 S.W.2d 53 (1998); *Ark. Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987); *Downey v. Toler*, 214 Ark. 334, 216 S.W.2d 60 (1963); *Forrest City Machine Works v. Colvin*, 257 Ark. 889, 521 S.W.2d 206 (1975); *Dean v. Cole*, 236 Ark. 64, 364 S.W.2d 305 (1963); and *Liquefied Petroleum Gas Bd. v. Newton*, 230 Ark. 267, 322 S.W.2d 67 (1959). Notably, the majority of those cases are *not* writ cases. *See Daniels v. Weaver, supra*; *Valley v. Bogard, supra*; *Tortorich v. Tortorich, supra*; *Ark. Game & Fish Comm'n v. Lindsey, supra*; *Dean v. Cole, supra*; and *Liquefied Petroleum Gas Bd. v. Newton, supra*. In addition, the remainder of the cases cited that involve petitions for writs either do not involve real property or were cases decided prior to the 2001 amendment. *See Ark. Game & Fish Comm'n v. Harkey, supra*; *Willis v. Circuit Court of Phillips Cty., supra*; *Downey v. Toler, supra*; *Forrest City Machine Works v. Colvin, supra*. Thus, despite AGFC's argument otherwise, the circuit court was not wholly without jurisdiction to determine that venue was proper in White County.

As to the second prong, AGFC possesses another adequate remedy. Specifically, AGFC can appeal this decision, once a final order is entered. Consequently, given the narrow scope and operation of a writ of prohibition, and the availability of another adequate remedy, we hold that writ of prohibition would not be appropriate.

Finally, AGFC argues that a writ of prohibition lies because the circuit court was wholly without jurisdiction because the statute of limitations barred the Morrison Family's cause of action. A writ of prohibition is not warranted with respect to this argument as this is a procedural argument, not a jurisdictional one.

We addressed this issue in *Tatro v. Langston*, 328 Ark. 548, 944 S.W.2d 118 (1997). In that case, the petitioner filed a writ of prohibition with this court, arguing that the circuit court was wholly without jurisdiction as the three-year statute of limitations had expired on the underlying product-liability tort claim. The court denied that writ, and we explained that statutes of limitations constitute an affirmative defense, *see* Ark. R. Civ. P. 8(c), and are generally not jurisdictional. *Id.* Those statutes of limitations that are jurisdictional are tied to the right itself, and not just the remedy. For instance, the statute of limitations for wrongful-death claims is jurisdictional because it is tied to the right itself. *See Vermeer Mfg. Co. v. Steel Judge*, 263 Ark. 323, 564 S.W.2d 518 (1978). Thus, in a wrongful-death case, prohibition may be proper to raise a statute-of-limitations challenge. However, prohibition is not an available remedy if the statute of limitations governing a particular proceeding is not jurisdictional, but may be raised as an affirmative defense. *Tatro v. Langston, supra.*

Here, the underlying complaint raises a cause of action for specific performance — reformation of a contract. Because the applicable statute of limitations is not tied to the right to bring that claim, the statute-of-limitations argument made in this petition for writ of prohibition must be denied as it is not jurisdictional, but procedural. In addition, AGFC is free to appeal this issue, once a final order is entered.

Writ denied.

Jorge L. HERNANDEZ *v.* Margaret L. HERNANDEZ

07-343 265 S.W.3d 746

Supreme Court of Arkansas
Opinion delivered October 25, 2007

J. Sky Tapp, for appellant/cross-appellee.

The Farrar Firm, by: *Michelle M. Strause* and *Philip B. Montgomery*, for appellee/cross-appellant.

ANNABELLE CLINTON IMBER, Justice. The instant appeal arises from a divorce decree entered by the Garland

County Circuit Court. Appellant Jorge Hernandez appeals the circuit court's ruling that certain funds Jorge received from his former employer were marital property and not a gift. Margaret cross-appeals the circuit court's unequal division of the proceeds from those funds.

In 1983, Jorge began working for Sante Fe Plastics in California. Christopher Rakhshan was his supervisor at Santa Fe Plastics for several years. In 1993, when Rakhshan moved to Hot Springs, Arkansas, and began Delta Plastics, he asked Jorge to move to Arkansas and work for the company. Jorge continued as a Delta Plastics employee until 2005 when the company was sold to Rexum Plastics.

Jorge and Margaret married in 1999. Because Jorge had been so loyal to the company, Rakhshan and the other owners of Delta Plastics decided to reward him and some other employees in 2003. The owners gave Jorge personal checks totaling approximately $10,000. Jorge then immediately endorsed the checks and returned them to the owners in exchange for 1,000 shares of common stock and 2,000 restricted incentive shares in Delta Plastics.

Jorge filed for divorce on September 8, 2005, and the couple separated. Shortly thereafter, Rexum purchased Delta Plastics through a leveraged stock buy-out, and Jorge's shares dramatically increased in value. Due to the buy-out, Jorge was required to redeem his stock certificates, and, on September 21, 2005, he received $458,591.70 for his shares. Jorge then deposited the proceeds from his shares into his separate personal checking account. Due to the pending divorce, Jorge and Margaret filed separate income tax returns for 2005, and Jorge paid the capital gains tax on the stock proceeds.

During the final divorce hearing before the circuit court, Jorge argued that the stock proceeds were not marital property because he received the funds through a check written only to him, the funds were never placed in the couple's joint checking account, and the stocks were only in his name. To corroborate his assertions that the funds were a gift, Jorge presented the depositions of Christopher Rakhshan and Carl Wellman. In his deposition, Rakhshan insisted that the funds were given to Jorge as a gift in appreciation of his service to Delta Plastics and were not part of Jorge's compensation plan. Wellman, the former CFO of Delta Plastics, stated that the funds given to Jorge did not come from the company or the shareholders, and instead, came only from the

owners personally. Marla Lammers, a CPA hired by Margaret, testified at the hearing that due to the employment relationship between Jorge and the Delta Plastics owners, the funds would not be considered a gift under the Internal Revenue Code and, therefore, would be considered income.

On December 29, 2006, the circuit court entered the divorce decree, in which the court determined that the disputed funds were marital property and not a gift. Due to the length of the marriage in comparison with the length of Jorge's employment and the contribution of each spouse to the acquisition of the stock proceeds, the circuit court decided to divide the stock proceeds unequally, thereby awarding Margaret only $85,335.38. However, the decree also stated that Jorge would receive a credit against the amount owing to Margaret for the taxes that he paid on that amount, and the circuit court judge made a handwritten notation that a hearing would be held on the tax-credit issue on January 8, 2007.

A hearing was never held on the tax-credit issue, but on January 9, 2007, Jorge filed his notice of appeal. On January 11, 2007, the circuit court sent the parties a letter order stating the exact amount of Jorge's tax credit at $17,293.51. On February 12, 2007, the court entered an amended and supplemented divorce decree reflecting the court's decision as to the tax credit. Margaret filed her notice of cross-appeal on March 13, 2007.

As a threshold matter, we must determine whether we have jurisdiction over the parties' appeals. Before this court assumed the instant case from the Arkansas Court of Appeals, Margaret filed a motion to dismiss Jorge's appeal on the ground that his notice of appeal was untimely. The court of appeals denied her motion, and Margaret now raises the same argument in her brief to this court. Because Margaret's argument concerns our subject-matter jurisdiction over the instant appeal, we can address the issue *sua sponte*. *See Clarendon America Ins. Co. v. Hickok*, 370 Ark. 41, 257 S.W.3d 43 (2007).

Relying on a recent opinion by the court of appeals in *Allen v. Allen*, 99 Ark. App. 292, 259 S.W.3d 480 (2007), Margaret argues that Jorge's notice of appeal was untimely because the initial December 29 divorce decree was not a final order, and he did not file an amended notice of appeal after the February 12 amended and supplemented divorce decree was entered. Specifically, she asserts that because the December 29 decree did not contain a

specific amount for the tax credit and thus did not include a specific amount of stock proceeds that Jorge owed her, the decree did not put the court's directive into execution or end a separable branch of the litigation. Jorge, however, argues that the decree did dispose of a separable branch of the litigation — the issue of whether the funds were a gift.[1]

We have long held that a money judgment must contain a specific dollar amount in order to be executed. *See, e.g.*, *Thomas v. McElroy*, 243 Ark. 465, 420 S.W.2d 530 (1967); *Estate of Hastings v. Planters and Stockmen Bank*, 296 Ark. 409, 757 S.W.2d 546 (1988). Under Ark. R. App. P.–Civil 2(a)(1), an appeal may be taken from a final judgment or decree entered by the circuit court. Ark. R. App. P.–Civil 2(a)(1) (2007). This court has stated that the "test of finality and appealability of an order is whether the order puts the court's directive into execution, ending the litigation or a separable part of it." *Villines v. Harris*, 362 Ark. 393, 397, 208 S.W.3d 763, 766 (2005). However, when the order appealed from reflects that further proceedings are pending, which do not involve merely collateral matters, the order is not final. *Id.*

In *Office of Child Support Enforcement v. Oliver*, 324 Ark. 447, 921 S.W.2d 602 (1996), the chancellor entered an order of arrearage against Oliver but did not fix the amount of arrearage. Instead, the order stated that the OCSE should certify the amount of arrearage within two weeks of the order. *Id.* Our court held that the chancellor's order did not finally resolve the amount of arrearage owed or end the litigation concerning the claim for arrearage. *Id.* In *Morton v. Morton*, 61 Ark. App. 161, 965 S.W.2d 809 (1998), the court of appeals held that a chancellor's divorce decree, which divided the property but held in abeyance the determination of alimony, was not a final order for purposes of appeal. *Id.* Likewise, in *Allen v. Allen, supra*, the court of appeals held that the circuit court's divorce decree was not a final order when the lower court's order acknowledged that the wife owed the husband $40,000 for his interest in her business, but that sum was to be reduced by set-offs in unstated amounts. *Id.*

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[1] Jorge argues that Margaret's reliance on *Allen v. Allen, supra*, is misplaced because that case only concerned the issue of when the divorce decree was effective. Although the *Allen* court did address the divorce decree's effective date, it also dealt with the question of whether the decree, which stated that the husband was entitled to a $40,000 award with set-offs without listing the exact amount of the set-offs, was a final order. *See id.*

Here, as in the cases cited above, the initial divorce decree stated that Margaret was entitled to $85,335.83 subject to reduction by the amount of Jorge's tax credit, and the amount of the tax credit was yet to be determined. The circuit court also made a notation on the decree that a further hearing would be held on the issue. Thus, it is clear from the face of the decree that, while the circuit court had determined the funds were not a gift, the issue was still subject to pending litigation. Accordingly, we dismiss Jorge's direct appeal.[2] Because Margaret did file a timely notice of cross-appeal, however, we will now address the merits of her argument.

For her cross-appeal, Margaret argues that the circuit court erred in unequally dividing the stock proceeds. She asserts that the circuit court based its decision solely on the basis of each party's contribution to the acquisition of the proceeds, and because the circuit court's order does not indicate that the court considered any of the other factors listed in Ark. Code Ann. § 9-12-315(a) (Repl. 2002), the circuit court's ruling was erroneous. Jorge does not offer any argument directly addressing this issue.

We review division-of-marital-property cases *de novo*; however, we will affirm the circuit court's findings of fact unless they are clearly erroneous, or against the preponderance of the evidence; the division of property itself is also reviewed, and the same standard applies. *Farrell v. Farrell*, 365 Ark. 465, 231 S.W.3d 619 (2006). A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Id.* In order to demonstrate that the circuit court's ruling was erroneous, the appellant must show that the circuit court abused its discretion by making a decision that was arbitrary or groundless. *Id.*

Under Arkansas Code Annotated § 9-12-315, all marital property shall be divided equally between the parties unless the circuit court finds such a distribution would be inequitable. *See* Ark. Code Ann. § 9-12-315(a)(1)(A) (Repl. 2002). Section 9-12-

[2] Under Ark. R. App. P.–Civil 4(a) (2007), when a party files a notice of appeal after an oral decision is announced from the bench but before the written decree is entered, the notice of appeal shall be treated as filed on the day after the decree is entered. In the instant case, however, Rule 4(a) does not apply because no hearing was held on the tax-credit issue and no ruling was made on the issue until January 11, two days after Jorge's January 9 notice of appeal.

315 requires that the circuit court consider the following factors when making an unequal distribution of marital property:

> (i) The length of the marriage;
>
> (ii) Age, health, and station in life of the parties;
>
> (iii) Occupation of the parties;
>
> (iv) Amount and sources of income;
>
> (v) Vocational skills;
>
> (vi) Employability;
>
> (vii) Estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income;
>
> (viii) Contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and
>
> (ix) The federal income tax consequences of the court's division of property.

Ark. Code Ann. § 9-12-315(a)(1)(A)(i)-(ix) (Repl. 2002). When the circuit court divides the property unequally, the circuit court must state its basis and reason for not dividing the marital property equally between the parties, and the basis and reasons should be recited in the circuit court's order. Ark. Code Ann. § 9-12-315(a)(1)(B) (Repl. 2002).

In *Keathley v. Keathley*, 76 Ark. App. 150, 61 S.W.3d 219 (2001), the court of appeals held that while section 9-12-315 requires the circuit court to consider the statutory factors and to state the basis of the unequal division of marital property, the circuit court is not required to list each factor in the order, nor to weigh all factors equally. *Id.* Further, the specific enumeration of the factors within the statute does not preclude a circuit court from considering other relevant factors, where exclusion of other factors would lead to absurd results or deny the intent of the legislature to allow for the equitable division of property. *Id.*

In the instant case, the circuit court gave each party the separate property they brought to the marriage and equally divided all of the marital property, except for the stock proceeds. Instead,

the court calculated the gain on the stock, and determined that Margaret was only entitled to an amount that was proportionate to the length of the marriage as compared to the length of Jorge's employment with Rakhshan and Delta Plastics. The court stated that because the parties were married six of the eighteen years Jorge was employed by Rakhshan, the gains should be divided by three, and then a third of the gains should be divided in half, resulting in Margaret's $85,335.85 share.

Thus, it is clear from the circuit court's order that both the length of the marriage and the contribution of the parties to the acquisition of the stock proceeds formed the basis for the circuit court's decision to divide the property unequally. Contrary to Margaret's argument, the fact that the circuit court did not list all of the statutory factors in the order does not show error because the lower court was not required to list all the factors and was entitled to weigh the factors differently in reaching its decision. *See Keathley v. Keathley, supra.*

Moreover, in *Marshall v. Marshall*, 285 Ark. 426, 688 S.W.2d 279 (1985), this court advocated an approach similar to the one taken by the circuit court in the instant case. In *Marshall*, the chancellor decided to divide the husband's retirement benefits equally when the parties were married only ten of the thirty-five years in which the husband worked for his former employer. *Id.* This court, however, determined that the portion of retirement benefits the husband obtained before the marriage was the husband's separate property and the wife should only receive a proportionate share as reduced by the husband's separate property. *Id.* Thus, given the foregoing reasons, we conclude that the circuit court did not abuse its discretion in dividing the stock proceeds unequally.

Margaret cites the court of appeals's opinion in *Baxley v. Baxley*, 92 Ark. App. 247, 212 S.W.3d 8 (2005), in support of her argument. In *Baxley*, the court of appeals reversed the circuit court because the lower court only considered the contribution of the parties to the acquisition of the marital property when it awarded one spouse the entire amount in an investment account. *Id.* The instant case is distinguishable from *Baxley*. Here, the circuit court's order reflects the court's consideration of more than just the contribution factor. Accordingly, we cannot find error in the circuit court's decision, and we affirm on cross-appeal.

Direct appeal dismissed. Cross-appeal affirmed.

IBAC CORP., Nylkoorb Management Group, Inc., The Royal Arkansas Hotel and Suites, Inc., Turner Hughes Corp., Wayne Burmaster, and Edward Hayster, Sr. *v.* Gerhardt BECKER, International Hotel Management, Inc.

07-252 265 S.W.3d 755

Supreme Court of Arkansas
Opinion delivered October 25, 2007

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *John K. Baker* and *Jeffrey L. Spillyards*, for appellant The Royal Arkansas Hotel & Suites, Inc.

James & Carter, PLC, by: *John D. Coulter*, for appellants.

Baim, Gunti, Mouser, Havner Boyd & Worsham, PLC, by: *Michael W. Boyd*, for appellees.

JIM GUNTER, Justice. This appeal arises from a restraining order and an order to inspect, entered on February 21, 2007, by the Jefferson County Circuit Court against IBAC Corporation (IBAC), Nylkoorb Management Group, Inc. (Nylkoorb), Turner Hughes Corporation (THC), Wayne Burmaster, Edward Hayter, Sr., and The Royal Arkansas Hotel and Suites, Inc. (Royal) (collectively Appellants). Appellants now bring this appeal and ask us to set aside the restraining order. Appellant Royal also asks that we dissolve the order to inspect. We reverse the circuit court's orders and remand for further proceedings.

On February 13, 2007, Gerhardt Becker and International Hotel Management, Inc., (collectively Appellees) filed a complaint in the Jefferson County Circuit Court against Appellants alleging various causes of action, including fraud, breach of contract, and breach of fiduciary duty and sought a liquidation and dissolution of Royal. Appellees also requested that the circuit court enter an order to inspect the financial records of Royal pursuant to Ark. Code Ann. § 4-27-1604 (Supp. 2007). Appellees further sought a restraining order prohibiting Appellants from

> misappropriating, or misusing corporate funds and assets, from paying any expenditure of the corporation except corporate expenditures incurred in the ordinary course of business, from operating the corporation in any manner other than in the ordinary course of business, from selling, concealing, moving, mortgaging, pleading, encumbering, damaging, destroying, impairing, conveying, obligating or otherwise disposing of any corporate asset of The Royal, Inc; and from destroying, transferring, concealing, altering any corporate record except in the ordinary course of business, from backdating any existing corporate record, from disbursing any bonuses or dividends to any officer or shareholder, from transferring any corporate stock or ownership, and from impairing stock in any way, and from interfering with a complete audit of the corporation's financial records and transactions.

On February 21, 2007, the circuit court entered a restraining order, stating that "[i]rreparable harm or damage will or might

result to Plaintiffs if preliminary injunctive relief is not granted." The order stated that Appellants were restrained and enjoined from the following:

a) misappropriating or misusing corporate funds and assets, from paying any expenditure of the corporation except corporate expenditures incurred in the ordinary course of business,

b) from operating the corporation in any manner other than in the ordinary course of business,

c) from selling, concealing, moving, mortgaging, pledging, encumbering, damaging, destroying, impairing, conveying, obligating or otherwise disposing of any corporate asset of the Royal Arkansas Hotel and Suites, Inc.;

d) from destroying, transferring, concealing, altering any corporate record,

e) from creating any corporate record except in the ordinary course of business,

f) from backdating any existing corporate record,

g) from distributing any bonuses or dividends to any officer or shareholder,

h) from transferring any corporate stock or ownership,

i) from impairing stock in The Royal Arkansas Hotel and Suites, Inc. in any way, and

j) from interfering with a complete audit of the corporation's financial records and transactions.

The circuit court also ordered Appellants to allow the inspection and copying of Royal's records. The circuit court did not conduct a hearing before entering these two orders. On March 13, 2007, Appellants filed their joint notice of appeal seeking interlocutory review and reversal of the restraining order and the order to inspect. Appellants now bring this appeal.

For their first point on appeal, Appellants argue that the restraining order should be vacated because the circuit court failed to comply with Rule 65 of the Arkansas Rules of Civil Procedure

(2007). Specifically, Appellants assert that the restraining order was entered without a showing of irreparable harm or likelihood of success on the merits. Appellants also argue that Appellees failed to satisfy the requirement under Ark. R. Civ. P. 7 (2007) by failing to submit a written or oral motion for injunctive relief. Royal further contends that the restraining order should be dissolved because it was issued without notice.

Appellees argue that, although the restraining order is "succinct," it sets forth that irreparable harm will or may result if the order is not entered and goes on to describe with particularity each act prohibited. They assert that the restraining order clearly meets the standards set forth in Rule 65(e). They also contend that Appellants' complaint regarding their ability to address the restraining order should have been raised with the circuit court pursuant to Rule 65. Appellees do not make an argument concerning Rule 7, except to provide a conclusory statement that they complied with the rule.

Royal also argues that the circuit court committed reversible error by entering the order to inspect without providing Royal the opportunity to answer the complaint, engage in discovery, and defend itself at a hearing or trial on the merits. Appellees respond, arguing that the order to inspect is not an appealable order pursuant to Rule 2(a) of the Arkansas Rules of Appellate Procedure – Civil (2007), and therefore should not be heard. Alternatively, Appellees assert that the order to inspect was proper and warranted pursuant to Ark. Code Ann. § 4-27-1604.

At the outset, we address whether the order to inspect is appealable. Ark. R. App. P.–Civil 2(a) enumerates matters in which an appeal may be taken from a circuit court to the Arkansas Supreme Court. An order to inspect is not enumerated in this list. However, Rule 2(a)(6) does provide that an injunction is an appealable order. Royal asserts that the order to inspect is a preliminary injunction, which is therefore appealable under Rule 2(a). Royal contends that because the order to inspect mandates acts on the part of Royal, it is rightly considered an affirmative or mandatory injunction under Rule 65.

We have defined an injunction as "a command by a court to a person to do or refrain from doing a particular act." *State Game and Fish Comm'n v. Sledge*, 344 Ark. 505, 42 S.W.3d 427 (2001); *Arkansas Dep't of Human Servs. v. Hudson*, 338 Ark. 442, 994 S.W.2d 488 (1999); *Tate v. Sharpe*, 300 Ark. 126, 777 S.W.2d 215

(1989). It is mandatory when it commands a person to do a specific act, and prohibitory when it commands him or her to refrain from doing a specific act. *Butler v. State,* 311 Ark. 334, 842 S.W.2d 435 (1992). All court orders are mandatory in the sense that they are to be obeyed, but not all orders are mandatory injunctions. *Tate*, 300 Ark. at 129, 777 S.W.2d at 215. To be a mandatory injunction, the order must be based upon equitable grounds to justify the use of the extraordinary powers of equity, such as irreparable harm and no adequate remedy at law. *Id.* In addition, the order must determine issues in the complaint, not merely aid in the determination of such issues. *Id.*; *see also Warren v. Kelso*, 339 Ark. 70, 3 S.W.3d 302 (1999) (stay of proceedings does not translate into an injunction).

[redacted] Here, the circuit court ordered Appellants to allow the inspection and copying of certain records belonging to Royal. We interpret this order as commanding Royal to do a specific act. *See Sledge, supra.* Such an inspection could also determine issues in the complaint, such as breach of fiduciary duty, fraud, and deceit. Therefore, we hold that the order to inspect is appealable and will be treated the same as the restraining order.

We now turn to the issue of notice. Royal argues that the restraining order should be dissolved because it was given without notice to Appellants, and the circuit court did not conduct a hearing regarding the issuance of the restraining order. Appellees respond, asserting that Appellants were properly served, and therefore they were properly notified.

Arkansas Rule of Civil Procedure 65 (2007) states:

> (a)(1) Notice. A preliminary injunction or a temporary restraining order may be granted without written or oral notice to the adverse party or his attorney where it appears by affidavit or verified complaint that irreparable harm or damage will or might result to the applicant if such preliminary injunction or temporary restraining order is not granted. In all other cases, reasonable notice must be given to the adverse party or his attorney of the application for a preliminary injunction or temporary restraining order and an opportunity for such party or his attorney to be heard in opposition thereto. Every preliminary injunction or temporary restraining order granted without notice shall be filed with the clerk and a copy served upon the party restrained in the manner prescribed by Rule 4 of these rules.
>
> . . . .

> (b) Hearing. Upon application by the party against whom the preliminary injunction or temporary restraining order has been issued without notice, the Court shall, as expeditiously as possible, hold a hearing to determine whether the preliminary injunction or temporary restraining order should be dissolved. Where a hearing is required to be held on an application for a preliminary injunction or temporary restraining order, the Court may order the trial of the action on the merits advanced and consolidated with the hearing on the application. When consolidation is not ordered, any evidence received upon application for a preliminary injunction or temporary restraining order which would be admissible upon the trial on the merits becomes a part of the record of the trial and need not be repeated upon the trial. This subdivision (b) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

Id.

Rule 65(a)(1) provides that, where a preliminary injunction is to be given without notice to the adversary of the one requesting it, it must be alleged by affidavit or verified complaint that, absent the injunction, irreparable harm will result to the appellant. Where notice is given, the rule contemplates that a hearing will be held at which such irreparable harm must be shown. The prospect of irreparable harm or lack of an otherwise adequate remedy is the foundation of the power to issue injunctive relief. *See Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997); *Amalgamated Clothing v. Earle Indus., Inc.*, 318 Ark. 524, 886 S.W.2d 594 (1994); *see also Ahrent v. Sprague*, 139 Ark. 416, 214 S.W. 68 (1919); *Ex Parte Foster*, 11 Ark. 304 (1850).

In the present case, Appellees obtained the restraining order from the circuit court before Appellants were served with the summons and complaint. No notice was given before the restraining order was issued. Because no notice was given, Rule 65(a)(1) requires that there must be an affidavit or verified complaint that irreparable harm or damage will or might result to the applicant if the restraining order is not granted. The complaint in the present case is unverified. Therefore, Appellants should have been notified of the application for a restraining order. Appellants also should have been notified of the request for an order to inspect. Under these facts, it was not necessary for Appellants to bring this issue before the circuit court. Accordingly, we reverse the orders of the circuit court and remand for further proceedings.

Because we are reversing and remanding this case on the issue of notice, we will not reach the remaining arguments.

Reversed and remanded.

STATE of Arkansas *v.* Agustin MORENO

CR 07-327 265 S.W.3d 751

Supreme Court of Arkansas
Opinion delivered October 25, 2007

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

Thurman Ragar, Jr., Deputy Public Defender, for appellee.

PAUL E. DANIELSON, Justice. The appellant, the State of Arkansas, appeals from the circuit court's order granting the motion to suppress of the appellee, Agustin Moreno. For its sole point on appeal, the State argues that the circuit court erred in granting the motion to suppress because the defendant was given valid *Miranda*

warnings in his native tongue before he was given a second set of warnings at the beginning of his videotaped statement, the set which was later found to be unconstitutional. Because we hold that this is an improper state appeal, we dismiss the appeal.

The underlying facts are these. On December 4, 2005, Moreno was questioned by Crawford County Sheriff Deputy Halbert Torraca regarding events that had allegedly occurred earlier in Moreno's home. Moreno does not speak English. While he can speak Spanish, he is unable to read it.

Additional facts were established at the October 23, 2006 suppression hearing by the testimony of Deputy Torraca. Torraca testified that he *Mirandized* Moreno in Spanish at his residence, translating it from an English Miranda warning card. While Torraca never received any formal education on reading and writing in Spanish, he grew up speaking Spanish as he lived with his grandparents who were Puerto Rican and could not speak any English. At age eleven, Torraca moved in with his mother and stepfather, a man of Mexican descent, and both English and Spanish were spoken in that household. While he is admittedly "a little bit slow at it," Torraca testified that he can read English and translate it into Spanish.

Torraca began to question Moreno regarding the allegations and Moreno started to answer affirmatively that he had inappropriately touched his niece, a minor child. At that time, Torraca noticed that the battery on his recording device had gone out and he decided to place Moreno under arrest and take him to the Crawford County Sheriff's Department, where he had access to audio and video recording. Moreno was then placed in an interview room at the sheriff's department.

Before questioning Moreno further, a videotape was started and Torraca went over the rights form with him. Torraca had a copy of the English rights form and tried to explain the rights to Moreno, who was equipped with the Spanish rights form. Moreno never indicated that he could not understand what Torraca was explaining and signed the rights form when asked.

The interpreter from the Administrative Office of the Courts provided the circuit court with a transcript of the translation of Torraca's interview with Moreno. The transcript provides in pertinent part:

> TORRACA: Sorry that took awhile, there are a lot of (unintelligible). Ok . . . ok, right now I am going to re

... um, I'm going to read you ... eh ... I'm going to read you the rights again, ok? Because I want you to understand your rights well, ok? Ok. And here you put (unintelligible). Ok, before uh ... ask you questions, uh ... you ca ... you ... uh ... you ha ... you have the right of to remain silent, do you understand that?

MORENO: U-hu.

TORRACA: Ok? Uh ... you, each thing that you says, can use it uh ... against you in ... a court of law, ok? Uh ... you have the right to consult a lawyer, before I ask you rights. Do you understand that?

MORENO: Yes

TORRACA: Yes? Ok, uh ... if you don't uh ... you ... if you want a lawyer and ... and ... don't have the money for a lawyer, we can writ ... write you down a law ... a lawyer, before I ask you rights. You do understand that right?

MORENO: Mh-hu.

TORRACA: Ok? Uh ... If you de ... decide to uh ... to answer my questions, ok? Then some eh ... at so ... some time, that you decide yourself you want a lawyer, you can stop to answer our question you can stop and eh ... to wait for a lawyer. You do understand that right? Ok, uh ... ok, and here it says that uh ... uh ... Can you read Spanish?

MORENO: Very little.

TORRACA: Very little? Ok. Here it says the place, ok. You see here that it says place?

MORENO: Yes. And here?

TORRACA: Here ... here goes write down, this is the name of the ... of our department, ok? Ok, today's date is: twelve, four, zero five and the time is; one thirty five, ok? Uh ... u ... uh ... do you want to read this for a moment?

MORENO: Let's see what it says (unintelligible) more or less.

TORRACA: Uh . . . uh . . . ok, you do understand your rights?

MORENO: Yes, yes I understand.

TORRACA: Ok, uh . . . also under . . . uh . . . nobody hasn't threatened you or promised you nothing.

MORENO: No.

TORRACA: Ok, uh . . . uh . . . I didn't promise you . . . I haven't promised you anything, uh . . . I haven't threatened you, so you answer my questions, uh . . . yes? Have I threatened you?

MORENO: No. No.

TORRACA: No? Ok, uh . . . I want you to sign here.

Moreno did sign the form indicating that he understood his rights and continued to make several incriminating statements during the course of the questioning by Torraca. On October 18, 2006, Moreno filed a motion to suppress any statement that he made to Torraca without the presence of counsel, claiming that his statements were made prior to his being properly informed of his *Miranda* rights and in violation of his constitutional right to the advice of counsel. The circuit court granted Moreno's motion on January 26, 2007, finding that: Moreno did not speak English with enough proficiency sufficient for him to understand *Miranda* warnings and rights; Moreno could not, in English, have made an intelligent waiver of those rights; and, the transcript of the interrogation showed that Torraca sufficiently failed to advise Moreno of his *Miranda* rights in Spanish. The State filed a notice of appeal, which appeal is now before this court.

In its jurisdictional statement, the State argues that the instant appeal involves the correct and uniform administration of the law because the circuit court erroneously interpreted the law to conclude that the second of two sets of *Miranda* warnings given in Spanish was inadequate to support Moreno's waiver of his *Miranda* rights and there is a risk that the circuit court's interpre-

tation of Ark. R. Crim. P. 16.2(e) (2007) will be at odds with the interpretations of other circuit courts. The State contends that the circuit court erred by finding that Moreno did not receive proper *Miranda* warnings and that his waiver of those rights was not knowingly, intelligently, and voluntarily made, as the State proved by a preponderance of the evidence that Moreno was given full and correct warnings not only at the time the video recording was made, but also when he was first arrested at his residence. Furthermore, the State alleges the circuit court erred in applying the law regarding *Miranda* warnings when it suppressed Moreno's statements.

Moreno responds that the State's arguments realistically turn on the circuit court's application of the law under the specific facts of this case, that Moreno did not advance his motion to suppress based on any new, novel, or untested legal theories, and that, for those reasons, the instant appeal is an improper state appeal. As to the merits, Moreno contends that the circuit court correctly decided that the insufficiency of Torraca's translation of the *Miranda* warnings into Spanish prevented Moreno from fully understanding the *Miranda* rights he waived.

Arkansas Rule of Appellate Procedure – Criminal 3(a)(1) provides that "[a]n interlocutory appeal on behalf of the state may be taken only from a pretrial order in a felony prosecution which (1) grants a motion under Ark. R. Crim. P. 16.2 to suppress seized evidence[.]" Ark. R. App. P. – Crim. 3(a)(1) (2006). It further states:

> (c) When a notice of appeal is filed pursuant to either subsection (a) or (b) of this rule, the clerk of the court in which the prosecution sought to be appealed took place shall immediately cause a transcript of the trial record to be made and transmitted to the attorney general, or delivered to the prosecuting attorney, to be by him delivered to the attorney general. If the attorney general, on inspecting the trial record, is satisfied that error has been committed to the prejudice of the state, and that *the correct and uniform administration of the criminal law* requires review by the Supreme Court, he may take the appeal by filing the transcript of the trial record with the clerk of the Supreme Court within sixty (60) days after the filing of the notice of appeal.

Ark. R. Crim. P. 3(c) (emphasis added).

This court has frequently observed that there is a significant and inherent difference between appeals brought by criminal

defendants and those brought on behalf of the State. *See State v. Nichols*, 364 Ark. 1, 216 S.W.3d 114 (2005). The former is a matter of right, whereas the latter is not derived from the Constitution, nor is it a matter of right, but is granted pursuant to Ark. R. App. P.–Crim. 3. *See id.* We accept appeals by the State when our holding would be important to the correct and uniform administration of the criminal law. *See id.*

As a matter of practice, this court has only taken appeals which are narrow in scope and involve the interpretation of law. *See State v. Pittman*, 360 Ark. 273, 200 S.W.3d 893 (2005). We do not permit State appeals merely to demonstrate the fact that the circuit court erred. *See 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. *See 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. *See id.* 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. *See id.*

Here, the State specifically concludes in its brief that the circuit court "erred in *applying* the law regarding *Miranda* warnings." The State does not allege that the circuit court misinterpreted the law; rather, the State argues that the circuit court erred in finding that Torraca did not adequately translate the *Miranda* warnings in such a way that Moreno fully understood what rights he was being asked to waive. The State does not argue how the circuit court misinterpreted the law; instead, it attempts to prove how the facts in this case are more analogous to cases that the State finds more favorable. In order to make a ruling on Moreno's motion to suppress, the circuit court was required to review the facts and circumstances surrounding the *Miranda* warnings given to him and the waiver of his rights.

While the State, in its reply, contends that the question presented to this court is "whether non-English language *Miranda* warnings are sufficient if they convey the essence of the *Miranda* rights and, alternatively, whether a previous giving of *Miranda* warnings in a suspect's native language is sufficient to supplant a

later, arguably flawed, giving of those warnings," both suggested questions presuppose that the warnings given in this case did properly convey the essence of the *Miranda* rights, which the circuit court did not find, and that a previous set of warnings were given fully in the suspect's native language. Those are both large presumptions and would require an intensive factual investigation by this court.

Indeed, this appeal is not one requiring interpretation of our criminal rules; instead, it raises issues involving the application of our rules to the specific facts of this case. It does not appear that a review of this appeal would have widespread ramifications on the interpretation of our criminal law. As such, this appeal clearly does not involve the correct and uniform administration of the criminal law and does not fall within the confines of Ark. R. App. P. – Crim. 3. We, therefore, dismiss the appeal.

Appeal dismissed.

K.C. PROPERTIES of N.W. ARKANSAS, INC., and Buildings, Inc. *v.* LOWELL INVESTMENT PARTNERS, LLC; Pinnacle Management Services, LLC; Tim Graham; Bill W. Schwyhart; J.B. Hunt; Ozark Mountain Water Park, LLC; J.B. Hunt, LLC; Schwyhart Holding, LLC; and Tim Graham, LLC

07-471 266 S.W.3d 204

Supreme Court of Arkansas
Opinion delivered October 29, 2007

Cypert, Crouch, Clark & Harwell, by: *James E. Crouch*, for appellants.

Shemin & Hendren, PLLC, by: *Kenneth R. Shemin*, for appellees.

PER CURIAM. This appeal arises from an order of the Washington County Circuit Court granting a motion for summary judgment filed by appellees. Appellants, K.C. Properties of N.W. Arkansas, Inc., and Buildings, Inc., however, have failed to include relevant pleadings in their Addendum in violation of Arkansas Supreme Court Rule 4-2(a)(8), which provides that an Addendum shall include 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). Although not raised by the appellees, we do not reach the merits of the argument of K.C. Properties of N.W. Arkansas, Inc., and Buildings, Inc., due to their failure to comply with our Addendum requirements. *See* Ark. Sup. Ct. R. 4-2(a)(8), 4-2(b)(3) (2007); *see also White County v. Cities of Judsonia, Kensett, and Pangburn*, 368 Ark. 603, 247 S.W.3d 863 (2007).

Specifically, the appellants' Addendum does not include the original complaint, appellees' motion for summary judgment and brief in support, and appellants' response to the motion. Appellees supplemented the Addendum by including their brief in support of the motion for summary judgment but did not include the motion itself or the response. It is a practical impossibility for seven justices to examine a single record filed with this court, and we will not do so. *City of Dover v. City of Russellville*, 351 Ark. 557, 95 S.W.3d 808 (2003).

Because K.C. Properties of N.W. Arkansas, Inc., and Buildings, Inc., failed to comply with our rules, we find that their brief is deficient and that we cannot reach the merits of their appeal. Therefore, pursuant to our rules, K.C. Properties of N.W. Arkansas, Inc., and Buildings, Inc., have fifteen days from the date of this opinion to file a substituted Addendum to conform to Arkansas Supreme Court Rule 4-2(a)(8). *See* Ark. Sup. Ct. R. 4-2(b)(3); *see also, White County, supra.* If K.C. Properties of N.W.

Arkansas, Inc., and Buildings, Inc., fail to file a substituted Addendum within this time period, the circuit court's judgment may be affirmed for noncompliance with our rule. *See id.*

Rebriefing ordered.

IMBER, J., not participating.

Angela KELLEY *v.*
USAA CASUALTY INSURANCE COMPANY,
State Farm Fire & Casualty Company

07-367 266 S.W.3d 734

Supreme Court of Arkansas
Opinion delivered November 1, 2007

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

Kilpatrick, Williams, Smith & Meeks, LLP, by: *Joseph E. Kilpatrick, Jr.* and *Richard A. Smith*, for appellee USAA Casualty Insurance Company.

JIM HANNAH, Chief Justice. Angela Kelley appeals summary judgment entered against her in Pulaski County Circuit Court. The circuit court rejected Kelley's argument that Act 1043 of 2003, amending Ark. Code Ann. § 27-19-503 (Repl. 1994), overruled this court's prior holdings that the uninsured-motorist statute, Ark. Code Ann. § 23-89-403 (Repl. 2004), requires a plaintiff to prove that the vehicle alleged to have caused the damage and injury was uninsured. The circuit court further rejected Kelley's argument that insurance policies requiring physical contact to trigger uninsured-vehicle coverage restricted coverage to a level that falls below the minimum insurance coverage required by Arkansas law. We affirm the circuit court and hold that Act 1043 did not overrule *State Farm Mut. Auto. Ins. Co. v. Henderson*, 356 Ark. 335, 150 S.W.3d 276 (2004), *Ward v. Consol. Underwriters & Medallion Ins. Co.*, 259 Ark. 696, 535 S.W.2d 830 (1976), did not amend section 23-89-403, and that the law under our uninsured-motorist statute remains that a plaintiff must prove that the other vehicle is uninsured. We further hold that the question of whether public policy requires the statutes be amended to provide uninsured coverage in the absence of physical contact should be addressed to the General Assembly. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(5).

On April 18, 2005, at approximately 9:35 a.m., Wendell Fair was involved in a one-car accident. Kelley was his passenger. Kelley and Fair were injured, and the accident resulted in the total loss of Fair's vehicle. The record reveals that there was no physical

contact. Kelley asserts that Fair was run off the road by an as yet unidentified vehicle and driver and that she is entitled to coverage for her injuries under the uninsured-motorist coverage of Fair's and her own automobile insurance policy. Fair's insurance carrier U.S.A.A. Casualty Insurance Company, and Kelley's insurance carrier, State Farm Fire and Casualty Company, filed and prevailed on motions for summary judgment.

In *Nash v. Hendricks*, 369 Ark. 60, 68, 250 S.W.3d 541, 546-47 (2007), we stated the standard of review where summary judgment is granted:

> Summary judgment is to be granted only 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. *See Vanderpool v. Pace*, 351 Ark. 630, 97 S.W.3d 404 (2003). The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried. *City of Barling v. Fort Chaffee Redevelopment Auth.*, 347 Ark. 105, 60 S.W.3d 443 (2001). Once the moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Spears v. City of Fordyce*, 351 Ark. 305, 92 S.W.3d 38 (2002).

This case concerns interpretation of acts of the General Assembly. We review issues of statutory interpretation de novo; it is for this court to decide what a statute means. *Maddox v. City of Fort Smith*, 369 Ark. 143, 251 S.W.3d 281 (2007). We are not bound by the trial court's decision; however, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. *Id.* 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. *Id.*

Act 1043 of 2003

Kelley presents the following argument:

> The 2003 amendment [Act 1043] presents a significant departure from prior Arkansas law and public policy. By adding the vehicle to section 503's presumption, the legislature's clear intent was to abrogate prior interpretations of the statute which do not include the vehicle in the uninsured presumption. The Appellee's policy,

> by creating an arbitrary requirement of physical contact, is in clear contradiction with the newly amended ARK. CODE ANN. § 27-19-503. It restricts coverage to a level that falls below the minimum required by Arkansas law.

This argument was raised in *Henderson, supra*, and there we declined to address the argument because the case was decided on an independent basis that did not require consideration of the argument. We now address the argument. As a threshold matter, we note that pursuant to Ark. Code Ann. § 27-19-621 (Repl. 2004), any action taken under section 27-19-503 is not admissible in a civil action:

> The report required following an accident, the action taken by the office pursuant to this chapter, the findings, if any, of the office upon which such action is based, and the security filed as provided in this chapter shall not be referred to in any way, and shall not be any evidence of the negligence or due care of either party, at the trial of any civil action to recover damages.

In *Branscumb v. Freeman*, 360 Ark. 171, 176, 200 S.W.3d 411, 414 (2004), we discussed the issue of admission of such evidence in a civil action:

> 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. 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).

Chapter 19 of Title 27, where section 27-19-503 is located, is the "MOTOR VEHICLE SAFETY RESPONSIBILITY ACT." What the chapter concerns is readily apparent from the Act's title:

> AN ACT to Eliminate the Reckless and Irresponsible Driver From the Highways and to Provide for the Giving of Security and Proof of Financial Responsibility By Persons Driving or Owning Vehicles of a Type Subject to the Registration Under the Laws of this State; and for Other Purposes.

Act 347 of 1953. Act 1043 amended the Motor Vehicle Safety Responsibility Act. It did not amend or modify the law on insurance coverage or tort liability. Section 27-19-503 declares that for purposes of the Motor Vehicle Safety Responsibility Act, any driver involved in an accident who fails to provide proof of insurance within ninety days is presumed uninsured, as well as the vehicle the driver is operating. It deals only with actions to be taken against the driver by the Department of Finance & Administration (DF&A), and it concerns identified drivers involved in accidents. Even within the context of the Motor Vehicle Safety Responsibility Act, the section is not now and was never a means to declare an unidentified and unknown driver and vehicle as uninsured for DF&A's purpose or for any purpose. The reason the driver and vehicle are presumed uninsured for DF&A's purpose is because when an identified driver fails to comply with the law and obtain and provide proof that he or she is insured, as well as the vehicle, as required by law, then this presumption is provided by law to allow DF&A to take the punitive actions under the Act designed to eliminate irresponsible drivers from the highways. If DF&A does not know who the driver is it cannot take any action under the Act to punish him or her. Thus, there is no presumption under section 27-19-503 that would allow Kelley to assert the driver and vehicle she has not identified are uninsured.

Physical Contact

As to our interpretation of section 23-89-403 and prior holdings that physical contact must be proven, this court since 1976 has held that neither section 23-89-403 nor public policy is violated by insurance contracts that require physical contact before uninsured coverage is triggered. *See Henderson, supra*; *Ward, supra.* "A cardinal rule in dealing with a statutory provision is to give it a consistent and uniform interpretation so that it is not taken to mean one thing at one time and something else at another time." *Morris v. McLemore*, 313 Ark. 53, 55, 852 S.W.2d 135, 136 (1993). "When a statute has been construed, and that construction has been consistently followed for many years, such construction ought not be changed." *Low v. Ins. Co. of N. America*, 364 Ark. 427, 438, 220 S.W.3d 670, 679 (2005); *Morris*, 313 Ark. at 55, 852 S.W.2d at 136. The law has remained consistent:

> Moreover, if there is to be a departure in the public policy since *Ward*, it is an issue that should be left to the General Assembly. This

> court has repeatedly held that the determination of public policy lies almost exclusively with the legislature, and the courts will not interfere with that determination in the absence of palpable errors. *See, e.g., Jordan v. Atlantic Cas. Ins. Co.*, 344 Ark. 81, 40 S.W.3d 254 (2001); *Norton v. Hinson*, 337 Ark. 487, 989 S.W.2d 535 (1999); *McDonald v. Pettus*, 337 Ark. 265, 988 S.W.2d 9 (1999). Similarly, this court has long held that a cardinal rule in dealing with a statutory provision is to give it a consistent and uniform interpretation, and when a statute has been consistently construed in one way for many years, that construction should not be changed by the courts. *Moix-McNutt*, 348 Ark. 518, 74 S.W.3d 612 (citing *Flemens v. Harris*, 323 Ark. 421, 915 S.W.2d 685 (1996); *Morris v. McLemore*, 313 Ark. 53, 852 S.W.2d 135 (1993); *Goldsby v. Fairley*, 309 Ark. 380, 831 S.W.2d 142 (1992)).

Henderson, 356 Ark. at 342, 150 S.W.3d at 279-80. There is no merit to Kelley's claim that requiring physical contact to trigger coverage under uninsured-motorist provisions in insurance contracts restricts coverage to a level that falls below the minimum coverage required by Arkansas law.

In *Ward*, *supra*, this court stated as follows on the matters at issue:

> Appellant argues that since the uninsured motorist statute is remedial in nature, the court should construe the act liberally to accomplish its remedial purpose. Appellant acknowledges that we have held that the burden of showing the other vehicle is uninsured is on the plaintiff. *South. Farm Bur. Cas. Ins. v. Gottsponer*, 245 Ark. 735, 434 S.W.2d 280 (1968). In the case at bar, however, appellant argues that although this may be a proper requirement as to the burden of proof when the driver is known and can be identified, it should not be required where, as here, the driver and vehicle are unknown.
>
> § 66-4003, which requires uninsured motorist coverage, reads in pertinent part:
>
>> No automobile liability insurance . . . shall be delivered or issued for delivery in this state . . . unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are legally entitled to recover damages from the owners or operators of uninsured motor vehicles . . . .

> Plainly, the statute only requires that coverage be provided for the protection of persons who are legally entitled to recover damages from the owners of *uninsured motor vehicles*. As indicated, we have interpreted this statute as requiring that the plaintiff has the burden of showing that the other vehicle is uninsured. *South. Farm Bur. Cas. Ins. v. Gottsponer, supra.* Here the policy does not require this burden of proof when there is physical contact and "the operator or owner of such 'hit-and-run automobile' " cannot be ascertained. Therefore, it appears the policy in question is a liberalization of the coverage required by our statute. *See Amidzich v. Charter Oak Fire Insurance Co.*, 170 N.W.2d 813 (Wis. 1969); *Phelphs v. Twin City Fire Insurance Company*, 476 S.W.2d 419 (Tex. Ct. App. 1972); and *Ward v. Allstate Insurance Company*, 514 S.W.2d 576 (Mo. 1974). In the case at bar, in our view, the physical impact provision in the policy is valid and does not contravene public policy. Appellant recognizes that if the physical contact requirement of the policy is not against the public policy, it is a legitimate objective and contractually binding.

Ward, 259 Ark at 698-99, 535 S.W.2d at 832. The law remains that the physical contact requirement in an insurance policy does not violate section 23-89-403, is not against public policy, and is contractually binding.

Affirmed.

Alice STEWARD and Sonya Steward as Co-Special Adminstrators of the Estate of Charlotte Steward, Deceased *v.* Kristi STATLER, M.D., and Kim Davis, M.D., and St. Bernard's Medical Center

06-1306 266 S.W.3d 710

Supreme Court of Arkansas
Opinion delivered November 1, 2007

[Rehearing denied December 6, 2007.]

The Brad Hendricks Law Firm, by: *Lamar Porter*; *Brian G. Brooks, Attorney at Law, PLLC*, by: *Brian G. Brooks*, for appellants.

Womack, Landis, Phelps, McNeill & McDaniel, by: *Paul D. McNeill*; *Barrett & Deacon, P.A.*, by: *Paul D. Waddell*, *Brandon J. Harrison*, and *Jason M. Milne*, for appellees.

TOM GLAZE, Justice. Appellants Sonya and Alice Steward appeal from the order granting summary judgment to Appellees Kristi Statler, M.D., Kim Davis, M.D., and St. Bernard's Medical Center ("St. Bernard's"). We reverse and remand.

The facts are set forth in the Stewards' complaint. On March 1, 2003, Charlotte Steward was admitted to St. Bernard's for purposes of giving birth to her first child. After her child was born, Charlotte started experiencing dizziness, rapid heart rate, low hemoglobin and hematocrit, and low blood pressure. She was also experiencing pain. On March 4, Charlotte died. The Stewards filed suit, alleging that it was only shortly before her death that efforts were made to diagnose her condition. Their complaint further alleged that Dr. Statler, a first-year family-practice resident at the time, and Dr. Davis, Dr. Statler's supervising attending physician, had been negligent in the treatment of Charlotte's care. The complaint also alleged that unknown nurses were responsible for failure to diagnose Charlotte's symptoms. The following procedural time-line is relevant to this appeal:

- On March 17, 2003, just days after Charlotte's death, the circuit court entered an order appointing Clarence Steward as special administrator of the Charlotte Steward Estate.
- On April 29, 2003, the circuit court entered an order appointing Clarence Steward *and* Sonya Steward as special co-administrators of the Charlotte Steward Estate.
- On October 23, 2003, the circuit court entered an order, extending the administration term of special co-administrators Clarence and Sonya Steward.
- On December 30, 2003, Clarence and Sonya Steward filed a complaint against Drs. Statler and Davis and St. Bernard's, alleging medical negligence. This complaint asserted a survival claim and a wrongful-death claim against the defendants.
- Several months later, on February 5, 2004, Sonya and Clarence filed an acceptance of appointment as special administrator of the Charlotte Steward Estate. That same day, letters of special administration were issued by the clerk to Clarence and Sonya.
- On April 18, 2006, Clarence Steward was discharged as a special co-administrator, and Alice Steward was appointed as co-special administrator.

- On March 4, 2005, the two-year statute of limitations to file a medical malpractice action expired.

On May 10, 2006, St. Bernard's filed a motion for summary judgment, contending that it was entitled to judgment as a matter of law because the Stewards' complaint was not filed in compliance with the statutory requirements set forth in the wrongful-death and survival statutes, codified at Ark. Code Ann. §§ 16-62-101 & 102 (Repl. 2005). Specifically, St. Bernard's argued that an individual does not have standing to assert a wrongful-death action on behalf of the estate unless a probate proceeding had been commenced. St. Bernard's maintained that, pursuant to Ark. Code Ann. § 28-40-102(b) (Repl. 2004), a probate proceeding could not be "commenced" until (1) a petition for appointment had been filed, (2) the court determined that the individual was qualified to act on behalf of the estate, (3) the appointed individual had accepted the appointment as personal representative of the estate, *and* (4) the letters of administration were issued authorizing the personal representative to act for and on behalf of the estate. Drs. Statler and Davis filed a separate motion for summary judgment, wherein they made the same arguments. The Stewards responded, maintaining that letters of administration were not required to commence a wrongful death action, and, even if they were, the letters of administration "related back" to before the complaint was filed because the circuit court had entered an order of appointment. The circuit court held a hearing on the motions, and, on September 6, 2006, the circuit court granted St. Bernard's and Drs. Statler and Davis's motions for summary judgment dismissing the Stewards' claims with prejudice. From that order, the Stewards bring this appeal.

Since the entry of the circuit court's order of dismissal, the 2007 General Assembly enacted Act 438, which amends Ark. Code Ann. § 28-48-102 to state, "Letters of administration are not necessary to empower the person appointed to act for the estate." Act 438 of 2007. Act 438 also provides, "The order appointing the administrator empowers the administrator to act for the estate, and any act carried out under the authority of the order is valid." *Id.* This Act became effective on July 31, 2007, more than ten months after entry of the September 6, 2006, order dismissing the Stewards' complaint.

The question arises as to whether Act 438 is to be applied retroactively in the instant case. Generally, retroactivity is a matter of legislative intent, and unless it expressly states otherwise, we presume the legislature intends for its laws to apply only prospectively. *JurisdictionUSA, Inc. v. Loislaw.com, Inc.*, 357 Ark. 403, 183

S.W.3d 560 (2004). Any interpretation of an act must be aimed at determining whether retroactive effect is stated or implied so clearly and unequivocally as to eliminate any doubt. *Id.* In determining legislative intent, we have observed a strict rule of construction against retroactive operation and indulge in the presumption that the legislature intended statutes, or amendments thereof, enacted by it, to operate prospectively only and not retroactively. *Id.* However, this rule does not ordinarily apply to procedural or remedial legislation. *Id.*

The strict rule of construction does not apply to remedial statutes that do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. *Bean v. Office of Child Support Enforcement,* 340 Ark. 286, 9 S.W.3d 520 (2000). Procedural legislation is more often given retroactive application. *Id.* The cardinal principle for construing remedial legislation is for the courts to give appropriate regard to the spirit which promoted its enactment, the mischief sought to be abolished, and the remedy proposed. *Id.* Although the distinction between remedial procedures and impairment of vested rights is often difficult to draw, it has become firmly established that there is no vested right in any particular mode of procedure or remedy. *See McMickle v. Griffen,* 369 Ark. 318, 254 S.W.3d 729 (2007). Statutes which do not create, enlarge, diminish, or destroy contractual or vested rights, but relate only to remedies or modes of procedure, are not within the general rule against retrospective operation. *Id.* In other words, statutes effecting changes in civil procedure or remedy may have valid retrospective application, and remedial legislation may, without violating constitutional guarantees, be construed to apply to suits on causes of action which arose prior to the effective date of the statute. *Id.*

[redacted] In this case, it is clear to this court that Act 438 of 2007 does not disturb a vested right or create a new obligation. Before Act 438, a personal representative already had the right to bring a wrongful-death action against a defendant. Act 438 of 2007 simply provides that the personal representative has the right to bring the action at the time the order appointing the personal representative is entered, not merely at the time the letters of administration are entered. Therefore, we conclude that Act 438 is procedural and was meant to be applied retroactively.

At oral argument and in their supplemental brief, relying on Ark. Code Ann. § 28-40-102(b) (Repl. 2004)[1], St. Bernard's and Drs. Statler and Davis submit that, even if we apply Act 438 retroactively, this act does not alter other provisions of the probate code which provide how to commence a proceeding, and without a proceeding, they maintain no wrongful-death lawsuit can be filed.

Until the enactment of Act 438, it has been well-settled law, since Ark. Code Ann. § 28-40-102(b) was enacted in 1949, that letters of administration are necessary to vest in a personal representative or special administrator the authority to sue or be sued. In *Jenkins v. Means*, 242 Ark. 111, 114, 411 S.W.2d 885, 887 (1967), our court explicitly stated that "[n]othing can be read into either [Ark. Code Ann. § 28-40-102(b)] or [Ark. Code Ann. § 28-40-104] which would authorize a personal representative to sue or be sued until such time as he has received letters of administration." The Arkansas Court of Appeals reiterated the law in *Filyaw v. Bouton*, 87 Ark. App. 320, 326, 191 S.W.3d 540, 543 (2004), with the pronouncement that "[u]ntil the issuance of the letters, appellant [personal representative] had no standing under *Jenkins* to file suit."[2]

However, the General Assembly's enactment of Act 438 repeals the Arkansas Probate Code's long-standing provision establishing the legal commencement of a probate proceeding, Ark. Code Ann. § 28-40-102(b), by implication. While it is true that repeals by implication are not favored, *Donoho v. Donoho*, 318 Ark. 637, 639, 887 S.W.2d 290, 291 (1994); *Moore v. McCuen*, 317 Ark. 105, 108, 876 S.W.2d 237, 238 (1994), we reiterated in *Board of Trustees v. Stodola*, 328 Ark. 194, 201, 942 S.W.2d 255, 258 (1997), a repeal by implication does transpire when there exists an "invincible repugnancy" between the earlier and the later statutory provisions.

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[1] That subsection states, "(b) The [probate] proceedings shall be deemed commenced by the filing of a petition, the issuance of letters, *and* the qualification of a personal representative. The proceeding first legally commenced is extended to all of the property in this state."

[2] Although the court of appeals appeared to change course in *Green v. Nuñez*, 98 Ark. App. 149, 253 S.W.3d 11 (2007), that case involved the probate court's issuance of letters of administration *nunc pro tunc*. *Id.*

Here, the later statute, Act 438 declares letters of administration to be unnecessary so long as there is an order appointing the administrator; whereas, the earlier statute, Ark. Code Ann. § 28-40-102(b), conditions the legal commencement of a probate proceeding upon the issuance of letters. The "invincible repugnancy" between these two statutes, such that both cannot stand, lies in the power of an administrator to act *before* a probate proceeding is legally commenced. Thus, pursuant to our rule of statutory construction that the earlier statute must yield to the later enactment, we conclude that Act 438 of 2007 effected a repeal by implication of Ark. Code. Ann. § 28-40-102(b) in probate proceedings. Stated simply, by the amendment, the General Assembly has rendered the requirement that the probate court clerk issue letters of administration obsolete and superfluous.

In this case, the facts reveal that the circuit court had entered an order appointing the Stewards as special co-administrators of Charlotte's estate. In light of Act 438, because the Stewards were empowered by the circuit court's order entered on April 29, 2003, we reverse the circuit court's grant of summary judgment.[3]

Reversed and Remanded.

HANNAH, C.J., and DANIELSON, J., concur.

JIM HANNAH, Chief Justice, concurring. I concur in the decision reached by the court in this case; however, I write separately because the analysis on the issue of when a personal representative or administrator is first empowered to act is incorrect. Even before Act 438 of 2007 was passed, personal representatives and administrators acted and were generally permitted by the circuit courts to act after appointment but before the letters issued. Contrary to the majority opinion, the case law on this issue was not clear and was not well developed.

It is not well-settled law that letters of administration are necessary to vest authority to sue or be sued. The language quoted by the majority from *Jenkins v. Means*, 242 Ark. 111, 114, 411 S.W.2d 885, 887-88 (1967), that "[n]othing can be read into either Ark. Stat. Ann. § 62-2102(b), *supra*, or Ark. Stat. Ann.

[3] Because we reverse on Act 438 grounds, we need not consider the Stewards' other points for reversal.

§ 62-2104 (Supp. 1965)[1] which would authorize a personal representative to sue or be sued until such time as he has received letters of administration," is obiter dictum. It is also a misstatement of the law. The issue in *Jenkins* was "whether a cause of action can properly be commenced against a decedent's estate before there has been an *appointment of a personal representative.*" *Jenkins*, 242 Ark. at 111, 411 S.W.2d at 886 (emphasis added). Issuance of letters of administration simply was not at issue. In *Jenkins*, this court held that the purported personal representative could not be served with process because she had not yet filed her petition for appointment.

There was no need in *Jenkins*, *supra*, to discuss the effect of issuance of letters of administration. Jenkins argued that an administrator obtains authority upon filing a petition to be appointed. Therefore, this court's statement in *Jenkins* in response to the argument that the filing of a petition for appointment by Gatlin gave her authority to act was superfluous to the issue presented in the case. Any discussion or comment not necessary to the decision reached in a case is obiter dictum. *Byme, Inc. v. Ivy*, 367 Ark. 451, 870 S.W.2d 212 (2006). This court is not bound by obiter dictum even if it is couched in terms that imply the court reached a conclusion on the matter. *Id.* Further, where a court's findings are obiter dictum a lower court is not bound by them. *See, e.g.*, *Ward v. Williams*, 354 Ark. 168, 177, 118 S.W.3d 513, 518 (2003) ("There is no doubt in our minds that these 'findings' by the Court of Appeals are obiter dictum and were not binding on the circuit court.").

Additionally, the majority also errs in relying on the court of appeals's opinion in *Filyaw v. Bouton*, 87 Ark. App. 320, 191 S.W.3d 540 (2004), where the court of appeals, citing *Jenkins*, *supra*, stated that a personal representative cannot act until the letters of administration are issued. The court of appeals stated in *Green v. Nuñez*, 98 Ark. App. 149, 152, 253 S.W.3d 11, 13 (2007),[2] that its "discussions regarding letters of administration in *Filyaw*

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[1] Ark. Code Ann. § 28-40-102(b) (Repl. 2004), or Ark. Code Ann. § 28-40-104 (Supp. 2005).

[2] The majority indicates in footnote 2 in the majority opinion that although the court of appeals "appeared to change course in *Green v. Nuñez*, 98 Ark. App. 149, 253 S.W.3d 11 (2007), that case involved the probate court's issuance of letters of administration nunc pro tunc." In *Green*, *supra*, as a consequence of the order nunc pro tunc, and although the letters of administration were actually issued on March 30, 2006, they related back to January 6, 2006,

were not necessary to the decision we reached. We therefore, determine that the language is *obiter dictum*, and we are not bound by it." Thus, *Filyaw* may not be cited for the purpose the majority cites it. In any event, the court of appeals in *Filyaw*, *supra*, relied on the obiter dictum in *Jenkins*, *supra*. It is of no precedential or persuasive value whatever. The issue in *Filyaw* was whether the personal representative had to be appointed before he could act. In *Green*, *supra*, the court of appeals stated that, "In *Filyaw*, we held that the purported personal representative had no authority to file suit because the order appointing him had not been entered of record." *Id. Filyaw* did not concern the question of whether authority arises only upon issuance of letters of administration.

The discussion in the present case regarding when a personal representative or administrator may sue or be sued is unnecessary to the decision in the present case. The discussion is obiter dictum and in error. Its inclusion only serves to confuse this case.

DANIELSON, J., joins.

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when the personal representative was appointed. Thus, arguably, the court of appeals's analysis on the stated issue of "whether Mr. Nunez was required to have letters of administration issue to him before he was empowered to file a wrongful death/survival action," and is itself obiter dictum. *See Green*, 98 Ark. App. at 151, 253 S.W.3d at 12. However, whether it is obiter dictum or not, the court of appeals analysis in *Green* is correct. Even if *Green*, *supra* had not been decided, *Filyaw v. Bouton*, 87 Ark. App. 320, 191 S.W.3d 540 (2004), would still be in error for precisely the reasons set out in *Green*, *supra*. Whether or not the court of appeals has addressed the question of obiter dictum in *Filyaw*, *supra*, is not relevant to this court's decision. The decisions of the court of appeals are not precedent for this court. The court of appeals relied on obiter dictum in *Jenkins v. Means*, 242 Ark. 111, 411 S.W.2d 885 (1967), in reaching its decision in *Filyaw*, *supra*, and thus it cannot support the majority's decision in the present case. It should not be cited.

Murriel SEYMOUR *v.* Gladys BIEHSLICH, Executrix;
The Estate of Floyd Davis, Deceased

07-63 266 S.W.3d 722

Supreme Court of Arkansas
Opinion delivered November 1, 2007

William F. Sherman, for appellant.

Elmore & Smith, by: *Barbara Elmore*, for appellee.

TOM GLAZE, Justice. This appeal asks our court to determine what constitutes a will contest for purposes of an *in terrorem*, or "no contest," clause in a will. Mr. Floyd Ray Davis, Sr., died testate on May 18, 2002. On May 21, 2002, Mr. Davis's daughter, appellee Gladys Biehslich, filed a petition for probate of will and appointment of personal representative. Biehslich's proffered will was dated May 6, 2002; after making a few specific bequests, the will bequeathed the remainder of Mr. Davis's property in equal shares to his seven children and the children of his one deceased son. In addition, the will contained an *in terrorem* clause that provided as follows:

> If any one person [or] persons named [or] referred to in this instrument contest my will, that person [or] persons will automatically be dropped from my will and their part will be equally divided among the other parties named and/or referred to herein.

The Probate Division of the Lonoke County Circuit Court entered an order on May 21, 2002, granting Biehslich's petition, probating the May 6, 2002, will, and appointing Biehslich as personal representative.

On July 1, 2002, appellant Murriel Seymour, another of Mr. Davis's daughters, filed her own petition for probate of will and appointment of personal representative. In this petition, Seymour averred that Mr. Davis had left as his last will "a handwritten instrument dated May 13, 2002[.]" This will left $1,000 to be divided among Mr. Davis's other children and grandchildren, with the remainder of the estate to go to Seymour. The proffered will, although handwritten, was in Seymour's handwriting, not Mr.

Davis's, whom Seymour contended was illiterate. After a hearing on November 6, 2002, the circuit court denied Seymour's petition to probate the will in an order entered on November 13, 2002.

On November 3, 2005, Biehslich filed a motion to exclude Seymour from distribution under the will. Citing the no-contest clause in Mr. Davis's will, Biehslich asserted that, by offering the May 13, 2002, will for probate, Seymour contested the May 6, 2002, will and thus should be excluded from the distribution of assets from Mr. Davis's estate.

The circuit court held a hearing on Biehslich's motion on August 29, 2006. At the conclusion of the hearing, the court, noting that no-contest provisions are valid in Arkansas, ruled from the bench as follows:

> The issues in this case is [*sic*] whether or not the actions taken by Ms. Seymour constitute a contest and whether or not that is in compliance with the provisions found in [the no-contest clause of Mr. Davis's will], and the court finds that it does and the exclusion of distribution to the heir is granted.

The court entered an order to this effect on October 17, 2006. A subsequent order, entered on October 24, 2006, directed distribution of the estate to the remaining heirs. Seymour filed a timely notice of appeal on October 24, 2006, and now raises three points on appeal.

Our standard of review in probate cases is well settled. This court reviews probate proceedings *de novo* on the record, but it will not reverse the decision of the circuit court unless it is clearly erroneous. *Bullock v. Barnes*, 366 Ark. 444, 236 S.W.3d 498 (2006); *Craig v. Carrigo*, 353 Ark. 761, 121 S.W.3d 154 (2003). In conducting our review, we give due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Bullock*, *supra*.

In her first point on appeal, Seymour argues that the trial court erred in concluding that she had contested the will in probate. Similarly, in her second argument, she contends that her filing of a conflicting will did not constitute a contest of the first will's validity. Because these two arguments are essentially the same, we treat them together.

At the outset, Seymour concedes that our court has recognized the validity of no-contest clauses since at least 1937. *See Ellsworth v. Arkansas Nat'l Bank*, 194 Ark. 1032, 109 S.W.2d 1258

(1937). In *Lytle v. Zebold*, 235 Ark. 17, 357 S.W.2d 20 (1962) (*Lytle II*), this court noted that, "[s]ince the testator may leave his property to anyone he chooses, he is at liberty to exclude from his bounty those beneficiaries who unsuccessfully seek to thwart his testamentary wishes." 235 Ark. at 18-19, 357 S.W.2d at 21.

Nonetheless, Seymour contends that her attempt to probate the May 13, 2002, will was not a challenge to the May 6, 2002 will. In support of her argument, she cites Ark. Code Ann. § 28-40-113 (Repl. 2004), which sets out the proceedings for contesting a will. Under that statute, an interested party may contest a will "by stating in writing the grounds of his or her objection and filing them with the court." Ark. Code Ann. § 28-40-113(a) (Repl. 2004). Seymour asserts that she never made a written objection to the will, and thus, she cannot be said to have challenged the will. She also points to her testimony at the August 29, 2006, hearing, wherein she stated that she had no idea there was another will, and that she had "bent over backwards to make sure" she did not contest the May 6, 2002, will.

In *Lytle II*, *supra*, this court held that an earlier lawsuit challenging the validity of a trust constituted an "attack[ ] upon the validity of the testamentary scheme." In the earlier lawsuit, *Lytle v. Zebold*, 227 Ark. 431, 299 S.W.2d 74 (1957) (*Lytle I*), five of eight named beneficiaries of W. W. West's estate contended that the trust established in West's will was invalid for several reasons. This court rejected their arguments, and following the decision in *Lytle I*, the executor of West's estate filed a petition for instructions regarding the distribution of the estate. In essence, the petition questioned whether those five beneficiaries had forfeited their interest in the trust by filing the earlier proceedings. The probate court determined that the first proceeding "violated the no-contest paragraph in the will and effected a forfeiture of the rights of the five complaining beneficiaries." *Lytle II*, 235 Ark. at 18, 357 S.W.2d at 21.

On appeal, this court affirmed, concluding that it "[could not] agree with the appellants' insistence that the earlier proceeding sought merely a construction of the will rather than its invalidation." *Id.* at 19, 357 S.W.2d at 21. The court further noted as follows:

> [T]he dissatisfied beneficiaries contended that the testamentary trust was invalid and that the property should be distributed as if the testator had died intestate. Our opinion [in *Lytle I*] discussed and

> rejected three separate attacks upon the validity of the testamentary scheme. We cannot avoid the conclusion that the first petition was the very type of proceeding that the testator intended to forbid.

Id., 357 S.W.2d at 21-22.

This court also considered a no-contest clause in *Jackson v. Braden*, 290 Ark. 117, 717 S.W.2d 206 (1986), in which the assets of Bob Bailey's estate included mineral interests. The executor of Bailey's estate sought permission to lease and sell some of the mineral acreage, and although the probate court authorized the leases and sales, no appraisals or confirmations of those leases and sales were ever performed. In 1979, the beneficiaries under the will each received checks from the executor for their interests in the sales and leases. In April of 1982, however, the beneficiaries filed a petition in probate, challenging the fact that there had never been an appraisal or confirmation of the sales and leases. The trial court found that, by accepting the checks, the beneficiaries ratified the action of the executor. *Jackson*, 290 Ark. at 118, 717 S.W.2d at 207.

On appeal, the *Jackson* court affirmed the trial court's decision regarding the beneficiaries' ratification of the sales. However, on cross-appeal, the court rejected the cross-appellant's argument that, by challenging the sales, the beneficiaries had triggered a no-contest clause in Bailey's will. The court held instead that the beneficiaries were not attempting to defeat the will, and noted that the time for filing a will contest had long since expired. *Id.* at 120, 717 S.W.2d at 208. Instead, the court stated that the beneficiaries "acknowledged the validity of the will and, rather than attacking it, were questioning the actions of the executor for not complying with the probate code." *Id.*

Seymour likens her situation to that of the beneficiaries in *Jackson*, asserting that she did not challenge the validity of Mr. Davis's May 6, 2002, will. However, her actions belie her contentions. By submitting a second will — drafted a week after the first will, in Seymour's handwriting, and leaving the bulk of the estate to her — Seymour clearly challenged the validity of the first will. In *Ellsworth v. Arkansas National Bank*, *supra*, this court noted the definition of the word "contest" as "[t]o make a subject of litigation; to dispute or resist by course of law; to defend, as a suit; to controvert." 194 Ark. at 1040, 109 S.W.2d at 1262. By offering the second will for probate, we conclude that Seymour disputed the validity of the first will.

While there appears to be no Arkansas case law on the specific question of the effect of proffering a subsequent will for probate, our decision is bolstered by cases from other jurisdictions that indicate that such an action, if not undertaken in good faith, can constitute the kind of challenge that triggers a will's no-contest clause. For example, in *In re Estate of Westfahl*, 674 P.2d 21 (Okla. 1984), the Oklahoma Supreme Court noted that the word "contest," "as it pertains to a no-contest clause is defined as any legal proceeding designed to result in the thwarting of the testator's wishes as expressed in the will." 674 P.2d at 24. The court explained further as follows:

> [T]he consensus rule is that the forfeiture clause should not be invoked if the contestant has probable cause to challenge the will based on forgery or subsequent revocation by a later will or codicil. An attempt in good faith to probate a later purported will, spurious in fact, but believed to be genuine by the one presenting it for probate, does not render the offeror subject to the forfeiture provisions of no contest clauses if . . . she has probable cause to believe that the instrument is genuine and entitled to probate. . . .
>
> There is a legal obligation to produce a will for probate by one who has custody of the will. However, an attempt to probate a will, known not to be a genuine instrument, falls within the forbidden behavior of the *in terrorem* clause, and will result in the sacrifice of the legatee's . . . share.

Id. at 25.

The Colorado Court of Appeals discussed a similar situation in *Estate of Peppler v. Connelly*, 971 P.2d 694 (Colo. Ct. App. 1998). Agreeing that the offering of a later will for probate can constitute a contest of an earlier will, the Colorado court noted that courts have generally declined to enforce no-contest clauses where the beneficiary challenging the will acted in good faith and had probable cause for the challenge. *Estate of Peppler*, 971 P.2d at 697. "Probable cause," in the context of will contests, was defined as "the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful." *Id.* (citing Restatement (Second) of Property § 9.1 cmt. j). Among the factors the Colorado court noted as bearing on the existence of probable cause was whether the beneficiary had relied upon the

advice of disinterested counsel sought in good faith after full disclosure of the facts. *Id.*

A California court of appeals also considered what was meant by "probable cause" or "reasonable cause" in *Estate of Gonzalez v. Gonzalez*, 126 Cal. Rptr. 2d 332 (Cal. Ct. App. 2002). In that case, the youngest of four children, Jorge Gonzalez, had been appointed executor of the estate of his father, Jose Gonzalez, in a 1992 will; the 1992 will contained a no-contest clause. Shortly before Jose's death, in March of 1998, Jorge had Jose sign a deed that transferred title of Jose's house to Jorge; in addition, Jorge had his father execute a will that essentially disinherited Jose's other children and left the entire estate to Jorge. *Estate of Gonzalez*, 126 Cal. Rptr. 2d at 333. After Jose's death, another son, Roy, who was apparently unaware of the existence of either the 1992 will or the 1998 will, filed a petition for letters of administration. Jorge then offered the 1998 will for probate. The brothers each objected to the other's petition, and their sisters also eventually filed petitions related to the will. *Id.* at 334.

After a trial on the matter, the lower court determined that Jorge had procured the 1998 will by undue influence, finding that Jose had been near death at the time and had not been given an opportunity to review the will (and that he was so disoriented, he likely would not have comprehended it if he had reviewed it). Thus, the court denied probate of the 1998 will. *Id.* at 335. Following that decision, one of the sisters was appointed executor of the estate, and she filed a petition to have Jorge excluded from the 1992 will for having violated its no-contest provision. *Id.* The trial court reviewed the earlier proceeding and found that Jorge had violated the 1992 will's no-contest clause and had thus forfeited any interest he had under that will. *Id.*

On appeal, Jorge argued that the no-contest clause should not be enforced because he had reasonable cause to offer the 1998 will for probate. The California Court of Appeals disagreed, rejecting his argument that he was required by statute to have the validity of the 1998 will determined before he could submit the 1992 will to probate. The court held that this statute would not shield him unless he had reasonable cause to believe that the 1998 will might be valid. *Id.* at 337. The court also rejected Jorge's argument that he believed the 1998 will was valid because he relied on the advice of an attorney who concluded that Jose was competent when he signed the 1998 will. The court held that, even

applying an objective standard, no reasonable person could conclude that the 1998 will was not the product of undue influence. *Id.* at 338-39.

In the instant case, while the trial court did not specifically state its reasons for declaring that Seymour's petition to probate the May 13 will invoked the no-contest provision in the May 6 will, we hold that sufficient evidence is found in the record to support a conclusion that Seymour was not acting in good faith when she procured the May 13 will and offered it for probate.[1] Seymour testified that she wrote the will in her handwriting because her father was "almost illiterate" and because he was so ill with cancer at that time that he could not raise his arm. In addition, she conceded that he "signed" the will with an "X" even though that was not his usual signature. Seymour further testified that she had asked her father whether he had signed another will, although she said that he indicated he did not know if he had. Regarding the drafting of the handwritten will, Seymour testified that she "got a piece of paper and I wrote what I could and then I read it to him and I asked him, 'Is this what you wanted?' " Only at that point did she call two friends to her father's hospital room to attest to the instrument. We also take note of the fact that the handwritten will left nearly the entire estate to Seymour, leaving only $1000 to be divided among the other heirs.

As mentioned above, we review probate matters *de novo* but will not reverse probate findings of fact unless they are clearly erroneous. *McAdams v. McAdams*, 353 Ark. 494, 109 S.W.3d 649 (2003). A finding is clearly erroneous when, although there is evidence to support it, we are left on the entire evidence with the firm conviction that a mistake has been committed. *Id.* We also defer to the superior position of the lower court sitting in a probate matter to weigh the credibility of the witnesses. *Id.* This court has also held that "it has been the 'invariable practice' of the court not to remand a case to [circuit] court for further proceedings and proof where we can plainly identify the equities of the parties." *Four County Regional Solid Waste Mgmt. Dist. Bd. v. Sunray Services, Inc.*, 334 Ark. 118, 971 S.W.2d 255 (1998); *see also Norman*

[1] At the November 6, 2002, hearing, Seymour averred that she was not attempting to probate the will as a holographic will, as the document was not in the handwriting of the testator.

v. Norman, 333 Ark. 644, 970 S.W.2d 270 (1998) (noting that "it is well settled that we have the power to hear [probate] cases *de novo*, and we have said that we do not remand [probate] cases when the facts have been developed fully in the record before us, as it would be pointless to remand for further evaluation"). Because there is ample evidence in the record demonstrating that Seymour was not acting in good faith when she proffered the later will, we affirm the trial court's finding that her actions triggered the no-contest clause in Mr. Davis's will.

Seymour also challenges the trial court's decision to distribute the estate without giving her notice. Here, she maintains that there is "no evidence of record that any of the heirs received legal notice of the hearing set on the final accounting in the matter," and she argues that the trial court's actions violated Ark. Code Ann. § 28-1-112 (Repl. 2004), which sets out the rules for providing notice under the probate code.

Seymour's argument is entirely without merit. The trial court entered an order on October 17, 2006, excluding Seymour as a distributee of the estate. On October 19, 2006, the court sent out a "notice of hearing on final distribution and discharge," noting that a hearing was scheduled for October 25, 2006. That notice was addressed to Ellen Justice and Joyce Thompson, two of Seymour's and Biehslich's sisters. Also on October 19, 2006, Seymour's attorney received a faxed copy of the notice of hearing on the final distribution. Prior to the scheduled hearing, however, the court entered an order on October 24, 2006, directing distribution of the estate and discharging Biehslich as personal representative. That order directed that the remaining heirs[2] should each receive $28,946.32. Between October 26, 2006, and October 31, 2006, each of the children and grandchildren entered receipts of distribution, acknowledging that they had received their share of the estate. Biehslich's report of final distribution was entered on November 1, 2006.

On appeal, Seymour concedes that she received actual notice of the hearing; moreover, she also admits the possibility that, having been excluded from the estate, she might not have been entitled to notice of the hearing. Nonetheless, she argues that

[2] These were Doloris Collins, Ellen Justice, Gladys Biehslich, Joyce Thompson, Jerry Davis, Johnny Davis, and the children of Floyd Davis, Jr. The grandchildren's share was divided equally among them, with each receiving $4,135.18.

there was a failure to comply with Ark. Code Ann. § 28-1-112, in that there were no waivers of notice filed from three of the designated beneficiaries, and no proofs of service were filed of record.

Section 28-1-112(a) provides that notice need be given "to interested persons . . . only when and as specifically provided for in the Probate Code or as ordered by the court." The Probate Code defines an "interested person" as "any heir, devisee, spouse, creditor, or any other having a property right, interest in, or claim against the estate being administered[.]" *See* Ark. Code Ann. § 28-1-102(a)(11) (Repl. 2004). Because Seymour had already been excluded from the distribution as an heir of the estate, she was not an "interested person" under the statute, and so there was no legal requirement that she be served notice. *See Lytle II, supra* (appellants, having forfeited their interest in the estate, were not in a position to question the distribution of the estate).[3]

Further, to the extent that Seymour argues that error resulted from the failure to send notice to several of the other heirs, she lacks standing to raise an argument on behalf of parties who have not appealed. *See Insurance from CNA v. Keene Corp.*, 310 Ark. 605, 839 S.W.2d 199 (1992) (citing *Hurley v. Bevens*, 57 Ark. 547, 549, 22 S.W. 172, 172 (1893) ("Judgments, 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.")).

Finally, while Seymour briefly argues that her due process rights were violated when the circuit court ordered distribution of the estate without considering her motion for continuance, she concedes that she failed to raise this argument in the trial court. It is axiomatic that we will not consider arguments raised for the first time on appeal. *See Cloud v. Brandt*, 370 Ark. 323, 259 S.W.3d 439 (2007); *McLane Southern, Inc. v. Davis*, 366 Ark. 164, 233 S.W.3d 674 (2006).

Affirmed.

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[3] Even if Seymour had been entitled to notice, she admits that she had actual notice of the hearing; accordingly, she cannot claim to have been prejudiced in any way. *See, e.g., Holt Bonding Co. v. State*, 328 Ark. 178, 942 S.W.2d 834 (1997) (noting that, even if the State had failed to comply with the notice and service requirements of a particular statute, the appellant could show no prejudice because it had received actual notice that proceedings had been instituted).

TERIS, LLC; Op-Tech Environmental Services, Inc.;
and CSX Transportation, Inc. *v.* Teresa GOLLIHER, et al.

07-155 266 S.W.3d 730

Supreme Court of Arkansas
Opinion delivered November 1, 2007

Compton, Prewett, Thomas & Hickey, LLP, by: *Floyd M. Thomas, Jr.*, for appellant Teris, LLC.

Mitchell, Williams, Selig, Gates & Woodyard, PLLC, by: *Sherry P. Bartley*, for appellant Op-Tech Environmental Services, Inc.

Friday, Eldredge & Clark, LLP, by: *Kevin A. Crass, R. Christopher Lawson* and *Seth M. Haines*, for appellant CSX Transportation, Inc.

Allen P. Roberts, P.A., John W. Walker, P.A., Vickery & Carroll, P.A., and *McMath Woods, P.A.*, for appellees.

DONALD L. CORBIN, Justice. This is an interlocutory appeal of the circuit court's order granting a motion for class certification pursuant to Ark. R. Civ. P. 23. Appellants Teris, L.L.C., Op-Tech Environmental Services, Inc., and CSX Transportation, Inc., argue that the trial court erred in granting a motion by Appellees seeking class certification in the instant matter because: (1) the class definition is not sufficiently definite and the identity of the class members is not ascertainable by reference to objective criteria; (2) the claims and defenses of the class representatives are not typical of the class; (3) common issues of law and fact do not predominate over individual issues; (4) a class action is not the superior method for adjudicating this controversy. This court assumed jurisdiction of this case pursuant to Ark. Sup. Ct. R. 1-2(d). We reverse and remand.

On January 2, 2005, a series of explosions and fires occurred at the Teris hazardous waste storage and treatment facility in Union County, Arkansas. As a result, emergency personnel evacuated residents in an area north and east of the Teris facility. As the wind shifted, the evacuation area grew to include an area north and west of the facility. Later that afternoon, the evacuation area was further expanded, but before the evacuation could be completed, the order was rescinded. An area south of the facility that was in closest proximity to the actual explosions and fires was never subject to an evacuation order, but El Dorado's Fire Chief Bob McDaniel stated that most people in this area evacuated of their own volition. Some evacuees were allowed to return to their homes that same evening, while others were not allowed to return until the following day.

Appellees, twelve individuals who lived within the mandatory evacuation area, filed suit against Teris on January 4, 2005.[1] In their suit, they alleged both personal and property damages for negligence, strict liability, nuisance, and trespass as a result of the explosions and fires at Teris on January 2. On September 22, 2005, Appellees filed a Motion for Class Certification, seeking to certify a class composed of:

[1] Originally, there were sixteen individuals from the evacuated areas who filed suit against Teris, but four of those individuals were removed from the list of proposed class representatives following a hearing on the motion for class certification.

> 1. All persons eighteen (18) years of age or older on January 2, 2005, who on that date resided within the one hundred percent evacuation area; and
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> 2. All persons eighteen (18) years of age or older on January 2, 2005, who on that date resided in close proximity to the one hundred percent evacuation area, who actually evacuated because of a reasonable belief that they were in imminent danger of death or serious injury from the explosions and fire if they remained.

Appellees filed an amended complaint, adding CSX Transportation and Op-Tech as parties. In their amended complaint, Appellees alleged that CSX hired Op-Tech to perform a cleanup of spilled chemicals resulting from a 2004 train derailment in New York, and that CSX and Op-Tech then packaged and shipped the chemicals to the Teris facility in El Dorado for disposal. According to the amended complaint, it was these chemicals that were the source of the explosions on January 2.

A hearing was held on April 27, 2006, regarding Appellees' motion for class certification. Appellees subsequently sought to amend the definition of the class as follows:

> (1) all the adults, (2) who on January 2, 2005, (3) resided or occupied a business premise in Areas A, B, or C, as shown in Exhibit "1," and who, in fact, physically evacuated because of the fire and explosion event at Teris.

In an order entered on July 21, 2006, the circuit court granted Appellees' request for class certification pursuant to Rule 23, finding that Appellees had proven that the six requirements for class certification under Rule 23 had been satisfied. Specifically, and as is pertinent to the present appeal, the trial court found that the class was susceptible of precise definition by objective standards. The trial court also found that Appellees suffered dislocation or evacuation injuries that were of a relatively small magnitude and were typical to all class members. With regard to predominance, the trial court ruled that this was a mass-accident case similar to the situation addressed by this court in *Summons v. Missouri Pacific Railroad*, 306 Ark. 116, 813 S.W.2d 240 (1991), and as such, that this case was particularly appropriate for class-action treatment, because Appellants' conduct resulting in the fires and explosions formed the basis of this action and affected all class members. The court further found that the element of

predominance was satisfied because there were numerous common questions of law and fact related to Appellants' duty to plaintiffs and proximate causation related to the evacuation, and the expenses stemming from that evacuation, and that these common questions predominated over any individual ones. Finally, the trial court concluded that the element of superiority was satisfied, as this case was an ideal one for class-action treatment because there are a large number of plaintiffs, each with relatively small amounts of damages, and common issues predominate over individual ones. From that order, comes the instant appeal.

Before analyzing the points on appeal, we note that the certification of a lawsuit as a class action is governed by Rule 23. The determination that the class-certification criteria have been satisfied is a matter within the broad discretion of the trial court, and this court will not reverse the trial court's decision absent an abuse of that discretion. *Johnson's Sales Co., Inc. v. Harris*, 370 Ark. 387, 260 S.W.3d 273 (2007); *Arkansas Blue Cross & Blue Shield v. Hicks*, 349 Ark. 269, 78 S.W.3d 58 (2002). In reviewing a class-certification order, this court focuses on the evidence in the record to determine whether it supports the trial court's conclusion regarding certification. *Hicks*, 349 Ark. 269, 78 S.W.3d 58. However, this court will not delve into the merits of the underlying claims when deciding whether the Rule 23 requirements have been met. *Id.*

Rule 23 provides the requirements for class certification. Specifically, the following six requirements must be met before a lawsuit can be certified as a class action under Rule 23: (1) numerosity; (2) commonality; (3) typicality; (4) adequacy; (5) predominance; and (6) superiority. *Johnson's Sales*, 370 Ark. 387, 260 S.W.3d 273. In the present appeal, in addition to challenging the class definition, Appellants also challenge the trial court's findings with regard to typicality, predominance, and superiority. Remaining mindful of our standard in reviewing class-certification orders, we now turn to the issues on appeal.

As their first point on appeal, Appellants argue that the class-certification order should be reversed because the class definition is not sufficiently definite and the identity of the class members is not ascertainable by reference to objective criteria. Appellants allege that the trial court's order itself demonstrates the inherent deficiency in the class definition, as the class is defined in one instance by the definition originally submitted by Appellees, but is then defined according to the amended definition suggested

by Appellees. Additionally, Appellants argue that the class as defined requires a subjective inquiry in order to ascertain who is a proper class member.

Appellees counter that the definition is sufficiently definite, that there were no inconsistencies in the trial court's order, and that class members are easily identifiable through means of objective criteria. According to Appellees, even though the trial court's order uses two different descriptions for the class, they both define the same class. Moreover, according to Appellees, if this court were to determine that the two descriptions are inconsistent, this court should hold that the class is defined in accordance with the amended definition and include instructions that this definition be used henceforth.

In addressing the issue of class definition, this court has recently said:

> It is axiomatic that in order for a class action to be certified, a class must exist. The definition of the class to be certified must first meet a standard that is not explicit in the text of Rule 23, that the class be susceptible to precise definition. This is to ensure that the class is neither "amorphous," nor "imprecise." Concurrently, the class representatives must be members of that class. Thus, before a class can be certified under Rule 23, the class description must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class. Furthermore, for a class to be sufficiently defined, the identity of the class members must be ascertainable by reference to objective criteria.

Van Buren Sch. Dist. v. Jones, 365 Ark. 610, 614, 232 S.W.3d 444, 448 (2006) (quoting *Hicks*, 349 Ark. at 280-81, 78 S.W.3d at 64-65). In *Ferguson v. The Kroger Co.*, 343 Ark. 627, 37 S.W.3d 590 (2001), this court pointed out that clearly defining the class insures that those people who are actually harmed by the defendant's wrongful conduct will participate in the relief ultimately awarded.

In the present case, there is a problem stemming from the fact that in paragraph eight of its order, the trial court under the section delineated as "Class Definition" defined the class according to the amended class definition advanced by Appellees, as:

> (1) all the adults who (2) on January 2, 2005, (3) resided or occupied a business premise in Areas A, B, or C, as shown in Exhibit

> "1," and who, in fact, physically evacuated because of the fire and explosion event at Teris.

However, in concluding the order, the trial court stated that Appellees had met their burden of establishing the requirements of Rule 23 and certified a class defined as follows:

> a. All persons eighteen (18) years of age or older on January 2, 2005, who on that date resided within the mandatory evacuation area; and
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> b. All persons eighteen (18) years of age or older on January 2, 2005, who on that date resided in close proximity to the mandatory evacuation area, who actually evacuated because of a reasonable belief that they were in imminent danger of death or serious injury from the explosions and fire if they remained.

Thus, this definition conflicts with the aforementioned class definition and raises the question of how exactly is the class defined. For this reason, we reverse and remand this matter to the trial court for clarification as to precisely how the class is defined.

[redacted] We note that Appellees aver that the two different descriptions in the order describe the same class. We disagree. The original class definition, used by the trial court, in the conclusion of its order, includes an additional element, namely that class members evacuated "because of a reasonable belief that they were in imminent danger of death or serious injury," whereas the amended definition requires no reasonable belief or fear for those who evacuated. We simply cannot say that these two definitions describe the same class.

Alternatively, Appellees argue that the actual class, as defined by the trial court, is based on the amended definition contained in the class definition section of the court's order. Appellees specifically argue:

> The definition of the class adopted by the trial court in paragraph 8 of its order appears under the general heading of CLASS MEMBERSHIP, and the specific subheading of *Class Definition*. In the second sentence of paragraph 8 of its order, the trial court specifically found that "a class membership composed of these individuals is a class susceptible of precise definition by objective standards," citing *Van Buren, supra*. This is the class definition adopted by the trial court and is the one that should be upheld on appeal.

In support of their argument, Appellees cite to *Magness v. McEntire*, 305 Ark. 503, 808 S.W.2d 783 (1991), for the proposition that court orders are interpreted like any other instrument with the determinative factor being the intention of the court, as gathered by the order itself and the record.

Appellees' reliance on *Magness* is of no import in this case, however. Here, Appellees advanced two different class definitions, and the trial court ultimately included both of these definitions in its order. We simply have no way of ascertaining which definition is the intended class definition. Because we are reversing and remanding for clarification as to how the class is defined, we are unable to address the remaining points on appeal. *See, e.g., Southwestern Bell Yellow Pages v. Pipkin Enters., Inc.*, 359 Ark. 402, 198 S.W.3d 115 (2004).

Reversed and remanded.

Richard Lynn BELL *v.* STATE of Arkansas

CR 07-261 266 S.W.3d 696

Supreme Court of Arkansas
Opinion delivered November 1, 2007

Teresa M. Smith, for appellant.

Dustin McDaniel, Att'y Gen., by: *Farhan Khan*, Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellant Richard Lynn Bell was convicted in Lonoke County Circuit Court of one count of rape and two counts of endangering the welfare of a minor in the second degree. The circuit court sentenced him to life imprisonment for the rape conviction and no time on the endangering-the-welfare-of-a-minor convictions. He now appeals, alleging six points of error. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(2) (2007), as Bell received a sentence of life imprisonment. We find no error and affirm.

On the morning of May 5, 2005, Bell was in the parking lot of the Lonoke County Office of the Arkansas Department of Health and Human Services (DHHS). He was waiting in his car while his girlfriend and her mother went into the DHHS office. In the car with him were the victim, B.C., age six, and the victim's brother, S.C., approximately age three. Both children are the

siblings of Bell's girlfriend. Also in the car was J.B., Bell's seven-month-old son by his girlfriend.

That same morning, Matthew Heil happened to be sitting in a car in the DHHS parking lot. He was waiting with his two young nephews while his sister-in-law, Shannette Heil, went to a meeting inside the DHHS office. Heil testified at trial that the van in which he was waiting was facing Bell's car, but two parking spaces over. He also testified that his van sits high above the ground and that he could see into Bell's car. Heil observed Bell sitting in the passenger's seat, shaking around violently, while a young girl leaned between the seats and bobbed her head up and down out of Bell's lap. Heil watched this go on for approximately five or ten minutes. He admitted that he saw no exposed genitalia and could not determine if Bell's pants were up or down. At one point, Bell realized he was being watched and put his leg over the console, started the car, and backed it up approximately two feet (though this did not obstruct Heil's view). Because Heil believed Bell was "having the little girl do something inappropriate," he waited for his sister-in-law to return, at which point he asked her to view the situation from inside the van. When she verified that Bell appeared to be receiving oral sex, Heil went to the Lonoke Police Department, which shares a parking lot with the DHHS office.

After Heil reported the incident, several police officers came outside to investigate. The officers testified that B.C. was in the front seat with Bell when they approached the car, but that she jumped into the back seat as soon as she saw them. Upon searching the car, they found all three children in the back seat. Bell's pants were up when the officers made contact with him. He was taken to the police department for questioning, where he gave an audio-taped statement. Bell confessed that he told B.C. to touch his penis and that she performed oral sex on him. This confession was corroborated by the testimony of Lisa Channel of the Arkansas State Crime Laboratory, who testified that a hair found on Bell's boxer shorts was microscopically similar to the head hair sample received from the victim.

Bell was charged with rape and three counts of endangering the welfare of a minor in the second degree. Because there was no evidence that the infant J.B. was awake at the time of the offense, the circuit court granted his directed-verdict motion as to one count of endangering the welfare of a minor. His other motions for directed verdict were denied.

I. Sufficiency of the Evidence

Bell asserts that, without his confession and a hearsay statement made by S.C., both of which he claims were improperly admitted, the evidence was insufficient to support the verdict. Although this point on appeal was listed fifth among Bell's points, double jeopardy considerations require this court to consider a challenge to the sufficiency of the State's evidence prior to the other issues raised in the case. *Holsombach v. State*, 368 Ark. 415, 246 S.W.3d 871 (2007).

We first note the State's assertion that this issue was not properly preserved for appeal due to the untimeliness of Bell's renewed motion for directed verdict. The State correctly notes that a directed-verdict motion is to be made at the close of the evidence offered by the prosecution and renewed at the close of all the evidence. *See* Ark. R. Crim. P. 33.1(a) (2007). Failure to challenge the sufficiency of the evidence at those times will waive the issue for appellate review: "A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal." Ark. R. Crim. P. 33.1(c). The State is also correct in pointing out that a renewal made after the jury has been instructed is untimely. *See Ellis v. State*, 366 Ark. 46, 233 S.W.3d 606 (2006). Our court has dismissed sufficiency challenges as not preserved for appeal when defense counsel waited until after the jury instructions to renew the motions for directed verdict. *See, e.g., id.*; *Robinson v. State*, 348 Ark. 280, 72 S.W.3d 827 (2002); *Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998).

In the instant case, the defense offered no testimony or evidence. Thus, the close of the State's case and the close of all the evidence occurred simultaneously. Under these circumstances, we conclude that a renewal of the directed-verdict motion made at the close of the State's case was unnecessary. We have stated that "[a] defendant who goes forward with the production of additional evidence after a directed verdict motion is overruled waives any further reliance upon the former motion." *Thomas v. State*, 315 Ark. 504, 506, 868 S.W.2d 483, 485 (1994). Here, the defense did not waive reliance on the earlier directed-verdict motion by the production of additional evidence. A renewal of the directed-verdict motion was therefore not required. Consequently, we deem the sufficiency challenge to be properly preserved for our review.

Our standard of review for a sufficiency challenge is well settled. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006). We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

Furthermore, circumstantial evidence may provide a basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Id.* Whether the evidence excludes every other hypothesis is left to the jury to decide. *Id.* The credibility of witnesses is an issue for the jury and not the court. *Id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

Bell asserts that his statement to police and a hearsay statement by S.C. should not have been admitted. He claims that, without these two statements, the evidence was insufficient. His argument on this point is without merit. When dealing with sufficiency-of-the-evidence challenges, our court considers evidence both properly and improperly admitted. *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998).

a. The Offense of Rape

A person commits rape if he engages in deviate sexual activity with another person who is less than fourteen years of age. Ark. Code Ann. § 5-14-103(a)(3)(A) (Repl. 2006 & Supp. 2007). "Deviate sexual activity" is defined as any act of sexual gratification involving the penetration, however slight, of the anus or mouth of a person by the penis of another person. Ark. Code Ann. § 5-14-101(1)(A) (Repl. 2006 & Supp. 2007). "Sexual gratification" is not defined by statute, but this court has held that the State is not required to provide direct proof that an act is done for sexual gratification if it can be assumed that the desire for sexual gratification is a plausible reason for the act. *Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993).

[redacted] We conclude there is ample evidence to support Bell's rape conviction. First, Bell admitted that B.C., a six-year-old, put her mouth on his penis and gave him oral sex. He admitted that his

pants were down during that time and that he had an erection. Heil's sister-in-law testified that she heard S.C., who was in the car at the time of the offense, yell, "Mama, Mama, Richard made her suck his dick." Furthermore, both Heil and his sister-in-law observed what they believed could only be oral sex between Bell and the victim. Though this evidence was circumstantial, the jury was free to find it persuasive. Finally, a hair found on Bell's underwear was found to be microscopically similar to the sample provided by B.C. Thus, there was substantial evidence, both direct and circumstantial, to support the rape conviction.

b. The Offense of Endangering the Welfare of a Minor in the Second Degree

A person commits the offense of endangering the welfare of a minor in the second degree if he knowingly engages in conduct creating a substantial risk of serious harm to the physical or mental welfare of another person known by the person to be a minor. Ark. Code Ann. § 5-27-206(a)(1) (Repl. 2006). "Serious harm" includes mental injury resulting in protracted impairment of mental health. Ark. Code Ann. § 5-27-206(a)(2)(B). A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that the attendant circumstances exist. Ark. Code Ann. § 5-2-202(2)(A) (Repl. 2006 & Supp. 2007). A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause the result. Ark. Code Ann. § 5-2-202(2)(B).

[redacted] We hold that the endangerment convictions as to both B.C. and S.C. are supported by the evidence. The testimony of police officers that B.C. and S.C. were found in the back seat of the car, coupled with Bell's admission that he forced B.C. to perform oral sex on him while S.C. sat in the back seat, is sufficient evidence to support a finding that the offense was committed while S.C. was in the car. The act of forcing a child to either perform oral sex or watch while a sibling does so would clearly create a substantial risk of serious harm to the child's mental health. In his statement to police officers, Bell indicated that he was aware of what he was doing and that S.C. was in the back seat. Moreover, the jury could have reasonably inferred that Bell was aware his conduct was practically certain to cause a substantial risk of serious harm to both children. As we have long held, a criminal defen-

dant's state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *E.g., Smith v. State*, 346 Ark. 48, 55 S.W.3d 251 (2001). Thus, we conclude that substantial evidence supports each element of the offense of endangering the welfare of a minor.

II. Voluntariness of Bell's Confession

Bell challenges the admissibility of his statement to police. His confession was tape-recorded; however, testimony elicited from Bell and both police officers present during the interview indicated there were eleven minutes of "preliminary" questioning that were neither recorded nor transcribed. According to Bell, it was during those eleven minutes that the officers promised to obtain psychological help for him and assured him that if he confessed to the crime he would not go to jail. Bell argues that, because of these false promises, his confession did not meet the test for voluntariness. He challenges the circuit court's denial of his motion to suppress on this basis.[1]

A statement made while in custody is presumptively involuntary, and the burden is on the State to prove by a preponderance of the evidence that a custodial statement was given voluntarily. *Flowers v. State*, 362 Ark. 193, 208 S.W.3d 113 (2005). In determining whether a statement is voluntary, the reviewing court makes an independent review of the totality of the circumstances and will not reverse unless the trial court's findings are clearly against the preponderance of the evidence. *Stephens v. State*, 328 Ark. 81, 941 S.W.2d 411 (1997).

We have distinguished the two components of the totality-of-the-circumstances test for determining the voluntariness of custodial statements. *See Stephens v. State, supra.* "First, we examine the statements of the interrogating officers. Second, we consider the vulnerability of the defendant[.]" 328 Ark. at 85, 941 S.W.2d at 413. The analysis of the vulnerability of the defendant includes such factors as age, education, intelligence, repeated or prolonged nature of questioning, delay between receiving *Miranda* warnings and giving a confession, length of detention, use of physical punishment, and the defendant's physical and emotional condi-

[1] We have recognized that the question of voluntariness and the question of knowing and intelligent waiver of *Miranda* rights are distinct and separate inquiries. *Wilson v. State*, 364 Ark. 550, 222 S.W.3d 171 (2006). Bell contests only the voluntariness of his confession.

tion. *Id.* Nonetheless, an involuntary confession requires police misconduct; the defendant's physical or mental conditions alone cannot render a confession involuntary. *Id.*

In the instant case, the only evidence of police misconduct is Bell's self-serving testimony. Sergeant Randy Wayne Mauk testified at the pretrial hearing and at trial that he obtained the statement from Bell and that he did nothing to induce the confession. Regarding the eleven minutes of unrecorded questioning, the sergeant testified that the same questions asked during the recorded interview were asked during the preliminary unrecorded interview. He stated that the purpose of the preliminary interview was merely to gather facts and inform Bell of the nature of the complaint against him. According to Officer David Huggs, who was also present during the interview, Bell at one point suggested that he had a problem that caused him to commit the offense, whereupon the officers advised Bell there were programs that could help him. Officer Huggs testified that neither he nor Sergeant Mauk told Bell they would keep him from going to jail.

The circuit court admitted the confession despite Bell's self-serving testimony. The evaluation of the credibility of witnesses who testify at a suppression hearing about the circumstances surrounding an appellant's custodial confession is for the trial judge to determine, and this court defers to the position of the trial judge in matters of credibility. *Flowers v. State, supra.* Conflicts in the testimony are for the trial judge to resolve, and the judge is not required to believe the testimony of any witness, especially that of the accused, since he is the person most interested in the outcome of the proceedings. *Id.* Based upon our deference to the trial judge in matters of credibility, we hold that Bell has failed to establish the allegations of false promises. Absent evidence of police misconduct, his confession cannot be deemed involuntary. *See Stephens v. State, supra.* Therefore, the circuit court did not err in admitting his statement.

III. Prior Sexual Misconduct Involving Victim

For his next point on appeal, Bell asserts that a specific portion of his statement to police should have been excluded as inadmissible evidence under Ark. R. Evid. 404(b) (2007). When asked if he had ever previously engaged in sexual conduct with B.C., Bell admitted that she had touched him through his pants when they were alone. He stated that this incident occurred

approximately two weeks prior to the charged offense. This court has long held that circuit courts have broad discretion over evidentiary rulings. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006). A circuit court's ruling on the admissibility of evidence will not be reversed absent an abuse of that discretion. *Id.*

Evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show that he acted in conformity with that character trait. Ark. R. Evid. 404(b). Our court has articulated a pedophile exception to this rule. *See Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996). Certain evidence that would otherwise be inadmissible under Rule 404(b) is nonetheless admissible in child abuse and incest cases. *Id.* Evidence is admissible pursuant to the pedophile exception to show "similar acts with the same child or other children in the same household when it is helpful in showing a 'proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship.' " *Id.* at 215, 913 S.W.2d at 299. We have noted that the pedophile exception extends to evidence of other sexual acts by the accused with the victim or another child in the same household. *Id.* Such evidence is admitted to assist in proving the depraved sexual instinct of the accused. *Id.*

[redacted] In the instant case, Bell's admission that he had a sexual encounter with B.C. only two weeks before the charged offense was relevant to show his depraved sexual instincts and his proclivity toward sexual acts with the victim. His contention that the evidence was improperly admitted because the previous touching was uncharged and unsubstantiated is without merit. This court's application of the pedophile exception does not require that the prior act be charged or substantiated. *See id.* Likewise, we reject his argument that the previous touching was not sufficiently similar to the charged offense to warrant application of the pedophile exception. The pedophile exception requires that there be a sufficient degree of similarity between the evidence to be introduced and the sexual conduct of the defendant. *White v. State, supra.* In *White*, we found a sufficient degree of similarity between the defendant's arousal at watching his young daughters perform a dance routine and his sexual conduct of having intercourse with them. *See id.* In the case at bar, the prior conduct and the conduct leading to the charged offense are even more similar. On both occasions, Bell had the victim touch his penis. The fact that during the later incident Bell had his pants down and B.C. performed oral sex on him is a

distinction without a difference. Thus, the requirement of a sufficient degree of similarity was met, and the circuit court did not abuse its discretion in admitting the evidence pursuant to the pedophile exception.

IV. Hearsay Statement

For his fourth point on appeal, Bell contests the admissibility of the testimony by Heil's sister-in-law that she observed "[a] young, young boy" run into the DHHS office, yelling, "Mama, Mama, Richard made her suck his dick." Although the record is unclear on the circumstances surrounding this statement, the child was presumably S.C., and the statement was made after police officers arrived on the scene. Bell asserts this hearsay statement was not admissible under an exception to the hearsay rule. He also argues that no proper foundation was laid for this testimony. His foundation argument, however, was not raised below and, therefore, is not preserved for appeal. *See Callaway v. State*, 368 Ark. 412, 246 S.W.3d 889 (2007).

The statement at issue was clearly a hearsay statement, as it was not made by the declarant, S.C., while testifying at trial, and it was offered to show that Bell had received oral sex from B.C. *See* Ark. R. Evid. 801(c) (2007). The statement was nonetheless admissible under the excited-utterance exception to the hearsay rule.[2] *See* Ark. R. Evid. 803(2) (2007). "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule. *Id.* We have discussed several factors to be considered when determining if a statement is an excited utterance. *See Wright v. State*, 368 Ark. 629, 249 S.W.3d 133 (2007). The lapse of time, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement are all factors to be considered. *Id.* Furthermore, we have stated that, for the excited-utterance exception to apply, there must be an event that excites the declarant, and it must appear that the declarant's condition at the time was such that the statement was spontaneous, excited, or

[2] The State contends, and the circuit court agreed, that the statement falls under the present-sense impression exception; but, we find the excited-utterance exception more applicable. This court can always affirm where the circuit court reaches the right result, albeit for the wrong reason. *See Davis v. State*, 367 Ark. 330, 240 S.W.3d 115 (2006).

impulsive rather than the product of reflection and deliberation. *Id.* The statement must be uttered during the period of excitement and must express the declarant's reaction to the event. *Id.*

In the case before us, it is patently clear that S.C. made the statement while he was under the stress of excitement caused by watching his sister perform oral sex on Bell. Bell's sexual conduct continued even after Heil went to the police department to report it, and S.C. made the statement at issue shortly after police officers arrived on the scene. Thus, the evidence suggests a short interval of time between the offense and S.C.'s statement. Moreover, there can be no doubt that S.C. would have been excited after watching the offense take place. In addition, it is unlikely that, at such a young age, S.C. reflected on the content of his statement before it was made.

We note that this court and other courts have expressed a preference for leniency as to the contemporaneous requirement when the declarant is a young child. *See Smith v. State*, 303 Ark. 524, 798 S.W.2d 94 (1990). In *Smith*, we upheld the admissibility of a statement of a three-year-old who witnessed a murder and told his mother about it the following day. *Id.* Thus, we cannot say that the contemporaneous requirement was not met here, where the child made the statement minutes after witnessing the offense. Because the challenged testimony clearly falls under the excited-utterance exception to the hearsay rule, the circuit court's decision to admit the evidence was not an abuse of discretion.

V. Transcript of Statement

Bell next alleges that the circuit court erred in admitting a transcript of his statement to the police. Over objection by defense counsel, copies of the transcript were passed out to the jury to be used as a guide while the tape of the statement played. Bell's argument is twofold. He claims that the tape was the best evidence of the statement and that the admission of the transcript violated the best-evidence rule. He further claims that the circuit court erred in not making a finding as to the accuracy of the transcript.

We find no merit in Bell's best-evidence argument. The best-evidence rule provides that, when proving the contents of a recording, the original recording is generally required. *See* Ark. R. Evid. 1002 (2007). Here, the tape recording was admitted

into evidence. Therefore, the best-evidence rule was satisfied. The rule, which requires the submission of the most reliable evidence, was not violated by the admission of additional evidence.

Our court has upheld a circuit court's decision to allow both the transcript and the recording of a defendant's statement. *See Baysinger v. State*, 261 Ark. 605, 550 S.W.2d 445 (1977). The *Baysinger* case presents facts very similar to those in this case. In *Baysinger*, police officers created a transcript of a recorded statement, leaving blanks or notations at points where the conversation was unintelligible. *Id.* Over the defendant's objection, the transcript was passed out for jurors to look at while the recording was being played. *Id.* Witnesses testified that the transcript was accurate, and the defendant could point to no prejudicial misrepresentations. *Id.* This court held the transcript was admissible, stating admission was the "better policy where as here the transcription is shown to be accurate and it would be necessary to replay the recording for the jurors several times unless the transcription is used." *Id.* at 613, 550 S.W.2d at 450. We have continued to follow the policy of allowing accurate transcripts to be used alongside recordings that may be difficult to understand. *See, e.g., Leavy v. State*, 314 Ark. 231, 862 S.W.2d 832 (1993).

The transcript at issue here contains notations referring to inaudible or unintelligible dialogue. It was used for the same reason set forth in *Baysinger*. Sergeant Mauk testified that he had compared the transcript with the tape and concluded that the transcript was accurate. Furthermore, there are no material misrepresentations that would prejudice Bell.[3] If the audio tape had been played without the transcript, it would have been necessary to replay the recording several times in order to ensure the jurors' understanding of the statement.

[redacted] With regard to Bell's contention that the circuit court should have made a finding as to the accuracy of the transcript, that is simply not a requirement under our case law. The case he cites for that assertion actually states that, when a witness testifies to the accuracy of the transcript and where it may be necessary to use the transcript in addition to the recording in order to ensure the jurors' understanding of the content, the decision to use the transcript is

[3] The only inaccuracies pointed out by defense counsel below are the names of the other children in the car. The names of S.C. and J.B. were misstated at one point but were later corrected.

discretionary with the trial court. *Leavy v. State, supra.* We have held that there is no abuse of that discretion when the appellant cannot demonstrate prejudice. *Id.* Similarly, Bell has failed to demonstrate prejudice in the instant case. Thus, the circuit court did not abuse its discretion in allowing the use of the transcript in addition to the recording.

VI. Prior Sex Offenses as a Juvenile

Bell's final point of appeal concerns evidence admitted at the sentencing phase of his trial. As a juvenile, he was adjudicated delinquent for two sex offenses, felony rape and misdemeanor sexual assault. The circuit court permitted testimony on this subject from the victims in those two cases. The court prohibited disclosure of the adjudication for sexual assault but allowed the State to establish, through the testimony of the victim's father, that Bell was adjudicated delinquent for rape. Bell does not contest the admissibility of the fact of adjudication on the rape charge. He agrees that, pursuant to Ark. Code Ann. § 9-27-345(a) (Repl. 2002), the adjudication of delinquency for rape, an offense for which he could have been tried as an adult, may be used at the sentencing phase in subsequent adult criminal proceedings against him. Likewise, the State did not contest the inadmissibility of the adjudication for sexual assault, as it was a misdemeanor for which Bell could not have been tried as an adult. Therefore, we need only consider the testimony of the victims regarding the facts and circumstances that led to both charges.

[redacted] Pursuant to Ark. Code Ann. § 16-97-103(6) (Repl. 2006 & Supp. 2007), evidence of aggravating circumstances is admissible at sentencing. Section 16-97-103 also refers to the criteria for departure from the sentencing standards as examples of evidence of aggravating circumstances. *Id.* One such criterion is that "[t]he offense was a sexual offense and was part of a pattern of criminal behavior with the same or different victims under the age of eighteen (18) years of age manifested by multiple incidents over a prolonged period of time." Ark. Code Ann. § 16-90-804(c)(2)(F) (Repl. 2006 & Supp. 2007). The testimony of the victims in Bell's prior rape and sexual assault cases shows a pattern of criminal behavior with victims under the age of eighteen. Therefore, such testimony is admissible as evidence of an aggravating circumstance.

Bell nonetheless contests the admissibility of this evidence on the basis of Ark. Code Ann. § 9-27-345 (Repl. 2002). This section reads as follows, in its entirety:

> (a) Juvenile adjudications of delinquency for offenses for which the juvenile could have been tried as an adult may be used at the sentencing phase in subsequent adult criminal proceedings against those same individuals.
>
> (b)(1) No other evidence adduced against a juvenile in any proceeding under this subchapter nor the fact of adjudication or disposition shall be admissible evidence against such juvenile in any civil, criminal, or other proceeding.
>
> (b)(2) However, the evidence shall be admissible where proper in subsequent proceedings against the same juvenile under this subchapter.

Ark. Code Ann. § 9-27-345. Clearly, subsection (a) refers to evidence that is admissible at the criminal trial of an adult who was adjudicated delinquent when he or she was a juvenile. Conversely, subsection (b)(2) refers to evidence that is admissible at a subsequent juvenile proceeding of a person who remains a juvenile.[4] Subsection (b)(1), however, is the source of contention on this subject. Bell suggests that no evidence adduced at the prior juvenile proceeding (i.e., evidence regarding the facts and circumstances leading to the charge) is admissible at any subsequent proceeding, even after the juvenile becomes an adult. We disagree.

[redacted] The legislature used the term "juvenile" in subsections (b)(1) and (b)(2), as contrasted with the term "individuals," used in subsection (a) to refer to juveniles who had become adults. The basic rule of statutory interpretation is to give effect to the intent of the legislature. *McKeever v. State*, 367 Ark. 374, 240 S.W.3d 583 (2006). We construe a statute just as it reads, giving the words their ordinary and usually accepted meaning. *Id.* In addition, when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to resort to the rules of statutory interpretation. *Id.* Because Ark. Code Ann. § 9-27-345(b) refers exclusively to the admissibility of evidence

[4] "[T]his subchapter" refers to the Juvenile Code.

against a "juvenile," that statutory provision is inapposite in a case involving an adult defendant. Therefore, Bell cannot claim protection under this statute. The circuit court did not abuse its discretion in admitting the testimony of the victims.

VII. Rule 4-3(h) Review

Pursuant to Ark. Sup. Ct. R. 4-3(h) (2007), the record in this case has been reviewed for all objections, motions, and requests made by either party, which were decided adversely to Bell, and no prejudicial error has been found.

Affirmed.

HANNAH, C.J., and DANIELSON, J., concur in part, and dissent in part.

JIM HANNAH, Chief Justice, concurring in part; dissenting in part. I concur in the court's decision on admission of evidence under Ark. R. Evid. 404(b) based on the principle of stare decisis. I dissent to the court's decision that Ark. Code Ann. § 9-27-345 (Repl. 2002) permits admission of testimony from victims of prior juvenile delinquency adjudications in subsequent adult criminal proceedings concerning unrelated crimes.

Section 9-27-345 provides as follows:

> (a) Juvenile adjudications of delinquency for offenses for which the juvenile could have been tried as an adult may be used at the sentencing phase in subsequent adult criminal proceedings against those same individuals.
>
> (b)(1) No other evidence adduced against a juvenile in any proceeding under this subchapter nor the fact of adjudication or disposition shall be admissible evidence against such juvenile in any civil, criminal, or other proceeding.
>
> (2) However, the evidence shall be admissible where proper in subsequent proceedings against the same juvenile under this subchapter.

The majority concludes that subsection (b)(1) is the source of contention. I disagree. Subsection (a) is dispositive of this issue. Bell correctly argues that the only evidence admissible under section

9-27-345 in an adult criminal proceeding is the fact and the nature of the juvenile adjudication. Subsection (a) is at issue. Bell's separate arguments about any effect of subsection (b) are superfluous and irrelevant to this discussion. The majority errs in discussing subsection (b).

As the majority notes, Bell does not dispute the admissibility of his juvenile adjudication of delinquency based on rape. Subsection (a) plainly makes certain "[j]uvenile adjudications" admissible at subsequent adult criminal proceedings. Rape is included because Bell certainly could have been prosecuted as an adult for that crime. *See* Ark. Code Ann. § 5-14-103 (Repl. 2006).

There are no opinions of this court interpreting the meaning of the term "[j]uvenile adjudications." "An 'adjudication' is simply a judicial determination." *Sikes v. Gen. Publ'g Co., Inc.*, 264 Ark. 1, 6, 568 S.W.2d 33, 35 (1978) (quoting *Webster's New International Dictionary* 33 (2d ed. 1939)). The term adjudication is not defined in our Juvenile Code. *See* Ark. Code Ann. § 9-27-303 (Supp. 2003). An "[a]djudication hearing" is defined in the juvenile code as "a hearing to determine whether the allegations in a petition are substantiated by the proof." Ark. Code Ann. § 9-27-345(4) (Supp. 2003). Thus, at a hearing, the evidence is admitted and a decision is reached. As stated in *Sykes, supra*, that decision constitutes an adjudication. In Utah, " 'Adjudication' is a defined term both in the Utah Rules of Juvenile Procedure and in related statutes that refer to a finding by the court, incorporated in a judgment or decree, that the facts alleged in the [petition alleging the court's jurisdiction] have been proved." *Office of the Guardian Ad Litem ex rel. S.M.*, 154 P.3d 835, 848 (Ut. 2007). It is clear that the term "[j]uvenile adjudications" as used in section 9-27-345 refers to admission of the prior convictions and their nature. This is consistent with similar provisions in the Criminal Code:

> The trial court shall then instruct the jury as to the number of prior felony convictions and the statutory sentencing range.
>
> The jury may be advised as to the nature of a prior felony conviction and the date and place of a prior felony conviction;

Ark. Code Ann. § 5-4-502(3)(A), (B) (Repl. 2006). Section 9-27-345 authorizes the circuit court to inform the jury of the juvenile adjudications and their nature. It does not permit the prosecuting attorney to put witnesses on the stand from the earlier cases to testify as to the facts

of the earlier crimes. Even though the evidence was admitted in sentencing, the inadmissible evidence could influence the jury to sentence for the prior juvenile offense rather than for the offense charged. It puts the criminal defendant again in jeopardy on a crime for which he or she has already been convicted. This is an issue exclusive of section 9-27-345 that would have to be considered regardless as it implicates both double jeopardy and res judicata. *See Mason v. State*, 361 Ark. 357, 206 S.W.3d 869 (2005). This case should be reversed for resentencing.

DANIELSON, J., joins.

William YOUNG *v.* STATE of Arkansas

CR 07-378 266 S.W.3d 744

Supreme Court of Arkansas
Opinion delivered November 1, 2007

C. Scott Nance, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellant William F. ("Bill") Young, Jr., was convicted by a Sharp County jury of capital murder, aggravated robbery, residential burglary, and two counts of theft of property. The circuit court sentenced him to life imprisonment without the possibility of parole for the capital murder, life imprisonment for the aggravated robbery, twenty years' imprisonment and a $15,000 fine for the residential burglary, ten years' imprisonment and a $10,000 fine for one count of theft of property, and twenty years' imprisonment and a $15,000 fine for the other count of theft of property. He now appeals, alleging the circuit court erred in failing to grant his motion for directed verdict. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(2) (2007), as Young received sentences of life imprisonment. We find no error and affirm.

On New Year's Day of 2006, Steve Furr visited the Cave City apartment of his ex-wife, Devonda Furr. At some point during the evening hours, while Steve was drinking beer in the apartment parking lot, he was approached by Bill Young and his

wife, Leslie. The Youngs lived in the same apartment complex as Devonda but testified that they had never met Steve. Bill and Leslie visited and drank beer with Steve and Devonda at the apartments. At approximately eleven o'clock, the group left in Steve's truck to go to the residence of a mutual friend, Greg Girtman. The Furrs' ten-year-old son accompanied them. The adults continued drinking at the Girtman residence. Devonda testified that, while they were there, Leslie exposed her breasts to Steve, Greg Girtman, and the Furrs' son. As a result of this incident, Devonda requested to be taken home. She and her son were dropped off at her apartment at approximately 1:20 A.M. on January 2. The last time Devonda saw her ex-husband was when Steve, Bill, and Leslie left in Steve's truck.

According to the testimony of Bill and Leslie, they accompanied Steve to his trailer home near Cave City so that Steve could pick up more alcohol. When they arrived at the residence, Steve made drinks and asked Bill to work on his malfunctioning computer, which sat on a desk facing a wall. Leslie testified that, while her husband's back was turned, Steve made sexual advances toward her. This allegedly went on for approximately ten to fifteen minutes. Leslie claimed that Steve put his hand on her shoulder and attempted to unbutton her pants. It was not until he put his hand around her throat and started choking her that Leslie began to yell. Her husband and Steve then got into an altercation. Leslie saw her husband stab Steve twice, causing him to fall backwards over the side of the chair in which she had been sitting. At that point, Bill instructed Leslie to leave the trailer and wait in Steve's truck, and to leave if Steve came outside. Leslie testified that she waited in the truck for approximately ten to fifteen minutes, until Bill came out with an unidentified item, placed it in the truck and then drove away.

Later on January 2, Devonda took her two children to Steve's residence to pick up a video game that they had left there. Devonda testified that Steve's truck was missing when they arrived. She and the children found Steve dead in a recliner in the trailer, covered in blood and with his pants pulled down. Law enforcement officials who responded to Devonda's 911 call recovered a butcher knife and screwdriver from the recliner in which the victim was sitting. Both were found under Steve's body. An associate medical examiner with the Arkansas State Crime Laboratory, Dr. Adam Craig, testified that the victim incurred twelve stab wounds, consistent with the use of the knife, and approxi-

mately twenty-two smaller abrasions, consistent with the use of the screwdriver. Dr. Craig noted that some of the victim's wounds could be characterized as defensive. He also pointed out the yellow-brown color and the clustering of some of the wounds, both of which suggested that those wounds were inflicted post-mortem. Dr. Craig testified about one wound in particular, which appeared to have been caused by a third weapon. A stab wound to the victim's chin broke his jaw and crushed his larynx. Dr. Craig stated that, in his opinion, such a wound would have been caused by a heavy blunt-ended object. The State introduced a knife owned by Bill that was fashioned out of a railroad spike. Greg Girtman testified that, while the group was at his residence, Bill was showing it off and boasting that it could puncture anything. Based on this evidence, the State suggested that the railroad-spike knife was the blunt-ended object that caused the wound to Steve's chin.

Police officers at the crime scene also found a bag of dog food, just inside the door of Steve's trailer. The dog food had been set on fire and had partially burned an adjacent wall. They also discovered a propane stove that had been ripped off the bar in the kitchen. The gas line attached to the stove had been broken, and officers in the trailer could smell and hear gas escaping from the line. Bill was charged with attempted arson based on this evidence. The jury returned a guilty verdict on the attempted-arson charge but failed to make a finding as to the amount of money damages caused to the property. The prosecutor conceded at trial that, because no evidence of the amount of damages was presented, the defense was entitled to a directed verdict on the charge of attempted arson.

Police officers photographed places in the trailer from which property had obviously been removed. Bill admitted at trial to taking the victim's television and computer with him when he left, purportedly because he knew his fingerprints would be found on both items. He also admitted to taking Steve's truck, claiming it was the only form of transportation he and Leslie had. Also, there were several tools already in the truck that Steve used in his refrigeration business.

Jimmy Doug Simpson, a long-time acquaintance of Bill, testified that he saw Bill and Leslie, along with two of their children, at the residence of a mutual friend on the evening of January 2. Bill had driven Steve's truck to the residence. Simpson testified that, at some point during the night, Bill asked Simpson to

accompany him to drop the truck off in the garage of Simpson's mother.[1] Simpson agreed, and when they dropped off the truck, Bill removed several tools from Steve's truck and placed them in Simpson's truck. They spent the night at the friend's house, and Bill woke Simpson the following morning, asking to be taken to a pawn shop. Simpson took Bill, Leslie, and the two children to E-Z Pawn in Batesville. An E-Z Pawn employee testified that Bill pawned several tools that were later identified as belonging to Steve, including a thermometer, drill, tool pouch, Sawsall, battery charger, and gauges. Simpson testified that, after leaving the pawn shop, he dropped Bill, Leslie, and the children off at a Batesville doctor's office, where Bill intended to meet up with someone who could give them a ride home to Cave City.

Anita Miller testified that Bill and Leslie approached her at the doctor's office on January 3, while she was in the middle of an appointment. They asked for a ride home, and she agreed. She gave them the keys to her car and allowed them to wait there while she finished her appointment. When she came out of the doctor's office, however, police officers were arresting Bill and Leslie.

Bill was charged with capital murder, aggravated robbery, residential burglary, attempted arson, and two counts of theft of property. As a threshold issue, we note that his sufficiency-of-the-evidence challenge to the theft-of-property charges was not properly preserved for our review. Specific motions for directed verdict are to be made at the close of the evidence offered by the prosecution and at the close of all the evidence. *See* Ark. R. Crim. P. 33.1(a) (2007). The failure to make the motions at the proper time and in the proper manner constitutes a waiver of any sufficiency-of-the-evidence challenge. *See* Ark. R. Crim. P. 33.1(c). Bill moved for a directed verdict only on the capital-murder, aggravated-robbery, and residential-burglary charges; thus, our review is limited to those convictions.

We have long held that a motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Cluck v. State*, 365 Ark. 166, 226 S.W.3d 780 (2006). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is

[1] Bill testified that Simpson claimed to know the Furr family.

that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

Furthermore, circumstantial evidence may provide a basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Id.* Whether the evidence excludes every other hypothesis is left to the jury to decide. *Id.* The credibility of witnesses is an issue for the jury and not the court. *Id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

I. The Offense of Aggravated Robbery

A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately after committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person. Ark. Code Ann. § 5-12-102 (Repl. 2006 & Supp. 2007). A robbery becomes aggravated if the person is armed with a deadly weapon, represents by word or conduct that he is armed with a deadly weapon, or inflicts or attempts to inflict death or serious physical injury upon another person. Ark. Code Ann. § 5-12-103 (Repl. 2006 & Supp. 2007). In the instant case, the jury found that Bill was armed with a deadly weapon.

We hold that substantial evidence supports the aggravated-robbery conviction. First, it is undisputed that Bill employed physical force upon Steve. He admitted to stabbing Steve; this admission was corroborated by the testimony of Leslie, who witnessed the stabbing. Second, the evidence indicates that Bill was armed with a deadly weapon. He admitted to the use of the knife found at the crime scene, and the testimony of both Greg Girtman and Leslie Young established that Bill carried the knife fashioned from a railroad spike on the night of the homicide.

Moreover, Bill's assertion that he lacked the purpose to commit theft is without merit. He argued at trial that he did not set out to rob Steve and that he took the television and computer only because his fingerprints were on them and the truck only because it was his sole means of transportation. According to Bill, he believed at the time that Steve may have still been alive and would attack him. However, there was overwhelming evidence showing that Bill intended to deprive Steve of the property.

Gary Bradley, a friend of Steve, testified that he saw Steve's truck on the road on January 2. He stated that he followed the truck and observed Leslie driving it, with a man sitting beside her. He also claimed that, when he caught up with the truck, Leslie cut him off and ran his vehicle into the ditch. David Drew, another long-time acquaintance of Bill, testified that, at approximately eleven o'clock on the morning of January 2, Bill, Leslie, and two of their children came to his house in Steve's truck. Drew stated that Bill asked him to pawn some tools for him, which Bill could not do himself because he did not have his driver's license at the time.

Terry Garrison, who worked with Steve, testified that he saw Steve's truck at a Batesville laundromat on the morning of January 2. Believing Steve would be in the truck, Garrison approached the truck to find Bill getting out of it. He also saw a woman "ducking down" and a couple of children in the truck. Garrison testified that he was not completely sure at the time that it was Bill exiting the truck. After learning that Steve had been killed, Garrison returned to the laundromat to ask the owners if they had identified the person driving Steve's truck. While there, Garrison spoke to Nolan Hennings, who also testified at trial. Hennings testified that he had seen and spoken to Bill and Leslie that morning in the convenience store neighboring the laundromat. He stated that they were driving Steve's truck and that two young boys were with them. Bill asked Hennings if he was interested in buying some items from him, and he proceeded to open the back of Steve's truck to show Hennings several items, including shotguns and a television. Steve's truck was later found abandoned on a gravel road in Independence County. Seven fingerprints lifted from the vehicle were determined to be those of Bill Young.

[redacted] The fact that Bill pawned Steve's tools, tried to sell other stolen items, and abandoned the truck in the days following the homicide establishes a purpose to commit theft. Theft requires only that a person knowingly take or exercise unauthorized control over, or make an unauthorized transfer of an interest in, the property of another person, with the purpose of depriving the owner of the property. Ark. Code Ann. § 5-36-103 (Repl. 2006 & Supp. 2007). As this court has long held, a criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Watson v. State*, 358 Ark. 212, 188 S.W.3d 921 (2004).

Moreover, because of the obvious difficulty in ascertaining a defendant's intent or state of mind, a presumption exists that a person intends the natural and probable consequences of his actions. *Id.* In the instant case, it is clear from the evidence set forth above that Bill intended to deprive Steve of the property, and thus had a purpose of committing theft, when he used force against Steve.

[redacted] Our court has upheld aggravated-robbery convictions in situations similar to the one at bar, where the purpose to commit theft was not apparent until after the force was employed. *See Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). In the *Grillot* case, the evidence suggested that the homicide was the result of a murder-for-hire contract. *Id.* After the shooting, perpetrated by a co-defendant, Grillot took the victim's wallet and vehicle. *Id.* He later abandoned the vehicle and threw the keys and wallet into a canal. *Id.* We stated, "[a]ll these acts stemmed from an event where a deadly weapon was used. From these facts, a jury could reasonably infer that neither the truck nor the wallet were likely to be restored to Jackson, or his estate." *Id.* at 308, 107 S.W.3d at 144. Because deprivation of property requires only disposal "under circumstances that make its restoration unlikely," Ark. Code Ann. § 5-36-101(4)(C) (Repl. 2006 & Supp. 2007), we held that force was used with the purpose to commit theft. *Id.* Similarly, in the instant case, though Steve was killed or at least injured before the purpose to commit theft was apparent, Bill's actions following the homicide clearly show a purpose to commit theft. Accordingly, we conclude there was sufficient evidence to support the aggravated-robbery conviction.

II. The Offense of Residential Burglary

A person commits residential burglary if he enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201(a)(1) (Repl. 2006 & Supp. 2007). To "enter or remain unlawfully" means to enter or remain in or upon premises when not licensed or privileged to enter or remain in or upon the premises. Ark. Code Ann. § 5-39-101(2)(A) (Repl. 2006).

Defense counsel argued at trial that Bill could not be guilty of burglary because he entered the trailer lawfully, as he was invited by Steve, and because, at the time of entrance, he did not

intend to commit any crime. According to the testimony of Bill and Leslie, the circumstances necessitating the stabbing and the taking of property developed only after they entered lawfully. We have overturned a burglary conviction where the defendant developed the intent to commit an offense punishable by imprisonment only after entering onto the premises. *See Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984). In *Hickerson*, the defendant entered a home through an unlocked door and did not carry a firearm. *Id.* According to the victim, a twelve-year-old girl, he spoke with her for some time before drawing a gun, taking her to his car, driving away, and raping her.[2] *Id.* We held that, because there was no evidence that the defendant carried a firearm at the time he entered the residence, the defendant lacked the intent to commit a felony at the time of entrance. *Id.* Therefore, he could not be guilty of burglary. *Id.*

The *Hickerson* case is distinguishable from the one at bar. In *Hickerson*, we stated that, if the jury had found that the defendant carried a firearm, "there would be substantial evidence that Hickerson intended to commit a felony when he entered the house." *Id.* at 221, 667 S.W.2d at 656. In the instant case, the testimony indicated that Bill carried the knife made from a railroad spike with him on the night of the homicide. The jury could have inferred from this evidence the intent to commit a felony at the time of entrance. Furthermore, the residential-burglary statute clearly contemplates situations where the defendant enters lawfully but remains unlawfully. *See* Ark. Code Ann. § 5-39-201(a)(1). As the circuit court indicated, although Bill may have been licensed or privileged to enter the trailer, he was certainly not licensed or privileged to remain there after he began stabbing the owner and removing his property. For these reasons, we conclude that substantial evidence supports the residential-burglary conviction.

III. The Offense of Capital Murder

A person commits capital murder if, acting alone or with one or more other persons, he commits or attempts to commit an enumerated felony, and, in the course of and in furtherance of the felony or in immediate flight from the felony, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. Ark. Code Ann.

[2] It is unclear from where the defendant obtained this gun.

§ 5-10-101(a)(1) (Repl. 2006 & Supp. 2007). Aggravated robbery is included in the list of enumerated felonies. Ark. Code Ann. § 5-10-101(a)(1)(vi) (Supp. 2007). The prosecution in the instant case proceeded against Bill Young on a felony-murder theory, with aggravated robbery as the underlying felony.

A forensic DNA examiner from the Arkansas State Crime Laboratory testified that samples from the blue jeans of both Bill and Leslie Young contained Steve's DNA. In addition, an empty box of Maxum brand pepper spray was recovered from the crime scene. A canister of the same brand of pepper spray was found on Leslie's person at the time of her arrest. Finally, Anita Miller later discovered Steve's wallet, containing his driver's license, in her car under the seat where Leslie had been sitting prior to the arrest. This evidence, combined with that evidence reviewed earlier, establishes that the capital-murder conviction is supported by substantial evidence.

A conviction of capital murder under the felony-murder rule requires proof that Bill caused Steve's death in the course of and in furtherance of the aggravated robbery and under circumstances manifesting extreme indifference to the value of human life. *See* Ark. Code Ann. § 5-10-101(a)(1). Bill's own testimony indicated that he stabbed Steve and took the property as part of the same incident. The jury was free to disbelieve his testimony regarding the defense of his wife and to conclude that he killed Steve in order to rob him. The number of wounds, coupled with the testimony that there were some defensive and post-mortem wounds, is sufficient to show circumstances manifesting extreme indifference to the value of human life. Thus, it cannot be said that the jury's verdict rested on speculation and conjecture. The evidence supports the capital-murder conviction.

IV. Rule 4-3(h) Review

Pursuant to Ark. Sup. Ct. R. 4-3(h), the record in this case has been reviewed for all objections, motions, and requests made by either party, which were decided adversely to the appellant, and no prejudicial error has been found.

Affirmed.

Caroline Louise LANGSTON *v.* Tony LANGSTON, Administrator; Heirs of Donald Ray Langston, Deceased; Estate of Donald Ray Langston, Deceased

06-1365 266 S.W.3d 716

Supreme Court of Arkansas
Opinion delivered November 1, 2007

[Rehearing denied December 6, 2007.*]

* IMBER and DANIELSON, JJ., not participating.

Stephen M. Sharum and *Mark E. Ford*, for appellant.

Lonnie C. Turner; *Hardin, Jesson & Terry, PLC*, by: *Rex M. Terry*, for appellees.

JIM GUNTER, Justice. This appeal arises from an order of the probate division of the Sebastian County Circuit Court granting a petition for declaratory judgment filed by Appellee Tony Langston ("Tony"), administrator of the estate of the Honorable Donald Ray Langston ("Langston"), deceased, regarding the application of Arkansas's implied revocation statute, Ark. Code Ann. § 28-25-109(b) (Repl. 2004), revoking a holographic will, which provided that Langston's estate would pass to Appellant Caroline Louise Langston ("Caroline"). We affirm the circuit court's ruling.

On May 26, 1978, Langston and Caroline were married. They separated on or about August 2, 1999. On August 10, 1999, Caroline filed for divorce, and the circuit court announced their settlement from the bench on March 20, 2000. On April 7, 2000, Langston wrote a holographic will with the following language:

> Will
>
> I, Don Langston, hereby will all my property, real, personal, and money to Caroline Louise Langston.
>
> /s/Don Langston
> 4-7-2000

In the holographic will, Caroline was not named as the personal representative of the estate. Langston and Caroline were divorced on May 23, 2000, when the circuit court entered the divorce decree. The couple, however, continued a close relationship after their divorce was finalized. According to several affidavits, the couple lived together for four months after the divorce until Caroline could purchase a house. They had keys to one another's houses. They talked daily and ate meals together. They also attended family functions together. Langston also paid many of Caroline's bills after their divorce. Langston, aged sixty-seven, died in Fort Smith on August 8, 2005, without issue.

On August 31, 2005, Caroline filed a petition for probate of will and appointment of personal representative. In the petition, she named herself as the surviving spouse and two aunts as heirs.

She also listed the value of the property as $498,000 with $70,000 in real property and $428,000 in personal property. In her petition, she requested that she be named as the "sole beneficiary and distributee of the estate." Four proofs of the holographic will were also filed on August 31, 2005.

On September 2, 2005, the circuit court entered an order probating Langston's will and appointing Caroline as the personal representative. A testamentary letter was filed on that same day. However, Langston's brothers, sisters, and their heirs filed responses to Caroline's petition on September 16, 2005, November 28, 2005, and December 22, 2005. In their respective petitions, they requested that the court appoint an independent personal representative of the estate and declare the will and benefits invalid.

Further, on February 3, 2006, Langston's heirs filed a petition to remove Caroline as the personal representative pursuant to Ark. Code Ann. § 28-48-105. On February 3, 2006, the heirs also filed a petition for declaratory judgment, pursuant to Ark. Code Ann. § 16-111-105 (Repl. 1999), asserting that the implied revocation statute, Ark. Code Ann. § 28-25-109, should revoke Caroline's bequest from inheriting Langston's estate. Specifically, the heirs argued that Langston's holographic will was revoked as an operation of law, without respect to the testator's subjective intent, because Langston's divorce with Caroline was entered after the execution of the will. Attached to the petition was the May 23, 2000 divorce decree. On February 14, 2006, Caroline responded to the petition to remove her as personal representative and to the petition for declaratory judgment.

On April 4, 2006, Caroline filed a motion for summary judgment, arguing that the statute was not applicable to the facts and circumstances of the case. With her motion for summary judgment, she filed six affidavits in support. On April 24, 2006, the heirs filed a response to Caroline's motion for summary judgment, claiming that the holographic will was ineffective. Attached to the heirs' response to Caroline's motion for summary judgment was an affidavit by Tony, Langston's first cousin.

The circuit court entered a letter order, dated September 13, 2006, in which the circuit court ruled that the holographic will was drafted before the divorce was finalized, thereby nullifying the will as void under Ark. Code Ann. § 28-25-109(b). The court noted that it was of the opinion that Langston's intent was to pass the estate to his former wife; however, "he did not legally do so." The court granted the petition to remove personal representative;

noted that the petition for appointment of administrator should be filed with heirs listed; denied Caroline's motion for summary judgment; and granted the petition for declaratory judgment. On September 25, 2006, the circuit court entered an order to that effect. An order appointing Tony as administrator of Langston's estate was filed on September 26, 2006. On October 9, 2006, Caroline filed a notice of appeal. From the September 25, 2006 order, Caroline now brings her appeal.

In the present case, the circuit court disposed of the petition for declaratory judgment, the petition to remove personal representative, and the motion for summary judgment after reviewing the petitions, "the responses," and "the pleadings." Thus, the standard of review is one for summary judgment. We have stated 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. *Danner v. MBNA Am. Bank, N.A.*, 369 Ark. 435, 255 S.W.3d 863 (2007). The standard is whether the evidence is sufficient to raise a fact issue, not whether the evidence is sufficient to compel a conclusion. *Id.* A fact issue exists, even if the facts are not in dispute, if the facts "may result in differing conclusions as to whether the moving party is entitled to judgment as a matter of law, and in such an instance, summary judgment is inappropriate." *Id.*

On review, we determine if summary judgment was appropriate based on whether the evidence presented in support of summary judgment leaves a material question of fact unanswered. *Id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

For her sole point on appeal, Caroline argues that the circuit court erred in granting Tony's petition for declaratory judgment regarding the application of Arkansas's implied revocation statute, Ark. Code Ann. § 28-25-109(b), and revoking, as a matter of law, a holographic will, executed by Langston, providing that his estate should pass to Caroline. Specifically, Caroline contends that (1) the statute should not operate to revoke the clear testamentary intent of Langston to bequeath his estate to Caroline, and (2) that

a divorce decree rendered in open court was effective on the date that it was actually rendered rather than from the date of entry of record.

In response, Tony argues that the circuit court properly granted Tony's petition for declaratory judgment and for the removal of Caroline as the personal representative. Tony asserts that the circuit court correctly interpreted Ark. Code Ann. § 28-25-109(b). Specifically, Tony contends that (1) Langston's intent is irrelevant, and (2) the divorce decree itself reflects that there was a hearing on March 20, 2000, but it has long been established that a divorce occurs on the date that the divorce decree was filed.

We are asked to interpret § 28-25-109. Therefore, our analysis is one of statutory interpretation. We review issues of statutory construction de novo. *Ryan & Co. AR, Inc. v. Weiss*, 371 Ark. 43, 263 S.W.3d 489 (2007). It is for this court to decide what a statute means, and we are not bound by the circuit court's interpretation. *Id.* The basic rule of statutory construction is to give effect to the intent of the General Assembly. *Id.* In determining the meaning of a statute, the first rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* We construe the statute so that no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible. *Id.* When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to resort to rules of statutory construction. *Id.* However, we will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. *Id.* We will accept a circuit court's interpretation of the law unless it is shown that the court's interpretation was in error. *Id.* We seek to reconcile statutory provisions to make them consistent, harmonious, and sensible. *Id.*

The revocation of wills is governed by § 28-25-109, which provides in relevant part:

> (a) A will or any part thereof is revoked:
>
> . . . .
>
> (b) If, after making a will, the testator is divorced or the marriage of the testator is annulled, all provisions in the will in favor of the testator's spouse so divorced are revoked.

Id. In construing § 28-25-109, we have uniformly held that the only methods of revoking a will are those enumerated in the statute. *Wells*

v. Estate of Wells, 325 Ark. 16, 922 S.W.2d 715 (1996). In *McGuire v. McGuire*, 275 Ark. 432, 631 S.W.2d 12 (1982), we stated that the clear meaning of this statute is that any bequest to the former spouse is void, but the remainder of the will remains in effect.

Further, we noted in *Davis v. Aringe*, 292 Ark. 549, 731 S.W.2d 210 (1987), that in 1949, our General Assembly enacted this statute, formerly known as § 60-407, in order to avoid some of the legal uncertainties in past years when dealing with marriage and divorce issues and the doctrine of implied revocation. In *Davis*, a will was executed prior to marriage, the decedent and Aringe married, and then they divorced. We held that the testator's divorce revoked the will provisions made in Aringe's favor, even though the will had been made by the testator prior to his marriage. *Id.*

With this precedent in mind, we turn to the present case. The circuit court made the following rulings in its letter order:

> 20. In the case at bar, Donald Langston drafted and signed his holographic will before the parties' divorce was filed. Therefore, his subsequent divorce nullified all provisions relating to Caroline Langston, who was his wife at the time of the execution of the holographic will. The fact that Donald Langston did not indicate that Caroline Langston as his spouse, but merely stated, "to Caroline Louise Langston" is of no legal consequence. They were legally married at the time.
>
> 21. Based on the above, it is this court's opinion that the single will provision, as there is only one, is void pursuant to Arkansas Code Annotated § 28-25-109(b). It is this court's opinion that Donald Langston intended to pass his estate to his former wife; however, he did not legally do so. It is this court's opinion that this is a very harsh ruling. It stands contrary to Judge Langston's desire. However, Judge Langston was educated in the law and he failed to ensure that the Arkansas probate laws were followed. This court cannot look the other way in the face of the clear legislative intent of Arkansas Code Annotated § 28-25-109. The Arkansas Supreme Court held in *McGuire v. McGuire*, [275 Ark. 432, 631 S.W.2d 12 (1982)], that "it is not necessary for us to try to reach the intent of the testator because the statute solves that problem for us."

[redacted] We agree with the circuit court's ruling on this issue. With the rules of statutory construction in mind, we look to the plain language of § 28-25-109, which provides that the provisions

of the will "in favor of the testator's spouse" are revoked "[i]f, after making a will, the testator is divorced . . . [.]" *Id.* Here, Langston executed the holographic will on April 7, 2000, and the couple's divorce decree was entered on May 23, 2000. Langston's divorce, which was finalized by the entry of the divorce decree, occurred *after* the execution of his holographic will. Based upon § 28-25-109, as well as our well established case law, his bequest to Caroline was revoked by operation of law.

Caroline argues that Langston's testamentary intent must prevail over the statute. However, in *McGuire, supra,* after holding that the statute rendered any bequest to the former spouse as void, we stated, "It is not necessary for us to try to reach the intent of the testator because the statute solves that problem for us. In view of the obvious effect of the statute we see no reason to embark upon a long discussion in order to decide this case." *Id.* at 435, 631 S.W.2d at 14. Here, Langston's intent was that Caroline would inherit his estate, but under *McGuire, supra,* that testamentary intent is irrelevant in light of § 28-25-109.

Further, Caroline argues that the divorce occurred on the day of the hearing when the settlement agreement was announced from the bench. Notwithstanding that there is a lack of evidence of the settlement agreement on March 20, 2000, in the record, we look to our rules for guidance on this issue. Subsection (d) of Appellate Rule 4 specifies that a judgment or order is considered entered when it is filed in accordance with Administrative Order Number 2(b). Ark. R. App. P.–Civ. 4(d) (2007). Likewise, Rule 58 of our Rules of Civil Procedure provides that "[a] judgment or decree is effective only when so set forth and entered as provided in Administrative Order No. 2." Ark. R. Civ. P. 58 (2007). *See, e.g., Francis v. Protective Life Ins. Co.,* 371 Ark. 285, 265 S.W.3d 117 (2007). Here, the hearing occurred on March 20, 2000, during which, Caroline maintains, the circuit court approved the couple's settlement agreement. Nevertheless, the divorce decree was not entered with the court until May 23, 2000, after Langston executed his holographic will. Based upon Rule 58, as well as Administrative Order No. 2, we conclude that the March 20, 2000 date is of no consequence and that the divorce was finalized on May 23, 2000, when the divorce decree was filed with the circuit court.

Therefore, based upon the foregoing analysis, as well as our standard of review regarding statutory construction, we hold that the circuit court was correct in granting summary judgment in Tony's favor and ruling, as a matter of law, that Langston's will was void under § 28-25-109(b). Accordingly, we affirm the circuit court's ruling.

Affirmed.

IMBER, J., not participating.

NABHOLZ CONSTRUCTION CORPORATION *v.* CONTRACTORS FOR PUBLIC PROTECTION ASSOCIATION

07-843 266 S.W.3d 689

Supreme Court of Arkansas
Opinion delivered November 1, 2007

Friday, Eldredge & Clark, LLP, by: *John Dewey Watson, Jr.* and *Jeffrey H. Moore*, for appellant.

Hope, Fuqua & Campbell, P.A., by: *Ronald A. Hope, David M. Fuqua*, and *Patrick L. Spivey*, for appellee.

PAUL DANIELSON, Justice. Appellant Nabholz Construction Corporation appeals from the circuit court's order directing it to produce certain documents, which the circuit court deemed "public records" under Arkansas's Freedom of Information Act (FOIA), codified at Ark. Code Ann. §§ 25-19-101–25-19-109 (Repl. 2002 & Supp. 2005), and which were requested by appellee Contractors for Public Protection Association (CFPPA). Nabholz asserts four points on appeal: (1) that it was not a proper defendant under the FOIA; (2) that, in the alternative, its records were not public records; (3) that, in the alternative, its records were exempt; and (4) that venue was improper. We reverse the circuit court's order and dismiss.

A review of the record reveals that on March 2, 2007, CFPPA filed a complaint in the Pulaski County Circuit Court against Nabholz, under the FOIA. In it, CFPPA asserted that Nabholz, as general contractor, had contracted with the University of Arkansas for the erection of the Northwest Quadrant Housing

Project on its Fayetteville campus. CFPPA stated that on October 25, 2006, it had requested documents and other items from the University related to the expenditure of public funds for the erection of several public buildings. It further stated that on November 8, 2006, the University responded to its request, offering to furnish documents and certain contracts relating to the construction of public buildings, which included the contract for the Fayetteville housing project.

According to the complaint, CFPPA, upon inspecting and copying the documents furnished by the University, extended its request to inspect certain documents[1] not previously disclosed, to which the University responded:

> (2) To the extent that supporting documentation for pricing of contracts and change orders is available it would be maintained in the files which you will review. However, it is more likely that such records would be maintained by the general contractor and is not in our files for the projects identified.
>
> . . . .
>
> (6) No audits have been performed on any of the jobs referenced.
>
> . . . .
>
> (10) The amount paid for general conditions is included with each payment request in the schedule of values but otherwise I do

[1] The extended request included the following documents, according to the complaint: (1) the actual construction file on each of six University projects; (2) the supporting documentation for the pricing of all contracts and change orders; (3) documentation of all monies spent on the projects, including the actual checks written or check registers, together with a schedule of all payments and ledgers; (4) the monthly billings with the supporting schedules of values for all jobs; (5) the calculations of savings from the guaranteed maximum proposal, together with documentation for each job; (6) the results of all audits performed on any of the jobs; (7) the documentation of any costs savings returned to the owner for each job; (8) documentation of the scope of work and the square footage for each project; (9) documentation of the labor burden stated as a percentage for each project; (10) complete supporting documentation for the general conditions portion of the job for each project, including the amount paid for general conditions on the job as well as supporting schedules for each individual item charged to general conditions for the potential project; (11) documentation of bond costs for each project; and (12) any schedules and printouts available from information stored on computers regarding each of the projects.

> not believe that our records of payment exist in our files for any individual items charged to general conditions.

CFPPA stated that after receiving the information in the University's possession, which did not include the information requested by CFPPA in its extended request, it requested the information, relating to the Fayetteville housing project, directly from Nabholz, which refused to release or produce the information.

By its complaint, CFPPA sought the information, which it believed to be in Nabholz's possession and which it believed related to charges by Nabholz for its completion of the Fayetteville housing project. CFPPA contended that the information it believed to be in Nabholz's possession constituted public records under the FOIA and asserted that Nabholz was the custodian of the records, for purposes of the FOIA. It further alleged that Nabholz had violated the FOIA by refusing to make the documents and items of evidence available for copying and inspection. For these reasons, CFPPA sought declaratory and injunctive relief, an in camera review, if necessary, as well as attorney's fees. In response, Nabholz initially moved to dismiss CFPPA's complaint under Ark. R. Civ. P. 12(b)(6) and for lack of venue and later answered the complaint, requesting that it be denied and dismissed.

A hearing was held on the matter, at the conclusion of which the circuit court rendered the following decision:

> The Court takes into consideration, Judge [I]mbers' [sic] opinion, the Fox versus Perroni, where it states that the Supreme Court literally interprets the Freedom of Information Act to accomplish its broad and honorable purpose, that public business be performed in an open and public manner. And it gives broader instruction to it in favor of disclosure. Taking that into consideration following that line of thought, the Court is of the opinion that in the response of Mr. Harrison on December 8, 2006, which is Plaintiffs' Exhibit 4, Mr. Harrison gives the suggestion that leaves this Court with the impression that the general contractor had really placed himself in the position of being the custodian of those documents concerning the contract between Nabholz and the University. Now, whether or not that was intended, this Court isn't sure, but based upon the statement in that Exhibit and the testimony of Mr. Harrison again here today, it appears to this Court, that Nabholz is the custodian of the records concerning that contract pertaining to this Northwest Quadrant Housing Project. Now, for that reason, the Court de-

> clares that to be the case. And the Court is not willing to say that Nabholz has knowing [sic] violated the FOIA though. I'm not sure that they knowingly did that. However, the Court believes that Nabholz should produce those requested documents pertaining to all subcontractors, the services provided by those subcontractors, and the charges for the work done by those subcontractors. And I don't think that this will, in fact, be any kind of prohibition or competition in the past. I don't want to give the competitors any advantage, and I think that all of these competitors need to know that this is part of the cost of doing business with the state. However, the Court does not believe that Nabholz should have to give copies of what was called today, take-offs for all worked [sic] performed, if that, in fact, infringes upon the competition with others, the Court will not require that. But, excluding those take-offs, the rest of the information requested, as that pertains to who are the subcontractors here, plus services those contractors provided, and what they charged for them, that appears to this Court, to be public business. If there is some dispute as to what would protect Nabholz from divulging competitive information, the Court will review that in-camera, if you still cannot agree on all the documents that should be disclosed, if there is some challenge to that, but if you can follow this general frame work that the list of subcontractors and services provided to others should be disclosed, that is the Court's order. The Court will not require any party to pay the other's attorney's fees, though.

Following the hearing, the circuit court entered its written order, in which it found that venue was proper in Pulaski County and that Nabholz was the custodian of the desired records. It further found that the items requested by CFPPA were public records, but that the "documents regarding Defendant's takeoffs, labor burdens charged and bonding costs [fell] within A.C.A. § 25-19-105(b)(9)(A) as they [were] files which, if disclosed, would give advantage to competitors or bidders." The circuit court then denied Nabholz's motion to dismiss and found Nabholz not guilty of any misdemeanor, as it had not knowingly violated the FOIA. Finally, the circuit court ordered Nabholz to immediately produce the documents requested by CFPPA, "including, but not limited to, the documentation to support the general conditions and the subcontracts and supporting documentation, with the exception of the takeoffs, labor burdens and bond costs[,]" which the circuit court had found to be excepted. Subsequent to its final order, the circuit court granted Nabholz's motion for

stay pending appeal. In addition, in a *nunc pro tunc* order, the circuit court granted CFPPA attorney's fees of $4,000. Nabholz now appeals.

Nabholz, for its initial point on appeal, argues that it was not a proper defendant under the FOIA for two reasons. It first contends that it was not the statutory custodian of the records because its mere possession of the requested documents did not equate to administrative control. Second, it urges that it is a private organization, not supported by or expending public funds, whose mere receipt of money in exchange for services provided to the University was insufficient to render it a proper defendant. CFPPA responds, asserting that the clear progression of the law has been that records of public business are subject to disclosure even when the records are not in the custody of the state actor. It asks this court to hold that a private entity, having actual possession of the records requested, can be a custodian within the meaning of the FOIA.

This court liberally interprets the FOIA to accomplish its broad and laudable purpose that public business be performed in an open and public manner. *See Fox v. Perroni*, 358 Ark. 251, 188 S.W.3d 881 (2004). Furthermore, we broadly construe the FOIA in favor of disclosure. *See id.* Arkansas Code Annotated § 25-19-105(a)(1)(A) (Supp. 2005) provides that "[e]xcept as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records." Subsection (a)(2)(A) provides that "[a] citizen may make a request to the custodian to inspect, copy, or receive copies of public records." Ark. Code Ann. § 25-19-105(a)(2)(A). Pursuant to subsection (d)(2)(A) of the statute, "the custodian shall furnish copies of public records if the custodian has the necessary duplicating equipment," upon request and payment of a fee as provided in subsection (d)(3). Ark. Code Ann. § 25-19-105(d)(2)(A). In the instant case, CFPPA presented a request to Nabholz for certain records, which pertained to the construction of the University's Fayetteville housing project.

■ We have held that for a record to be subject to the FOIA and available to the public, it must be (1) possessed by an entity covered by the Act, (2) fall within the Act's definition of a public record, and (3) not be exempted by the Act or other statutes. *See Legislative Joint Auditing Comm. v. Woosley*, 291 Ark. 89, 722 S.W.2d 581 (1987). The question presented here is whether

Nabholz is an entity covered by the Act, such that suit against Nabholz is even proper. While our review of the record reveals that Nabholz appears to be in possession of the records requested, we cannot say that it is an entity covered by the FOIA, which would render it subject to suit under the FOIA.

A review of our jurisprudence reveals that in previous cases, the FOIA request being reviewed was directed to a state agency or public entity covered by the Act and not to a private corporation, such as Nabholz. *See, e.g.*, *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 371 Ark. 217, 264 S.W.3d 465 (2007); *Ryan & Co. AR, Inc. v. Weiss*, 371 Ark. 43, 263 S.W.3d 489 (2007) (request directed to the Department of Finance and Administration); *Harris v. City of Fort Smith*, 359 Ark. 355, 197 S.W.3d 461 (2004); *Nolan v. Little*, 359 Ark. 161, 196 S.W.3d 1 (2004) (request directed to the Arkansas State Plant Board); *Fox v. Perroni*, *supra* (request directed to a circuit judge); *Arkansas Ins. Dep't v. Baker*, 358 Ark. 289, 188 S.W.3d 897 (2004); *Arkansas Prof'l Bail Bondsman Licensing Bd. v. Frawley*, 350 Ark. 444, 88 S.W.3d 418 (2002); *Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167 (2000) (request directed to the Department of Correction); *Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998) (request directed to the Governor and the Department of Finance and Administration); *Arkansas Dep't of Fin. & Admin. v. Pharmacy Assocs., Inc.*, 333 Ark. 451, 970 S.W.2d 217 (1998); *Arkansas Dep't of Health v. Westark Christian Action Council*, 322 Ark. 440, 910 S.W.2d 199 (1995); *Swaney v. Tilford*, 320 Ark. 652, 898 S.W.2d 462 (1995) (request directed to the Arkansas Development Finance Authority); *Byrne v. Eagle*, 319 Ark. 587, 892 S.W.2d 487 (1995) (request directed to the Arkansas Development Finance Authority); *Johninson v. Stodola*, 316 Ark. 423, 872 S.W.2d 374 (1994) (request directed to the Pulaski County Prosecutor); *Furman v. Holloway*, 312 Ark. 378, 849 S.W.2d 520 (1993) (request directed to the Arkansas Department of Correction); *Troutt Bros., Inc. v. Emison*, 311 Ark. 27, 841 S.W.2d 604 (1992) (request directed to the sheriff of Craighead County); *Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992) (request directed to the Attorney General); *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992) (request directed to the City of Little Rock's personnel office); *Hengel v. City of Pine Bluff*, 307 Ark. 457, 821 S.W.2d 761 (1991); *Snyder v. Martin*, 305 Ark. 128, 806 S.W.2d 358 (1991) (request directed to the Motor Fuel Tax Section of the Department of Finance and Administration); *Arkansas Gazette Co. v. Goodwin*, 304 Ark. 204, 801 S.W.2d 284 (1990) (request directed

to the Arkansas State Police and the Sixth Judicial District Prosecutor); *Gannett River States Publ'g Co. v. Arkansas Judicial Discipline & Disability Comm'n*, 304 Ark. 244, 801 S.W.2d 292 (1990); *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990); *Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990) (request directed to the City of Rogers's Chief of Police); *Gannett River States Publ'g Co. v. Arkansas Indus. Dev. Comm'n*, 303 Ark. 684, 799 S.W.2d 543 (1990); *Arkansas Highway & Transp. Dep't v. Hope Brick Works, Inc.*, 294 Ark. 490, 744 S.W.2d 711 (1988); *Blaylock v. Staley*, 293 Ark. 26, 732 S.W.2d 152 (1987) (request directed to the Pulaski County Clerk); *Legislative Joint Auditing Comm. v. Woosley*, *supra*; *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986) (request directed to the Commissioner of Revenues).

In the instant case, Nabholz is an Arkansas corporation and is not an entity of the state. As such, it alone cannot be sued under the Act and directed to turn over documents under the Act.[2] While we liberally construe the FOIA in favor of disclosure, we are also aware of the need for a balancing of interests to give effect to what we perceive to be the intent of the General Assembly; in doing so, we must take a common-sense approach. *See Bryant v. Mars*, 309 Ark. 480, 830 S.W.2d 869 (1992). Indeed, we have held that we will not interpret a statute to yield an absurd result that defies common sense. *See National Home Centers, Inc. v. First Arkansas Valley Bank*, 366 Ark. 522, 237 S.W.3d 60 (2006). Were we to hold in this case that Nabholz, a private corporation, had to comply with a request under the Act, it would then be in the position of making a crucial decision under the FOIA, that is, whether or not the requested records constitute public records and are subject to disclosure. We cannot say that such was the intent of the General Assembly.

That being said, we render no decision as to whether the requested documents are or are not public records, subject to disclosure under the FOIA. The question still remains as to whether the documents could be considered under the "administrative control" of the University, such that they would be subject

[2] We noted in *Sebastian County Chapter of the American Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993), that we had previously applied the FOIA in several instances in which private entities had received public funds. However, in each instance, the request for the records was directed to a public agency or entity covered by the Act and not to the private entity itself.

to disclosure, if found to be public records. In addition, we note that we will not permit the circumvention of the FOIA by the simple "hand-off" of documents to entities not covered by the Act. *Cf. City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.3d 275 (1990). Nevertheless, in the instant case, CFPPA filed suit not against an entity that would be covered under the Act, but solely against Nabholz, a private corporation. Therefore, because CFPPA did not bring suit against an entity covered by the FOIA, we reverse and dismiss the matter, along with the circuit court's order granting attorney's fees.[3]

Reversed and dismissed.

John H. BOLDIN *v.* STATE of Arkansas

CR 07-1024 266 S.W.3d 752

Supreme Court of Arkansas
Opinion delivered November 1, 2007

Dana A. Reece, for appellant.

No response.

PER CURIAM. Appellant John H. Boldin, by and through his attorney, has filed a motion for rule on clerk. His attorney, Dana A. Reece, states in the motion that the record was tendered late due to a mistake on her part.

[3] Because we reverse on Nabholz's first point, there is no need to address its remaining points on appeal.

Because Reece has admitted fault, this motion is granted pursuant to *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). A copy of this opinion will be forwarded to the Committee on Professional Conduct.

DANIELSON, J., not participating.

Christopher L. BRANNING *v.* STATE of Arkansas

CR 07-789 266 S.W.3d 753

Supreme Court of Arkansas
Opinion delivered November 1, 2007

James W. Wyatt, for appellant.

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

PER CURIAM. Appellant filed a petition for writ of certiorari and motion for extension of time to file the record on July

30, 2007. On September 6, 2007, this court granted the petition and directed that the Circuit Court of Boone County complete and file a certified supplemental record within thirty days from the date of the per curiam. On October 5, 2007, the Boone County Circuit Clerk issued an affidavit stating that the complete record had been prepared but that she had not received the completed transcript from the court reporter. The clerk's supplemental record was tendered on October 8, 2007. Branning shows this court that the court reporter has already failed to comply with an order of the trial court extending the time for preparing and filing the transcript to August 2, 2007, which was seven months from entry of judgment.

We hereby order the court reporter to complete and file the transcript in this matter within thirty days of the date of this per curiam. The supreme court clerk is directed to forward a copy of this per curiam to the Board of Certified Court Reporter Examiners for any action it may deem appropriate under its rules. *See Crawford v. State*, 359 Ark. 408, 198 S.W.3d 121 (2004); *Epps v. State*, 338 Ark. 551, 998 S.W.2d 419 (1999).

CITIFINANCIAL RETAIL SERVICES DIVISION of CITICORP TRUST BANK, FSB *v.* Richard WEISS, in His Official Capacity as Director, Arkansas Department of Finance and Administration; and Timothy J. Leathers, in His Official Capacity as Commissioner of Revenue, Arkansas Department of Finance and Administration

07-551 266 S.W.3d 740

Supreme Court of Arkansas
Opinion delivered November 1, 2007

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *John K. Baker* and *Jeffrey L. Spillyards*, for appellant.

Ronna Abshure, for appellee.

PER CURIAM. Appellant, CitiFinancial Retail Services, has appealed the February 8, 2007, order of the trial court granting summary judgment to the appellees in this case, Richard Weiss, in his official capacity as the Director of the Arkansas Department of Finance and Administration, and Timothy Leathers, in his official capacity as Revenue Commissioner. However, we are unable to consider CitiFinancial's appeal at this time because its brief is not in compliance with Ark. Sup. Ct. R. 4-2(b) (2007).

This case was decided on the parties' cross-motions for summary judgment. However, CitiFinancial has failed to include copies of either the parties' motions or the briefs in support thereof in its Addendum. Rule 4-2(a)(8) of the Rules of the Supreme Court requires the inclusion in the Addendum of the "relevant pleadings, documents, or exhibits essential to an understanding of the case and the Court's jurisdiction on appeal." Rule 4-3(b) explains the procedure to be followed when an appellant has failed to supply this court with a sufficient brief, providing as follows:

> Whether or not the appellee has called attention to deficiencies in the appellant's abstract or Addendum, the Court may address the question at any time. If the Court finds the abstract or Addendum to be deficient such that the Court cannot reach the merits of the case, or such as to cause an unreasonable or unjust delay in the disposition of the appeal, the Court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, Addendum, and brief, at his or her own expense, to conform to Rule 4-2(a)(5) and (8). Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the Court may direct. If after the opportunity to cure the deficiencies, the appellant fails to file a complying abstract, Addendum and brief

within the prescribed time, the judgment or decree may be affirmed for noncompliance with the Rule.

Accordingly, we order CitiFinancial to file a substituted Addendum containing the motions for summary judgment and the supporting briefs within fifteen days from the date of entry of this order. According to Rule 4-2(b)(3), if CitiFinancial fails to file a complying brief within the prescribed time, the order appealed from may be affirmed for noncompliance with the Rule.

After service of the substituted brief, the appellees shall have an opportunity to file a responsive brief in the time prescribed by the Supreme Court Clerk, or to rely on the brief that they have previously filed in this appeal.

Rebriefing ordered.

The ESTATE of SHAWN McKNIGHT *v.* BANK of AMERICA, N.A.

07-368 266 S.W.3d 742

Supreme Court of Arkansas
Opinion delivered November 1, 2007

Gary Eubanks & Associates, by: *Jeffrey A. Weber* and *Russell D. Marlin*, for appellant.

Wright, Lindsey & Jennings, LLP, by: *Isaac A. Scott, John G. Lile, III*, and *Judy Simmons Henry*, for appellee.

PER CURIAM. On September 27, 2007, Appellant, the estate of Shawn McKnight, filed a motion for leave to supplement the record on appeal or, in the alternative, to enforce a writ of certiorari entered by this court on May 3, 2007. We order the Clerk to reissue a writ of certiorari to complete the record in the present case.

On April 10, 2007, the appellants in *Estates of Jerome McKnight v. Bank of America*, 07-371, and *The Estate of Shawn McKnight, v. Bank of America, N.A.*, 07-368, lodged partial records from the Phillips County Circuit Court. On that same day, Appellants in both cases filed a petition for a writ of certiorari requesting that we order the circuit court clerk to complete the respective records because both records were missing certain exhibits from an underlying probate hearing. On May 3, 2007, we granted the petition for writ of certiorari to complete the record in both cases. On June 4, 2007, the circuit court clerk returned the writ with respect to 07-371, and a supplemental record consisting of trial exhibits was filed in that case. However, the writ regarding 07-368 was not returned and no supplemental record was filed.

On June 8, 2007, the appellant in 07-368 moved to consolidate the two cases. We denied the motion to consolidate on June 28, 2007. Appellant then filed a motion to use the exhibits from 07-371 in 07-368, asserting that the exhibits were from the same underlying probate hearing and were identical. On September 6, 2007, we denied Appellant's motion. Appellant now brings the present motion.

Appellant argues that the issue here can be remedied by supplementing the record in 07-368 with exhibits from the record in 07-371. In the alternative, Appellant requests that we enforce the writ issued to the Phillips County Circuit Court on May 3, 2007, with respect to 07-368. Appellee Bank of America responds, arguing that Appellant did not make any objections to the accounting or assert any claims and that the exhibits admitted in 07-371 should not be made part of the record in 07-368. Based on the facts above, we direct the Supreme Court Clerk to reissue the writ of certiorari to complete the record in 07-368.

Motion granted.

Debra SMITH *v.* ARKANSAS DEPARTMENT of HEALTH & HUMAN SERVICES

07-1066 266 S.W.3d 694

Supreme Court of Arkansas
Opinion delivered November 1, 2007

Melissa Dorn Bratton, for appellant.

No response.

PER CURIAM. Debra Smith, by her attorney, Melissa Dorn Bratton, has filed a Motion to Amend the Notice of Appeal and Stay the Briefing Schedule. While captioned as a motion to amend the notice of appeal, Smith moves this court for relief from Ark. Sup. Ct. R. 6-9(b)(2)(d) which requires that a notice of appeal be signed by the appellant, if an adult, and by counsel. The notice of appeal in this case was signed by Smith's counsel Tom Garner; however, it was not signed by Smith. While Smith asserts a right to move to amend the notice and add the signature, this court has treated this issue as a motion for belated appeal. *See Martin v. Arkansas Dep't of Health and Human Servs.*, 369 Ark. 477, 255 S.W.3d 830 (2007).

In an order entered July 18, 2007, The Fulton County Circuit Court terminated Smith's parental rights and granted the Arkansas Department of Health and Human Services the power to consent to the adoption of Smith's minor son Joshua Smith. On August 1, 2007, Garner filed a notice of appeal; however, Smith did not sign the notice. On August 14, 2007, a notice of appeal signed by both Garner and Smith was filed. Under Ark. Sup. Ct. R. 6-9(b)(2), the notice of appeal had to be filed "within 14 days from the entry of the circuit court order from which the appeal is

being taken." The noncomplying notice was timely filed on the 14th day; however, the amended notice was not filed until two weeks later. It was untimely.

This court has clarified its treatment of motions for rule on clerk and motions for belated appeals in criminal cases in *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004).

There we said:

> Where an appeal is not timely perfected, either the party or attorney filing the appeal is at fault, or there is good reason that the appeal was not timely perfected. The party or attorney filing the appeal is therefore faced with two options. First, where the party or attorney filing the appeal is at fault, fault should be admitted by affidavit filed with the motion or in the motion itself. There is no advantage in declining to admit fault where fault exists. Second, where the party or attorney believes that there is good reason the appeal was not perfected, the case for good reason can be made in the motion, and this court will decide whether good reason is present.

Id. at 116, 146 S.W.3d at 891 (footnote omitted). While this court no longer requires an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where he or she has erred and is responsible for the failure to perfect the appeal. *See id.* When it is plain from the motion, affidavits, and record that relief is proper under either rule based on error or good reason, the relief will be granted. *See id.* If there is attorney error, a copy of the opinion will be forwarded to the Committee on Professional Conduct. *See id.* While the instant case is not a criminal case, we have afforded indigent parents appealing from a termination of parental rights similar protections to those afforded indigent criminal defendants by applying the *McDonald* standard. *See, e.g.*, *Martin*, *supra*. (granting a motion for belated appeal in a termination-of-parental-rights case).

It is plain from Smith's motion that there was error on the part of her attorney Tom Garner. A review of the notice of appeal reveals that Smith did not sign the notice of appeal. The language of Ark. Sup. Ct. R. 6-9(b)(2)(D) is clear:

> The notice of appeal and designation of the record shall be signed by the appellant, if an adult, and appellant's counsel. The notice shall set forth the party or parties initiating the appeal, the address of the party or parties, and specify the order from which the appeal is taken.

Ark. Sup. Ct. R. 6-9(b)(2)(D). Because Smith's notice of appeal lacked her signature, it was deficient. Pursuant to *McDonald v. State, supra*, we grant Smith's motion for belated appeal and forward a copy of this opinion to the Committee on Professional Conduct.

Motion granted.

Woodruff T. SPARACIO *v.* STATE of Arkansas

CR 07-1025 266 S.W.3d 751

Supreme Court of Arkansas
Opinion delivered November 1, 2007

Thurman Ragar, Jr., for appellant.

No response.

PER CURIAM. Attorney Thurman Ragar, Jr., has filed a motion to be relieved from representing appellant Woodruff Thomas Sparacio on appeal. Sparacio was convicted of two counts of rape in Crawford County on May 26, 2007. On June 6, 2007, Sparacio's trial attorney, Naif Khoury, moved to withdraw as

counsel. The trial court granted that motion and appointed Ragar that same day. Also on June 6, 2007, Ragar filed a notice of appeal on Sparacio's behalf. Following the June 6 notice of appeal, attorney Dana Reece filed a motion to set aside the order appointing Ragar as counsel. The trial court granted her motion on June 16, 2007. On October 3, 2007, Reece filed the instant motion for rule on clerk,[1] and on October 5, 2007, Ragar filed a motion to withdraw as attorney on direct appeal.

We are unable to consider Reece's motion at this time. Under Ark. R. App. P.–Crim. 16(a), once the notice of appeal has been filed, "the appellate court shall have exclusive jurisdiction to relieve counsel and appoint new counsel." Thus, because Ragar had filed a notice of appeal on June 6, 2007, the trial court lacked jurisdiction to grant Reece's subsequent motion to set aside the order appointing Ragar as counsel. Consequently, because Reece was never properly appointed as counsel, she did not represent Sparacio, and this court will not consider a motion for rule on clerk filed by her at this stage of the proceedings.

As Ragar has not yet been relieved as counsel, he remains counsel of record, and we therefore direct him to file a motion for rule on clerk on Sparacio's behalf. We will hold Ragar's motion to withdraw as counsel in abeyance until such time as he has filed the motion for rule on clerk. Further, should Reece wish to represent Sparacio on appeal, she may file a motion with this court for appointment as counsel.

[1] Reece's motion for rule on clerk asserts that the order extending the time for lodging the record did not comply with Ark. R. App. P.–Civ. 5.

Debra TALBERT *v.* U.S. BANK

07-497 266 S.W.3d 741

Supreme Court of Arkansas
Opinion delivered November 1, 2007

Bradley J. Williams, for appellant.

Herbert C. Rule, III, for appellee.

PER CURIAM. Appellant Debra Talbert appeals the Pulaski County Circuit Court's order granting Appellee U.S. Bank's motion for summary judgment. Because Appellant has submitted a brief without a proper abstract in violation of Ark. Sup. Ct. R. 4-2 (a)(5), we order rebriefing.

Rule 4-2(b)(3) explains the procedure to be followed when an appellant has failed to supply this court with a sufficient brief and states:

> Whether or not the appellee has called attention to deficiencies in the appellant's abstract or Addendum, the Court may address the question at any time. If the Court finds the abstract or Addendum to be deficient such that the Court cannot reach the merits of the case, or such as to cause an unreasonable or unjust delay in the disposition of the appeal, the Court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, Addendum, and brief, at his or her own expense, to conform to Rule 4-2(a)(5) and (8). Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the Court may direct. If after the opportunity to cure the deficiencies,

> the appellant fails to file a complying abstract, Addendum and brief within the prescribed time, the judgment or decree may be affirmed for noncompliance with the Rule.

Id.

In the case at bar, a hearing was held on January 8, 2007, in which counsel for both parties discussed with the trial court the merits of Appellee's summary-judgment motion. Among the issues discussed was whether Appellee waived its right to collect an amount of $15,000 from Appellant because it failed to place a permanent hold on her account. While Appellant argued Appellee's waiver of its claim for the $15,000 as one of her points on appeal, Appellant failed to abstract the discussion of that issue, which occurred during the summary-judgment hearing below. Here, as Appellant has failed to comply with this Rule, we order Appellant to properly abstract the entire transcript of the January 8 hearing and to file a substituted brief within fifteen days from the date of entry of this order. According to Rule 4-2(b)(3), if Appellant fails to file a complying brief within the prescribed time, the order appealed from may be affirmed for noncompliance with the Rule.

After service of the substituted brief, Appellee shall have an opportunity to file a responsive brief in the time prescribed by the Supreme Court Clerk, or to rely on the brief that it has previously filed in this appeal.

Rebriefing ordered.

James WEDGEWORTH *v.* STATE of Arkansas

CR 07-1042 266 S.W.3d 743

Supreme Court of Arkansas
Opinion delivered November 1, 2007

Katherine S. Streett, for appellant.

No response.

PER CURIAM. Appellant James Wedgeworth, by and through his attorney, has filed a motion for rule on clerk. His attorney, Katherine S. Streett, Public Defender for the Thirteenth Judicial District, states in the motion that she takes full responsibility for the late tender of the record.

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 stated 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." *Id.* at 116, 146 S.W.3d at 891. Because Ms. Streett has admitted fault, this motion is granted in accordance with *McDonald*. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion granted.

James WEDGEWORTH *v.* STATE of Arkansas

CR 07-1042 266 S.W.3d 743

Supreme Court of Arkansas
Opinion delivered November 1, 2007

Katherine S. Streett, for appellant.

No response.

PER CURIAM. Katherine S. Streett, a full-time, state-salaried public defender for the Thirteenth Judicial District, was appointed by the circuit court to represent Appellant James Wedgeworth on the charge of capital murder. Appellant was convicted of the charge and sentenced to life without parole in the Arkansas Department of Correction. A timely notice of appeal was filed with the circuit clerk, and the record has been lodged in this court.

Ms. Streett now asks to be relieved as counsel for Appellant in this criminal appeal, based upon *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000) (holding that full-time, state-salaried public defenders were ineligible for compensation for their work on appeal), and Ark. Code Ann. § 19-4-1604(b)(2)(B) (Supp. 2005) (providing that persons employed as full-time public defenders, who are not provided a state-funded secretary, may also seek compensation for appellate work from the Arkansas Supreme Court or the Arkansas Court of Appeals).

Ms. Streett's motion states that she is provided with a full-time, state-funded secretary. Accordingly, we grant her motion to withdraw as counsel. Tim Cullen will be substituted as attorney for Appellant in this matter. The Clerk will establish a new briefing schedule.

Motion granted.

Christopher BRANNING *v.* STATE of Arkansas

CR 07-415 267 S.W.3d 599

Supreme Court of Arkansas
Opinion delivered November 8, 2007

Erwin L. Davis, for appellant.

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

JIM HANNAH, Chief Justice. Appellant Christopher Branning was convicted of second-degree stalking, two counts of first-degree terroristic threatening, and misdemeanor violation of a protection order, for which he was sentenced to concurrent terms of 120 months, 72 months, 72 months, and 259 days, respectively, in the Arkansas Department of Correction. On appeal, Branning argues that the circuit court erred in denying his motion to dismiss based on double-jeopardy grounds and his motion to dismiss based on speedy-trial grounds. In an unpublished opinion, the court of appeals reversed and dismissed Branning's convictions for second-degree stalking and the first count of terroristic threatening based on double-jeopardy grounds; Branning's speedy-trial argument was not addressed. *Branning v. State*, CACR 05-989 (Ark. App. Apr. 4, 2007). The State petitioned this court for review, contending that the decision of the court of appeals is in conflict with prior case law, and is therefore in error. We granted the State's petition for review pursuant to Ark. Sup. Ct. R. 1-2(e). When we grant review following a decision by the court of appeals, we review the case as though the appeal was originally filed with this court. *See, e.g., Porter v. State*, 356 Ark. 17, 145 S.W.3d 376 (2004). We affirm the circuit court and reverse the court of appeals.

Branning was arrested on December 3, 2003, and charged in Harrison District Court with four misdemeanors: harassing communications, terroristic threatening, carrying a weapon, and second-degree assault. Pursuant to an agreement with the State, Branning pled guilty on May 5, 2004, to carrying a weapon and second-degree assault. Branning was placed on a suspended sentence, and the State *nol prossed* the charges for harassing communications and terroristic threatening.

On January 27, 2005, in circuit court, the State charged Branning by amended information with six felony offenses:

(1) Stalking in the second degree, based on a course of conduct occurring between December 3, 2003, and June 7, 2004;

(2) Terroristic Threatening in the First Degree, Count One, based on conduct occurring December 3, 2003;

(3) Criminal Mischief in the First Degree, based on conduct occurring February 15, 2004;

(4) Criminal Trespass, based on conduct occurring May 1, 2004;

(5) Terroristic Threatening in the First Degree, Count Two, based on conduct occurring May 15, 2004; and

(6) Violation of an Order of Protection, based on conduct occurring June 7, 2004.

Branning filed motions to dismiss based on double-jeopardy grounds and speedy-trial grounds. The circuit court denied both motions, concluding that double jeopardy was not implicated, given that the amended information did not reassert any charges underlying Branning's district court convictions for carrying a weapon and second-degree assault. The circuit court also concluded that, "because the charges of harassing communications and terroristic threatening were *nol prossed*, a procedure that allows for the refiling of those charges, the State is entitled to proceed on those charges without being prevented from doing so by the double jeopardy (former prosecution) provisions of the Arkansas Constitution and the Arkansas Code Annotated § 5-1-110—112." Further, the circuit court concluded that, while Branning was brought to trial more than one year after he was arrested, the State was not barred from prosecuting him because the period of delay was excludable under the speedy-trial rule.

Branning now brings this appeal. Because Branning alleges a double-jeopardy violation based on convictions for conduct occurring on December 3, 2003, the charges of terroristic threatening, count two, and violation of an order of protection, both of which occurred after December 3, 2003, are not at issue in this appeal. In addition, the first-degree criminal mischief and criminal trespass charges were severed and are not a part of this appeal. Thus, we address Branning's double-jeopardy argument only as it applies to his charges for stalking in the second degree and terroristic threatening in the first degree, count one.

When reviewing a denial of a motion to dismiss for violation of the Double Jeopardy Clause, typically a question of law, a de novo review should be conducted. *Winkle v. State*, 366 Ark. 318, 235 S.W.3d 482 (2006) (citing *United States v. Brekke*, 97 F.3d 1043 (8th Cir. 1996); *Muhammad v. State*, 67 Ark. App. 262, 998 S.W.2d 763 (1999)).

Branning first argues that the circuit court erred in denying his motion to dismiss based on double-jeopardy grounds because he had already been charged and convicted of misdemeanors arising out of the same occurrence. He states that the *nol prossing* of

the two charges was "obviously part of a plea agreement." Accordingly, he argues that "he was placed in jeopardy for all events occurring on December 3, 2003," and that successful prosecution of him in district court precluded him from being charged with the same acts at some later date, "as the element in a multi-element stalking charge." He states that he was charged twice in two courts for the same thing and was convicted both times. Thus, he claims that the State is barred from prosecuting him in circuit court.

The State argues that it was not barred from prosecuting Branning in circuit court, pursuant to this court's holding in *McKinney v. State*, 215 Ark. 712, 223 S.W.2d 185 (1949). We agree. In *McKinney*, we held that "the State's dismissal of a case before the trial has begun does not prevent a subsequent prosecution." *Id.* at 713, 223 S.W.2d at 185 (citing Justin Miller, *Miller on Criminal Law* § 186 (1934)). Here, the acts constituting the stalking charge in circuit court were the basis of the harassing-communications charge in district court, and count one of the terroristic-threatening charge in circuit court was based on the same conduct as the terroristic-threatening charge in district court. However, as we previously noted, the harassing-communications charge and terroristic-threatening charge in district court were *nol prossed* and constituted separate crimes, even though they arose from the same criminal episode. Thus, Branning's argument that "he was charged twice in two courts for the same thing and was convicted both times" is simply without merit. A *nolle prosequi*, or *nol pros*, is a dismissal of a prosecution without prejudice to refile. *See Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002). *See also* Black's Law Dictionary 1074 (8th ed. 2004) (The Latin words translated into English mean "not to wish to prosecute."). The State, having *nol prossed* the charges in district court, was free to bring a subsequent prosecution. *See McKinney, supra*; *see also Halton v. State*, 224 Ark. 28, 271 S.W.2d 616 (1954) (stating that a dismissal of an indictment is not a bar to a future prosecution for the same offense). We hold that the circuit court did not err in denying Branning's motion to dismiss on double-jeopardy grounds.

Branning next argues that the circuit court erred in denying his motion to dismiss the case against him due to a violation of the speedy-trial rules. We recently stated in *Yarbrough v. State*, 370 Ark. 31, 33-34, 257 S.W.3d 50, 53 (2007):

> Under Rule 28.1 of the Arkansas Rules of Criminal Procedure, a defendant must be brought to trial within twelve months unless there are periods of delay that are excluded under Rule 28.3. Ark. R. Crim. P. 28.1(c) (2006); *Gamble v. State*, 350 Ark. 168, 85 S.W.3d 520 (2002); *Doby v. Jefferson County Circuit Court*, 350 Ark. 505, 88 S.W.3d 824 (2002). If the defendant is not brought to trial within the requisite time, the defendant is entitled to have the charges dismissed with an absolute bar to prosecution. Ark. R. Crim. P. 30.1 (2006); *Gamble v. State, supra*; *Doby v. Jefferson County Circuit Court, supra*. Once a defendant establishes a prima facie case of a speedy-trial violation, i.e., that his or her trial took place outside of the speedy-trial period, the State bears the burden of showing that the delay was the result of the defendant's conduct or was otherwise justified. *Gamble v. State, supra*; *Doby v. Jefferson County Circuit Court, supra*.

In the case before us, Branning was arrested on December 3, 2003. On February 1, 2005, Branning filed a motion to dismiss for violation of his speedy-trial rights based on a scheduled trial date of February 2, 2005. We have held that the filing of a speedy-trial motion tolls the running of the time for a speedy trial under our rules. *Yarbrough, supra*. Here, the State concedes that Branning made a prima facie showing of a speedy-trial violation, and that the burden shifted to the State to show the delay was the result of the defendant's conduct or was otherwise justified.

On appeal, we conduct a de novo review to determine whether specific periods of time are excludable under our speedy-trial rules. *Yarbrough, supra*; *Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002). There were 426 days between Branning's arrest on December 3, 2003, and February 1, 2005, the day his speedy-trial motion was filed. The district court docket sheet reflects that on May 5, 2004, the charges of harassing communications and terroristic threatening, based on the conduct that occurred on December 3, 2003, were *nol prossed* by the State. The prosecutor filed a felony information in circuit court on June 25, 2004. The period of delay due to the State's *nol prossing* of charges for good cause is excludable under the speedy-trial rule. Ark. R. Crim. P. 28.3(f). Branning does not contend that the State lacked good cause. The district court disposed of the four charges in that court by taking two charges, harassing communications and terroristic threatening, under advisement for one year, until May 4, 2005, condi-

tioned upon, among other things, no like charges being filed and by *nol prossing* the other two charges. The period between the *nol pros* in district court and the filing of charges in circuit court — May 5 to June 25, 2004 — is 51 days.

At Branning's request, the circuit court granted a continuance from November 5 to December 3, 2004, a period of 28 days. Delays resulting from continuances given at the request of the defendant are excluded in calculating the time for speedy trial. Ark. R. Crim. P. 28.3(c); *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000).

Subtracting the *nol pros* and continuance periods (51 and 28 days, respectively) from the overall 426-day period leaves 347 days, well within the one-year period of the speedy-trial rule. Thus, the circuit court did not err in denying Branning's motion to dismiss on speedy-trial grounds.

Affirmed.

Marcus Lance RACKLEY *v.* STATE of Arkansas

CR 06-385 267 S.W.3d 578

Supreme Court of Arkansas
Opinion delivered November 8, 2007

Lisa C. Ballard, for appellant.

Dustin McDaniel, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

TOM GLAZE, Justice. Appellant Marcus Rackley was charged with thirty-seven various sex offenses in Faulkner County; the charges, which included rape, incest, second-degree sexual assault, and first-degree sexual abuse, stemmed from allegations that Rackley had repeatedly sexually molested his step-daughter, T.W., between 2001 and 2004. Cynthia Rackley, Marcus Rackley's wife and T.W.'s mother, was also charged with permitting abuse of a minor, a misdemeanor violation of Ark. Code Ann. § 5-27-206 (Repl. 2006).

Prior to trial, Rackley filed a motion pursuant to the Arkansas rape-shield statute, Ark. Code Ann. § 16-42-101 (Repl. 1999), seeking permission to introduce an "instant message," or IM, conversation in which T.W. had engaged with her boyfriend. Following a hearing on Rackley's motion, the trial court entered an order on June 7, 2005, finding that the evidence was irrelevant to the proceedings as it was not "evidence directly pertaining to the act upon which the prosecution is based or evidence of the victim's prior sexual conduct with the defendant or any other person." Just prior to trial, however, the court determined that, if T.W. denied having a relationship with the boy with whom she was communicating, Rackley could introduce a redacted version of the transcript of the IM conversation to impeach her.

The case proceeded to trial on June 22-23, 2005. A Faulkner County jury convicted him on all counts and sentenced him to a

total of thirty-seven years in the Arkansas Department of Correction. Rackley filed a timely notice of appeal, and now raises two arguments for reversal.

As mentioned above, Rackley's wife, Cynthia, also faced charges stemming from Rackley's sexual abuse of T.W. According to a footnote in Rackley's brief,[1] Cynthia was initially charged with permitting abuse of a minor, a felony violation of Ark. Code Ann. § 5-27-221 (Repl. 2006); however, the charge was subsequently reduced to the misdemeanor offense of endangering the welfare of a minor, Ark. Code Ann. § 5-27-206 (Repl. 2006). The same attorney, Max Horner, represented both Rackleys. In his first point on appeal, Marcus Rackley argues that the trial court should have taken it upon itself to inquire into this "joint representation" situation.

Rackley concedes at the outset of his argument that it "may be that the resolution of this matter will occur in Rule 37 proceedings [as] indeed, many of the relevant decisions on the point have come in postconviction proceedings." Nonetheless, he insists that his counsel's conflict was "so egregious" that he "posits a valid jurisprudential basis for its consideration now." In essence, Rackley asserts that the conflict inherent in his attorney's representation of both himself and his wife was so conspicuously offensive that the trial court should have "intervene[d], without an objection, to correct a serious error either by an admonition to the jury or by ordering a mistrial." *See Wicks v. State*, 270 Ark. 781, 786, 606 S.W.2d 366, 369-70 (1980).

This third of the so-called *Wicks* exceptions is a narrow one and, since *Wicks*, it has rarely been applied. *See Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006). The exception applies 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." *Springs*, 368 Ark. at 261, 244 S.W.3d at 687 (quoting *Anderson v. State*, 353 Ark. 384, 395, 108 S.W.3d 592, 599 (2003)). Indeed, this court has held that the third *Wicks* exception "has only been applied to cases in which a defendant's fundamental right to a trial by jury is at issue." *Id.* (quoting *McKenzie v. State*, 362 Ark. 257, 277, 208 S.W.3d 173, 184 (2005)).

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[1] Neither the record nor the addendum contains documents that indicate the crimes with which Cynthia was charged.

Rackley cites to no cases in which a claim of ineffective assistance of counsel due to a conflict of interest has been considered by this court on direct appeal in the absence of an objection in the trial court. However, our court of appeals has rejected such an argument in *Cook v. State*, 76 Ark. App. 447, 68 S.W.3d 308 (2002). In *Cook*, the same attorney represented two co-defendants, Cook and Burris. On appeal, Cook argued that because his attorney also represented his co-defendant, his defense was prejudiced by creating a conflict of interest, thereby denying his right to effective assistance of counsel. Even though Cook had not raised this argument to the trial court, he argued on appeal that it should fall within the third *Wicks* exception, and that the trial judge should have been obligated to make an inquiry into the conflict on his own motion. *Cook*, 76 Ark. App. at 453, 68 S.W.3d at 312-13.

The court of appeals noted that the crux of Cook's argument was that he had been denied the effective assistance of counsel, and that such claims are typically raised in Rule 37 proceedings, where the parties have an opportunity to develop a record on the conduct of defense counsel, and counsel can testify on his or her own behalf. *Id.*, 68 S.W.3d at 313. However, Cook had not raised his conflict-of-interest argument in the trial court, and the court of appeals concluded that his argument was one of ineffective assistance of counsel, which was not "an immediate and egregious trial error" that warranted application of the third *Wicks* exception. *Id.* at 454, 68 S.W.3d at 313. Accordingly, the court of appeals concluded that Cook's ineffective-assistance argument was not preserved for appellate review. *Id.*[2]

Our research has not revealed a single case where this court has considered an ineffective-assistance, conflict-of-interest argument on direct appeal in the absence of a proper objection in the trial court. Certainly, an ineffective-assistance argument can be raised on direct appeal, but it may only be done if 1) the issue was first raised during trial or in a motion for new trial, and 2) the facts and circumstances were fully developed either during trial or during other hearings conducted by the trial court. *See, e.g.*,

[2] In *Cook v. State*, 361 Ark. 91, 204 S.W.3d 532 (2005), Cook's appeal from the circuit court's denial of his petition for postconviction relief pursuant to Ark. R. Crim. P. 37, this court noted the court of appeals' treatment of this issue and voiced no concerns with it. *Cook*, 361 Ark. at 99, 204 S.W.3d at 536. Moreover, this court rejected Cook's multiple claims that his attorney's joint representation had caused counsel to labor under a conflict of interest. *Id.* at 99-102, 204 S.W.3d at 536-38.

Ratchford v. State, 357 Ark. 27, 159 S.W.3d 304 (2004) (this court will not consider ineffective assistance as a point on direct appeal unless that issue has been considered by the trial court); *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002); *Price v. State*, 347 Ark. 708, 66 S.W.3d 653 (2002) (considering an ineffective-assistance, conflict-of-interest argument on direct appeal where appellant raised the issue in a motion for new trial). Here, Rackley failed to raise his conflict-of-interest argument in the trial court. Accordingly, we hold that he has failed to preserve this argument for review.

In his second point on appeal, Rackley argues that the trial court erred in finding that evidence of sexual conversations between the victim and her boyfriend were encompassed by the rape-shield statute. Under Arkansas's rape-shield statute, Ark. Code Ann. § 16-42-101, evidence of a victim's prior sexual conduct is inadmissible by the defendant to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose. Ark. Code Ann. § 16-42-101(b) (Repl. 1999); *see also Rapp v. State*, 368 Ark. 387, 246 S.W.3d 858 (2007). The trial court is vested with a great deal of discretion in determining whether the evidence is relevant, and we will not overturn the trial court's decision unless it constitutes a clear error or a manifest abuse of discretion. *See Parish v. State*, 357 Ark. 260, 163 S.W.3d 843 (2004).

As mentioned above, prior to trial, Rackley argued that he should be permitted to introduce a transcript of an instant-message conversation between T.W. and her boyfriend. In his rape-shield motion, Rackley alleged that the conversation "included statements of [a] sexual nature," and he urged that the material should be admitted at trial in order to challenge the credibility of the victim.

The trial court held an *in camera* hearing on Rackley's rape-shield motion on June 5, 2005. At that time, Rackley argued that the instant messages went to show T.W.'s motives and credibility. In addition, he contended that the instant messages were not "sexual conduct" that would be covered by the rape-shield statute. The trial court did not rule on the motion at the time, but entered an order two days later on June 7, 2005, finding that the evidence offered was not evidence pertaining to the act upon which the prosecution was based or evidence of the victim's prior sexual conduct with the defendant or any other person, and was thus not relevant to the proceedings.

On the morning of trial, Rackley changed his tack slightly and asserted to the court that he wished to introduce the instant message conversation "to establish that [the victim] was speaking with this boy [whom] she wasn't supposed to. Her parents had forbidden her to do this." He also averred the "part about the sex" could be redacted, because that was "not really [his] interest in using that piece of evidence." The trial court ruled that, if T.W. denied speaking to the boy, Rackley would be permitted to use the transcript of the conversation, with the references to sexual conduct redacted from it. Rackley further noted that the messages went "to her motivation behind her making these accusations, in that she is having this relationship with this boy that her parents have forbidden her to have." The following colloquy then occurred:

> THE COURT: Well, the question is going to be, I presume, were you forbidden to have a relationship or any conversation or contact with this young man, and did you violate that? If she says no, then you could use —
>
> RACKLEY: And I would say specifically, "were you instant messaging him when you were not supposed to on the computer?"
>
> THE COURT: All right.
>
> RACKLEY: And that would really be the gist of it, and I think we could — I mean, and there is also another part in there where she talks about skipping school, which again is something that goes to her credibility. . . . And . . . I mean, if she admits it, then that will be that, I mean, and there's no need to —
>
> PROSECUTOR: But the document itself, just to be clear, is inadmissible into evidence.
>
> RACKLEY: In its present state.
>
> PROSECUTOR: No, Judge, the document, to make clear, is inadmissible as evidence.
>
> RACKLEY: Oh, yes.
>
> THE COURT: At this point, yes. If she denies that she did that, then it could be introduced as impeachment evidence, and then we'll redact that part that needs to be done.

On appeal, Rackley acknowledges that the trial court permitted him to cross-examine T.W. regarding her bias and also allowed him to redact the messages to omit the sexual discussion. Nonetheless, he asserts that the "problem" with the trial court's ruling was that the sexual content of the instant messages was the "integral part" of the evidence. Our difficulty with Rackley's argument is that he represented to the trial court that the "part about the sex" was "not really [his] interest in using that piece of evidence," and he agreed that using the redacted version of the instant-message transcript would be sufficient to challenge the victim's credibility. A party may not attack and appeal from a decision to which he agreed. *See Brown v. State*, 368 Ark. 344, 246 S.W.3d 414 (2007); *Banks v. State*, 354 Ark. 404, 125 S.W.3d 147 (2003) (a defendant cannot agree with the trial court's ruling and later attack the ruling on appeal); *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 355 (2001). Accordingly, we do not reach the merits of Rackley's second point on appeal.

Affirmed.

Doris HUBBARD, Individually and as Administratrix of the Estate of Thelma Hayes, Deceased *v.* NATIONAL HEALTHCARE of POCAHONTAS, INC., d/b/a Randolph County Medical Center

07-423 267 S.W.3d 573

Supreme Court of Arkansas
Opinion delivered November 8, 2007

Rees Law Firm, by: *David Rees*; *Woodruff Law Firm, P.A.*, by: *Arlon L. Woodruff*, for appellant.

Friday, Eldredge & Clark, LLP, by: *John Dewey Watson*, *Jason B. Hendren*, and *J. Adam Wells*.

DONALD L. CORBIN, Justice. Appellant Doris Hubbard, individually and as administratrix of the estate of Thelma Hayes, deceased, appeals the Randolph County Circuit Court's order granting summary judgment in favor of Appellee National Healthcare of Pocahontas, Inc., d/b/a Randolph County Medical Center. On appeal, Appellant raises three arguments for reversal: (1) the circuit court erred in granting summary judgment where the complaint, on its face, was not barred by the statute of limitations; (2) Appellant, as special administratrix, was not required to have letters of administration executed to have authority to file a malpractice action; and (3) the circuit court erred in granting summary judgment where, by order of appointment, Appellant was authorized to file an action. This court assumed jurisdiction of this case pursuant to Ark. Sup. Ct. R. 1-2(b)(6). We find no error and affirm.

On April 9, 2003, Appellant filed this wrongful-death and survival action alleging medical negligence on the part of Appellee

relating to care provided to Hayes, which proximately caused Hayes's death in September 2002. Attached to the complaint was a signed order appointing Appellant as special administratrix of Hayes's estate. On April 25, 2003, both Appellant's petition for appointment of special administratrix and the circuit court's order of appointment were filed of record. On April 29, 2003, Appellee filed a response in which it denied all of Appellant's allegations. Appellee also raised numerous affirmative defenses, including that Appellant's allegations were barred by the applicable statute of limitations.

Then, on October 26, 2006, Appellee filed a motion for summary judgment. Specifically, Appellee claimed that Appellant lacked standing to bring the claims alleged in the complaint when it was filed. Therefore, Appellee argued, Appellant never properly commenced an action and her claims were now time barred by the applicable two-year statute of limitations, which expired in September 2004. On December 28, 2006, after a hearing on the matter, the circuit court granted Appellee's motion for summary judgment and the case was dismissed with prejudice. This appeal followed.

The law is well settled that summary judgment is to be granted by a circuit court when there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *See Stromwall v. Van Hoose*, 371 Ark. 267, 265 S.W.3d 93 (2007). 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 id.* On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *See id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *See id.* Our review focuses not only on the pleadings, but also on the affidavits and documents filed by the parties. *See id.*

This case involves both a wrongful-death and a survival action based upon Appellee's alleged medical negligence. Under Ark. Code Ann. § 16-62-101 (Repl. 2005) only the administrator can file a survival action. Furthermore, pursuant to Ark. Code Ann. § 16-62-102(b) (Repl. 2005),

> [e]very [wrongful-death] action shall be brought by and in the name of the personal representative of the deceased person. If there is no personal representative, then the action shall be brought by the heirs at law of the deceased person.

Thus, the wrongful-death code does not create an individual right in a beneficiary to bring suit, and where no personal representative has been appointed, a wrongful-death suit must be filed with all of the heirs at law of the deceased joined as parties to the suit. *See Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002).

In the present case, Appellant filed suit individually and as administratrix of the estate. Appellant could not bring this suit individually. *See id.* Additionally, Appellant did not join all the heirs at law as parties to the suit. Although the complaint stated that Appellant was also bringing this suit on behalf of the decedent's heirs, whom she went on to name, none of these heirs at law were actually named as parties to the complaint. Therefore, only the appointed personal representative could bring the wrongful-death action. Also, because this suit included a survival claim, it could only be brought by the administrator. *See id.* Consequently, the primary issue is whether Appellant had standing as the duly-appointed administrator.[1]

On appeal, Appellant argues that she had standing because (1) she was not required to have letters of administration executed to file this medical-malpractice action, and (2) by order of appointment, she was authorized as the administratrix to file an action. Appellee responds that the lack of letters of administration is not the fatal flaw; rather, the failure to file a petition to allow the court to grant her authority by an order and the entry of the order by filing it in the probate records rendered the complaint a nullity because Appellant lacked standing.

First, letters of administration were not required to be executed in order to file suit. Since entry of the December 28 order, this issue has been addressed by both the legislature and this court. Specifically, the 2007 General Assembly enacted Act 438, which amended Ark. Code Ann. § 28-48-102 to state, "Letters of

[1] Appellant does not argue standing as her first point of appeal; however, the question of standing is a threshold issue that must be addressed first. *See Bomar v. Moser*, 369 Ark. 123, 251 S.W.3d 234 (2007).

administration are not necessary to empower the person appointed to act for the estate." Ark. Code Ann. § 28-48-102(d)(1)(A) (Supp. 2007). Section 28-48-102(d)(2) also provides that "[t]he order appointing the administrator empowers the administrator to act for the estate, and any act carried out under the authority of the order is valid." In *Steward v. Statler*, 371 Ark. 351, 356, 266 S.W.3d 710, 714 (2007) (emphasis added), we determined that this statute was meant to be retroactively applied and explained that "Act 438 declares letters of administration to be unnecessary *so long as* there is an order appointing the administrator." *Id.* (Emphasis added.) Thus, "the personal representative has the right to bring the action at the time the order appointing the personal representative is entered, not merely at the time the letters of administration are entered." *Id.* at 354, 266 S.W.3d at 714. Therefore, it is clear that letters of administration were not required for Appellant to file the present cause of action.

This case boils down to whether the order appointing Appellant as special administratrix had been entered at the time this cause of action was brought. It is well settled that an "order is entered when so stamped or marked by the clerk, irrespective of when it is recorded in the judgment record book." Administrative Order No. 2(b)(2). *See also* Ark. R. Civ. P. 58 ("A judgment or decree is effective only when so set forth and entered as provided in Administrative Order No. 2."). Furthermore, it is equally clear that the personal representative of the estate has the authority to act on behalf of the estate when the order of appointment is entered. *See Steward*, 371 Ark. 351, 266 S.W.3d 710 (explaining that the appellants were empowered to act on behalf of the estate when the order was entered or filed). *See also* Admin. Order No. 2; Ark. R. Civ. P. 58.

In the present case, Appellant filed her complaint on April 9, 2003. Attached to this complaint, as an exhibit, was a copy of an order of appointment, purportedly signed by the circuit judge on March 25, 2003. The order was not stamped or marked as filed in any way. On April 25, 2003, both Appellant's petition for appointment of special administratrix and the order of appointment were filed. It is undisputed that the order was not entered until after Appellant filed her complaint. Rather, Appellant argues that (1) the order was filed as an exhibit to the complaint; (2) the order, upon filing, granted her the authority as of the date of execution by

the court; and (3) an order of special administratrix is not an appealable order and therefore not subject to Administrative Order No. 2 and Rule 58. Appellant's arguments are without merit.

First, Appellant claims that, because the order was attached as an exhibit to the filed complaint, it had been "stamped to the extent [that] it is stamped as part of the Complaint, filed by the clerk of the Court" and "[t]he rules do not require each page to be marked stamped." Appellant does not cite to any legal authority for this proposition, but rather seems to assert that if the order of appointment must be "stamped" then it was since it was attached to the "stamped" complaint. This argument is not only contrary to our established rules that an *order* is *effective when stamped*, but it is also unconvincing and unsupported by legal authority. *See Stromwall*, 371 Ark. 267, 265 S.W.3d 93 (explaining that this court refuses to consider arguments not supported by convincing argument or citation to legal authority).

Appellant next argues that the order, upon filing, granted her authority as of the date of execution by the circuit court. Essentially, Appellant is claiming that the order was effective when the circuit court issued or signed the order, even if the order was filed at a later date. As with her previous argument, Appellant fails to cite to any legal authority or provide a convincing argument to support her proposition. Therefore, this argument cannot be addressed. *See id.*

Appellant's final argument is that an order of special administratrix is not an appealable order, and therefore is not subject to Administrative Order No. 2 and Rule 58. Specifically, Appellant claims that an order appointing special administrator is merely the court granting a statutory power, and it in no way creates a judgment or affects property such that it does not have to be filed to give life to the power it granted. This argument is without merit and is clearly contrary to the rule that an order is not entered until it is marked "filed." *See* Admin. Order No. 2. *See also Filyaw v. Bouton*, 87 Ark. App. 320, 191 S.W.3d 540 (2004) (rejecting the appellant's argument that Rule 58 and Administrative Order No. 2 do not apply because an order appointing a special administrator is nonappealable, and holding that the order must be filed with the clerk to be effective).

The order appointing Appellant was not effective until it was filed on April 23, almost two weeks after the complaint was filed. Therefore, at the time Appellant filed this cause of action against Appellee, she was not the administrator of the estate and did not have standing to pursue the claim against Appellee. The complaint filed on April 9 was, thus, a nullity. *See also St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County*, 348 Ark. 197, 73 S.W.3d 584 (2002) (holding that a pro se complaint filed by the deceased's parents and two of his sisters within the two-year statute of limitations period, even though at the time it was filed the probate court had already appointed an administrator of the estate, the complaint was a nullity because the pro se plaintiffs were without standing).

Appellant's final argument is that the circuit court erred in granting summary judgment and dismissing the cause of action because the complaint, on its face, was not barred by the statute of limitations. Specifically, she claims that, for the purposes of a motion for summary judgment, the circuit court was to look at the complaint on its face and if the full statute of limitations did not run before the filing of the complaint, then the motion should have been denied.

First, it should be noted that Appellant incorrectly states that the circuit court was only to look at the face of the complaint to determine if the statute of limitations was violated. This would be true if this were a motion to dismiss; however, in this case Appellee filed a motion for summary judgment. As stated above, in considering a summary judgment motion, our review focuses not only on the pleadings, but also on the affidavits and documents filed by the parties. *See Stromwall*, 371 Ark. 267, 265 S.W.3d 93.

Second, in Arkansas, a medical-malpractice action must be brought within two years of the date of the wrongful act complained of and no other time. Ark. Code Ann. § 16-114-203 (Repl. 2006). The medical-malpractice act applies to all causes of action for medical injury arising after April 2, 1979, including wrongful-death and survival actions arising from the death of a patient. *See St. Paul Mercury Ins. Co.*, 348 Ark. 197, 73 S.W.3d 584. Moreover, a party who relies upon a statute of limitations as a defense to a claim has the burden of proving that the full statutory period has run on the claim before the action was commenced. *See Bomar*, 369 Ark. 123, 251 S.W.3d 234.

In the present case, Appellant's complaint was a nullity because she did not have standing. Consequently, because Appellant never attempted to rectify or refile the action prior to the running of the statute of limitations, the circuit court did not err in granting summary judgment as the statute of limitations had expired in 2004, two years before the court's December 28, 2006 order dismissing with prejudice Appellant's case.

Affirmed.

Beth Marie RIDDLE, Julia A. Riddle, and Beth Marie Riddle Representing the Interest of Joseph H. Riddle, Sr., Deceased *v.* Richard J. UDOUJ, as Special Administrator for the Estate of Olivia K. Udouj, Deceased, and Michael A. Udouj and Richard J. Udouj, Trustees of the Olivia K. Udouj Trust Dated February 18, 1983

07-538 267 S.W.3d 586

Supreme Court of Arkansas
Opinion delivered November 8, 2007

[Rehearing denied December 6, 2007.]

Sam Sexton, III, for appellants.

Warner, Smith & Harris, PLC, by: *Douglas O. Smith, Jr.*, *Stephanie Harper Easterling*, and *Robert A. Frazier*, for appellees.

ROBERT L. BROWN, Justice. Appellants Beth Marie Riddle, et al. ("the Riddles") appeal the grant of summary judgment in favor of appellees Richard J. Udouj, et al. ("the Udoujes") and assert that the court erred in deciding the Riddles' claims regarding breach of the warranties of title and quiet enjoyment and constructive fraud based on the running of the respective statutes of limitations. We affirm the circuit court.

On May 30, 1996, the Riddles purchased a home in a residential neighborhood from the Olivia K. Udouj Trust. As part of that conveyance, Olivia Udouj provided a property disclosure, which stated in relevant part that: (1) there were no "features of the Property shared in common with adjoining landowners, such as walls, fences and driveways, the use or responsibility for which may have an effect on the property"; and (2) there were no "encroachments, easements, leases, liens [sic] adverse possession claims or similar matters that may affect the title to the Property." Prior to completing the purchase, the Riddles obtained a survey of the property, which indicated that the property described by the legal description extended several feet beyond the fences that lay to the north and the east of the property. These fences had been built in the 1950s by Olivia Udouj and her husband.

Sometime after purchasing the property, the Riddles began altering the landscaping to the east of the fence, leading the property owners to the east, Conrad F. Kaelin and Ava Paulette Kaelin ("the Kaelins"), to hire an attorney, who sent the Riddles a letter dated May 26, 1998, demanding that the Riddles not remove the existing fence or disturb any landscaping to the east of the fence. In July of 2000, the Riddles made additional changes to the landscaping east of the fence, removing trees, bushes and tulip plants and prompting the Kaelins' attorney to send the Riddles

another letter.[1] After a December 2000 ice storm, the Riddles had tree limbs removed from trees located to the north of the fence.

On June 18, 2001, the Riddles filed suit against the Kaelins in circuit court, seeking to quiet title to the disputed property east of the fence as per their survey. The Kaelins counterclaimed, asserting that the fence existing at the time the Riddles acquired the property described the boundary line by acquiescence. In 2002, the Riddles removed the northern fence and began constructing a new fence four feet to the north at what they alleged to be the true property line. This prompted the property owners to the north of the Riddles, Cecil Knight and Robbie Mae Knight ("the Knights"), to move to intervene in the lawsuit and seek to quiet title to the property to the north of the original fence. On October 15, 2002, the circuit court entered judgment in which it concluded that the old fence lines established by acquiescence the boundaries between the Riddles' land and the Knights' and Kaelins' land.

On January 13, 2005, the Riddles filed suit against the Udoujes and alleged breach of contract through breach of warranty of title, breach of warranty of quiet enjoyment, and breach of warranty to defend title. The Riddles also alleged constructive fraud by Olivia Udouj based on the representations she made in the property disclosure.[2]

On February 16, 2006, the Udoujes moved for summary judgment and argued that the Riddles' claims were barred by the statute of limitations. The Riddles responded that the statute of limitations for their claims of constructive fraud and breach of the warranties of title and quiet enjoyment did not begin to run until the entry of the circuit court's October 15, 2002 order, and, thus, their complaint was timely. Following a hearing on the motion, the circuit court found that the existence of hedges and landscaping on the disputed property to the north and east of the fence, when coupled with the Kaelins' May 26, 1998 letter to the Riddles, triggered the running of the statute of limitations for both

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[1] On November 17, 2000, the Riddles recorded a deed conveying the property to their daughter, Julia Riddle.

[2] Joseph Riddle, Sr. and Olivia Udouj died in early 2005. On May 13, 2005, the circuit court entered an order substituting Beth Riddle as the party representing Joseph Riddle's interest and James Shoffey as a special administrator representing the interest of Olivia Udouj. The role of special administrator is currently filled by Richard J. Udouj.

the breach of warranty and constructive fraud claims. An order to this effect was entered on April 24, 2006. The Riddles appealed. On May 9, 2007, the Arkansas Court of Appeals affirmed the circuit court's order. *See Riddle v. Udouj*, 99 Ark. App. 10, 16-17, 256 S.W.3d 556, 560 (2007). On May 25, 2007, this court granted the Riddles' petition for review.

After granting a petition for review, this court considers the case as if it had originally been filed in this court. *VanWagner v. Wal-Mart Stores, Inc.*, 368 Ark. 606, 608, 249 S.W.3d 123, 124 (2007). The standard used by this court when reviewing a circuit court's grant of summary judgment is well established:

> Summary judgment is to be granted by a trial court 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 its motion leave a material fact unanswered. 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. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable persons might reach different conclusions from those undisputed facts.

Lewis v. Mid-Century Insurance Company, 362 Ark. 591, 594, 210 S.W.3d 113, 115 (2005) (citations omitted).

The Riddles first assert that the statute of limitations did not begin to run on their breach-of-the-warranties-of-title and quiet-enjoyment claims until the court entered an order in October 2002, holding that the disputed property did not belong to the Riddles. It was only at that time, they argue, they were evicted from the disputed property. Until that time, they contend, they continued to use and enjoy the land. The Riddles claim, in addition, that their knowledge that their neighbors disputed their title to the land was insufficient to constitute eviction and was merely notice of a claim of paramount title. At the very least, they maintain, there was a disputed issue of fact regarding the date of eviction, which renders summary judgment inappropriate.

The Udoujes concede that in some cases an eviction is effected by the entry of a judgment. They contend, however, that a judgment was not needed to evict the Riddles in the case at hand. On the contrary, the Udoujes assert that the Riddles were never in possession of the disputed land and were constructively evicted on the date the property was conveyed to them in 1996, which triggered the statute of limitations. This constructive eviction, the Udoujes assert, was effected by the encroaching fence lines, which were visible and obvious. The Udoujes also point out that the Riddles knew from a survey that the fences were inside the boundaries described in their deed.

If these facts alone are insufficient to evict the Riddles constructively, the Udoujes argue that they should be considered in conjunction with the letter the Kaelins' attorney sent to the Riddles in 1998, which directed them to cease all activities east of the original fence. They further contend that the hostile assertion of title contained in the letter, when combined with the visible encroachments, constituted a constructive eviction. According to the Udoujes, this constructive eviction was not overcome by the limited use of the disputed property that the Riddles continued to have.

As a final point, the Udoujes urge that the issue of whether the Riddles had possession of the property was conclusively decided when the circuit court found in 2002 that the boundary lines of the property had been established at the original fence lines by acquiescence. They argue that, as a result, the Riddles are barred by issue preclusion from relitigating the boundary-line issue.

The statute of limitations for breach of a warranty is five years. Ark. Code Ann. § 16-56-115 (Repl. 2005). It is well established that the mere existence of superior title, whether or not the grantee has notice of its existence, is insufficient to constitute breach of a warranty. *Hamilton v. Farmer*, 173 Ark. 341, 344-45, 292 S.W. 683, 684-85 (1927). Rather, a cause of action for breach of a warranty accrues and the statute of limitations begins to run only when the grantee is evicted or constructively evicted from the conveyed property. *Thompson v. Dildy*, 227 Ark. 648, 651, 300 S.W.2d 270, 272 (1957) ("With some exceptions, the rule is that an action for damages on a covenant of warranty cannot be maintained where there has been no eviction."); *Hamilton,* 173 Ark. at 344-45, 292 S.W. at 684-85 ("[A]n outstanding paramount title is not an eviction and does not of itself constitute a breach of

the warranty. . . . [T]he existence of [] paramount title itself would not constitute an eviction nor entitle the appellant to bring suit against the grantors.").

Eviction occurs when a person is dispossessed by process of law. *Black's Law Dictionary* 594 (8th ed. 2004). Constructive eviction, on the other hand, occurs when a purchaser is unable "to obtain possession because of a paramount outstanding title." *Id.* at 594. Therefore, the question in the case at hand concerns whether the Riddles were constructively evicted from the disputed property at some time before the 2002 order was entered.

Neither the bench ruling in the instant case nor the subsequent order of the circuit court contains an explicit finding that the Riddles were constructively evicted at the time of conveyance. The court noted that the existing landscaping "wouldn't necessarily have triggered the Buyer's response to clarify that issue." The circuit court did, however, go on to note that the existing landscaping, when combined with the cease and desist letter sent by the Kaelins, was sufficient to put the Riddles on notice of a problem with their title.

As an initial matter, we conclude that the circuit court's reasoning is flawed. The Kaelins' letter could only have put the Riddles on notice of a competing claim to the land. It could not effect an eviction if the Riddles were currently in possession of the property. This court's case law is clear that notice of a claim is not the standard for commencing the running of the statute of limitations in a breach-of-warranty action. *Elliott v. Elliott*, 252 Ark. 966, 972, 482 S.W.2d 123, 127 (1972) (analyzing Texas law and noting the distinction between notice of a pending suit and constructive eviction). Nonetheless, this court can affirm a circuit court that has reached the correct conclusion, albeit for the wrong reason. *Middleton v. Lockhart*, 355 Ark. 434, 439, 139 S.W.3d 500, 503 (2003).

This court has examined the issue of when a covenant of warranty is breached by a constructive eviction on several occasions. In *Smiley v. Thomas*, we held that the ownership of a one-half undivided oil and gas interest by a third party at the time property was conveyed to a grantee did not amount to an immediate breach of the grantor's warranty. 220 Ark. 116, 121, 246 S.W.2d 419, 421 (1952). Instead, this court found that "[t]here had been no constructive eviction, in effect, until the present suit was filed in December, 1950, wherein [grantor] was a party and the court held

. . . that [a third party] owned the 1/2 mineral interest in the land involved here and that the covenant of warranty in the above deed had been breached." *Id.*[3] Accordingly, the cause of action for breach of warranty did not accrue nor the statute of limitations begin to run until that time. *Id.*

Where, however, there is a visible, physical encroachment on the complainant's land, a constructive eviction may occur long before a court finds that title is held by a third party. In *Timmons v. City of Morrilton*, the grantee of a piece of property sued the grantor, claiming that "obstacles and obstructions" that the grantor had erected before the conveyance "prevented [grantee] from full possession of the property described in the deed." 227 Ark. 421, 422, 299 S.W.2d 647, 648 (1957). This court held that, "[w]hen the land conveyed is at that time in possession of a stranger, the covenant is broken the date the deed is made, and limitations commence immediately." *Id.* at 423, 299 S.W.2d at 649. This court noted that "[a]ny obstruction or encroachments involving the property [the grantor] conveyed to [the grantee] existed prior to and at the time of the delivery of the deed and were visible and obvious, so there was a constructive eviction the day of the deed." *Id.* at 422, 299 S.W.2d at 648. We concluded that the statute of limitations began to run immediately upon conveyance. *Id.* at 423, 299 S.W.2d at 649.

In still another case, *Van Bibber v. Hardy*, this court found that a property owner could be evicted by the presence of a tenant on the property with a superior right to possession. 215 Ark. 111, 118, 219 S.W.2d 435, 439 (1949). A court order confirming the tenant's superior possessory right was not required for a cause of action for breach of warranty to accrue. *Id.* Likewise, in *Bosnick v. Hill*, this court noted that where a third party had fenced in a portion of the conveyed land and run cattle on it, the grantee never obtained possession of the disputed property, and the covenant of seisin was breached immediately upon conveyance. 292 Ark. 505, 508-09, 731 S.W.2d 204, 206-07 (1987).[4]

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[3] Though it couches its holding in terms of a constructive eviction, the *Smiley* court appears to have analyzed the issue using the definition for an actual eviction.

[4] We note that a covenant of warranty such as we have in the instant case and a covenant of seisin are not one and the same. *Black's Law Dictionary* 393 (8th ed. 2004). In the case at hand, the Riddles have not asserted a breach of the covenant of seisin. Nonetheless, the

Turning to the situation in the instant case, it is clear to this court from our case law that physical encroachments may result in a constructive eviction. For example, where a home or other building encroaches into a neighbor's yard, the record owner has been dispossessed of that portion of the yard. *See Nunley v. Orsburn*, 312 Ark. 147, 150, 847 S.W.2d 702, 704-05 (1993) (holding that construction of a storage shed constituted possession sufficient to establish a boundary by acquiescence). Likewise, if a person builds a fence or wall completely surrounding his or her home and in so doing encloses a portion of their neighbor's yard, the record owner has been dispossessed. *See Bosnick*, 292 Ark. at 508-09, 731 S.W.2d at 206-07. Such an encroachment need not completely foreclose the possibility of physical entry in order to result in constructive eviction. *See, e.g., id.* In *Bosnick*, there was no indication that the fence involved was unscalable. *Id.*

The Riddles claim that the visible, physical encroachments onto the disputed property were not sufficient to prevent their possession of that property. We disagree. Not only were there visible fences establishing the boundary, but the adjacent property owners, the Kaelins and the Knights, were using the disputed property as their own on the date of conveyance. The maintenance of shrubs and other landscaping is the normal use of a residential yard, and it is to this use that the Kaelins and Knights were putting the disputed property at the time of the conveyance. The Riddles undoubtedly made attempts to regain possession of the disputed property by the legal process and by entering their neighbors' yards for landscaping activities. None of these attempts, however, change the fact that, as of the date of the conveyance, the disputed property was possessed by third parties, the Riddles were constructively evicted, and the warranties of title and quiet enjoyment were breached.

We further underscore the fact that in 2002, the circuit court found that a boundary by acquiescence had been established by the existing fence. That precise issue cannot now be relitigated, as it is an issue that has been decided. *Riverdale Dev., LLC v. Ruffin Bldg. Sys. Inc.*, 356 Ark. 90, 96, 146 S.W.3d 852, 855 (2004). We affirm the circuit court and its order of summary judgment based

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Bosnick court's discussion is applicable to this because both breach of the covenant of seisin and breach of a covenant of warranty by constructive eviction are decided on the basis of who has possession.

on the fact that a constructive eviction occurred due to the breach of the respective warranties as of the date of conveyance in 1996 and the limitations period had expired when the Riddles' complaint against the Udoujes was filed in 2005. Our holding of constructive eviction is based on the fact that at the time of the 1996 conveyance, the existing fences and shrubbery dispossessed the Riddles of part of the land conveyed to them.

The Riddles next claim that when Olivia Udouj signed the owner property disclosure, which asserted that no fences were shared in common with adjoining landowners and that there were no encroachments that might affect the title to the property, she committed constructive fraud. The statue of limitations for this fraud, they argue, was tolled until they discovered or should have discovered the fraud. The Riddles further assert that this did not occur until the circuit court ruled in 2002 that the disputed property did not belong to the Riddles, because up until that time, the Riddles believed that their title to the disputed property was good. To hold otherwise, they contend, would require landowners with disputed title to sue prior landowners before it is clear that an adverse claim will succeed.

The statute of limitations for a constructive fraud claim is three years. Ark. Code Ann. § 16-56-105 (Repl. 2005). More than three years have elapsed since the commission of the alleged fraud. Therefore, the burden is on the Riddles to show that the statute of limitations was tolled. *Scollard v. Scollard*, 329 Ark. 83, 87, 947 S.W.2d 345, 347 (1997).

Tolling occurs when the person alleged to have committed the fraud has committed a "positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself." *Hampton v. Taylor*, 318 Ark. 771, 778, 887 S.W.2d 535, 539 (1994). It is a fraud that a plaintiff, by reasonable diligence, could not have detected or had reasonable knowledge. *Id.*

The Riddles, however, have failed to produce any evidence that Olivia Udouj engaged in any act designed to conceal her alleged misrepresentation. On the contrary, the Riddles were aware of all material facts surrounding the alleged fraud, including the fact that the existing fences were inside the property line described by the survey, before taking possession of the land. We hold that the Riddles have failed to meet their burden of showing that the statute of limitations was tolled, and we further hold that

the circuit court correctly concluded that the statute of limitations on the fraudulent concealment claim had expired.

Affirmed.

Harry McDERMOTT *v.* Teresa Combs SHARP, Omer Combs, and Estate of Omer Albert Combs

07-528 267 S.W.3d 582

Supreme Court of Arkansas
Opinion delivered November 8, 2007

Appellant pro se.

No response.

JIM GUNTER, Justice. This appeal arises from an April 2, 2007 order entered against Appellant Harry McDermott by Judge John Lineberger of the Madison County Circuit Court, Probate Division. The probate court quashed the deposition of Omer Combs and ordered McDermott to pay attorney's fees to Combs's estate. Combs, Teresa Combs Sharp, and Combs's estate are listed as Appellees in this matter. We affirm the probate court's rulings.

Combs's daughter, Teresa Combs Sharp, filed a petition alleging that her father was incapacitated and that she should be appointed guardian to manage his person and his estate. McDermott represented Combs in this matter. On November 30, 2005, Judge Michael Mashburn of the Madison County Circuit Court, Probate Division, denied the petition for guardianship over Combs's person, but granted the petition for guardianship over his estate. The probate court explained that the appointment of Sharp over her father's estate was only temporary and would be revisited because there were not "good feelings" between Sharp and Joan Clark, Combs's caregiver. The probate court further stated at the hearing that it found Combs incapacitated to manage his estate or to protect it from the undue influence of Clark, and that he was unable to contract. McDermott asked the court if Combs had the capacity to hire him to continue as Combs's attorney. The court responded that Combs did not have such capacity.

McDermott filed a notice of appeal of the guardianship order to the Arkansas Court of Appeals on December 22, 2005. On March 15, 2006, before the record was lodged with the court of appeals, McDermott filed a motion with the probate court asking that the Bank of Fayetteville be substituted for Combs's daughter as his guardian and as the trustee of the trust. McDermott also asked that he be dismissed as Combs's attorney of record and that the court dismiss all pleadings filed by him from November 23, 2005. The probate court held a hearing involving Combs's guardianship on March 20, 2006, where McDermott asked to be allowed to withdraw as counsel from all cases involving Combs. On March 27, 2006, the probate court released McDermott as counsel for Combs and appointed Lauren Adams as attorney ad litem. The attorney ad litem decided not to pursue the appeal. On April 20, 2006, the probate court denied McDermott any attorneys' fees for his services rendered after the November 23, 2005 incapacity hearing, finding that Combs's incapacity made him

subject to the will of Joan Clark, and that McDermott's legal services performed on behalf of Combs after the incapacity hearing were for the benefit of Clark and not Combs. The probate court reiterated in this order that McDermott was released as Combs's counsel as of March 20, 2006.

On June 15, 2006, despite being released as counsel by the probate court, McDermott filed a brief with the court of appeals on Combs's behalf. On July 6, 2006, the attorney ad litem moved to withdraw the appeal. On July 26, 2006, the court of appeals dismissed the appeal. Sharp then asked the court of appeals to sanction McDermott pursuant to Rule 11 of the Arkansas Rules of Appellate Procedure–Civil. On September 13, 2006, the court of appeals ordered McDermott to pay the attorneys' fees expended in the preparation of the motion to dismiss and the motion for sanctions by the attorney ad litem and Sharp's attorney. Opinions were forwarded to the Committee on Professional Conduct.

On September 22, 2006, the attorney ad litem filed a motion to quash the deposition of Omer Combs. On September 25, 2006, the probate court entered an order quashing the notice of deposition of Combs for the following reasons: (1) that the notice to depose Combs, an incapacitated person, was improper; (2) that the notice falsely stated that McDermott is the attorney for Combs; and (3) that McDermott was not a party or attorney for any party in the action. The probate court further ordered McDermott to pay Combs's estate $100 in attorneys' fees and ordered McDermott to cease and desist from contacting Combs for any purpose. The notice of deposition that the probate court's order quashes is not contained in the record.

The record contains a notice of deposition for Combs and Jo Clark on April 2, 2007, at 1:00 a.m. in the case before the Supreme Court Committee on Professional Conduct. In this notice, McDermott certified that a copy was mailed to Nancie Givens of the Committee on Professional Conduct on March 21, 2007. However, this notice is not file-stamped. On April 2, 2007, at 12:01 p.m., Judge John Lineberger, sitting as probate judge by assignment, entered an order quashing the deposition, ordered McDermott to pay attorney's fees in the amount of $250 and to cease and desist contact with Combs for any purpose. Combs's deposition was taken before the Committee on Professional Conduct on April 2, 2007, at 2:10 p.m. It is from the April 2, 2007 order that McDermott brings this appeal. Appellees in this case have not filed a responsive brief.

On appeal, McDermott argues that (1) the probate court erred in finding that the deposition of Combs in the Supreme Court Ethics Committee case was for an improper purpose; (2) the probate court erred by denying McDermott due process by assessing attorney's fees against him for "improper conduct" on an unverified contempt motion without giving the opportunity to respond; and (3) the probate court erred in finding McDermott in criminal contempt without giving him the opportunity to respond or present a defense, thus denying him due process pursuant to Ark. Code Ann. § 16-10-108(c) (Supp. 2007). We now consider McDermott's appeal.

In bench trials, the standard of review on appeal is not whether there is substantial evidence to support the finding of the probate court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Omni Holding & Dev. Corp. v. C.A.G. Invs., Inc.*, 370 Ark. 220, 258 S.W.3d 374 (2007). We have repeatedly and consistently stated that matters outside of the record will not be considered on appeal, and it is the appellant's burden to bring up a record sufficient to demonstrate that the trial court was in error. *Hudson v. Kyle*, 365 Ark. 341, 229 S.W.3d 890 (2006). Where the appellant fails to meet this burden, we have no choice but to affirm the trial court. *Id.* Further, we will not address issues on appeal that are not appropriately developed. *Spears v. Spears*, 339 Ark. 162, 3 S.W.3d 691 (1999). We will not research or develop an argument for an appellant. *Martin v. Pierce*, 370 Ark. 53, 257 S.W.3d 82 (2007).

We will first address McDermott's argument that the probate court erred in finding that the deposition of Combs scheduled before the Supreme Court Committee on Professional Conduct was improper. Combs's deposition was taken on April 2, 2007, despite the probate court's order filed the same day quashing the deposition. Therefore, we hold that this issue is moot. We do not address moot issues. *Alexander v. McEwen*, 367 Ark. 241, 239 S.W.3d 519 (2006). Thus, we will not address this argument on appeal.

We now will turn to McDermott's contempt arguments, which are misguided. In his brief, McDermott states that "[t]he contempt motion filed by the attorney ad litem on April 2, 2007, was not verified and falsely stated that McDermott's deposition of Omer to contest an ethics complaint was improper." However, the attorney ad litem did not file a motion for contempt,

as alleged by McDermott. On April 2, 2007, Combs, through his attorney ad litem, filed a motion to quash deposition. In that motion, Combs asked that the probate court restrain McDermott from deposing Combs and impose Rule 11 sanctions against McDermott for violation of a September 21, 2006 order that McDermott cease and desist from contacting Combs. Specifically, Combs requested that the probate court quash the deposition, award $250 in attorney's fees, and order McDermott to cease all contact with Combs. That same day, the probate court granted Combs's requests. Contrary to McDermott's argument, Combs did not file a motion for contempt, but rather filed a motion to quash deposition that contained a request for sanctions pursuant to Rule 11. The probate court did not enter an order of contempt against McDermott. Nonetheless, Appellant specifically argues contempt on appeal, and does not develop an argument regarding the Rule 11 sanctions. Because he did not do so, we will not research or develop a Rule 11 argument for Appellant. *See Martin, supra.* Accordingly, we affirm the probate court's ruling.

Affirmed.

ARKANSAS RIVER EDUCATION SERVICE COOPERATIVE *v.* Larry MODACURE; Donna Hudson

07-611 267 S.W.3d 595

Supreme Court of Arkansas
Opinion delivered November 8, 2007

Friday, Eldredge & Clark, by: *Khayyam M. Eddings*, for appellant.

Floyd A. Healy, for appellees.

PAUL E. DANIELSON, Justice. Appellant Arkansas River Education Service Cooperative ("ARESC") appeals from the circuit court's order denying its motion for summary judgment. ARESC's sole point on appeal is that the circuit court erred in denying its summary-judgment motion because it is entitled to immunity from liability and from suit for damages pursuant to Ark. Code Ann. § 21-9-301 (Repl. 2004). We reverse and remand.

A review of the record reveals that during the 2004-05 school year, Appellee Larry Modacure was a student in the Watson Chapel School District. Modacure was also enrolled in a vocational training program at ARESC in Pine Bluff, where he was injured on November 29, 2004, when struck in the face by a foreign object that ejected from a lathe machine that Modacure was using. On December 5, 2005, Modacure, by and through his mother, Appellee Donna Hudson, and Donna Hudson, individu-

ally, filed a lawsuit against ARESC, which sought damages as a direct and proximate result of ARESC's alleged negligence in adult supervision and prevention of such injury. ARESC answered and pled affirmatively that it was immune from suits for negligence under Ark. Code Ann. § 21-9-301 and because it did not maintain liability insurance for the claim asserted. The circuit court denied ARESC's motion for summary judgment and found that ARESC, as an educational service cooperative, was not included in the list of entities under section 21-9-301 that enjoy immunity. ARESC timely filed a notice of appeal.

ARESC argues on appeal that the circuit court erred when it ruled that Ark. Code Ann. § 21-9-301 does not provide immunity to education service cooperatives, as that ruling does not properly consider the entire text of the statute. ARESC contends that the circuit court's ruling should be reversed because an education service cooperative is a creation of the State Board of Education which operates as a public body corporate and, in effect and purpose, is a collective of school districts which individually enjoy statutory immunity from suit for damages except to the extent that they may be covered by liability insurance. Therefore, ARESC urges, it is entitled to statutory immunity under the statute and its summary-judgment motion should have been granted.

Appellees respond that nowhere in our statutes or other governing law has the legislature deemed it necessary to include educational cooperatives as those who enjoy governmental immunity and that this court has a long-standing policy of not rewriting or creating legislation, as that is the job of the legislature.

ARESC replies that legislation does not have to be rewritten or created in order for education cooperatives to come within the ambit of section 21-9-301, as the statute already contains the necessary, inclusive language.

As a general rule, the denial of a motion for summary judgment is neither reviewable nor appealable. *See Helena-West Helena Sch. Dist. v. Monday*, 361 Ark. 82, 204 S.W.3d 514 (2005). However, that general rule does not apply where the refusal to grant a summary-judgment motion has the effect of determining that the appellant is not entitled to immunity from suit, as the right of immunity from suit is effectively lost if a case is permitted to go to trial. *See id.* The issue of whether a party is immune from suit is purely a question of law and is reviewed *de novo*. *See id.*

The circuit court's order denying ARESC's motion for summary judgment stated that the court did "not feel that the legislature intended for educational co-ops to enjoy the same statutory immunity as that currently enjoyed by school districts pursuant to Ark. Code Ann. § 21-9-301." ARESC simply argues that the circuit court's finding did not take into consideration the statute as a whole. We agree.

We review issues of statutory interpretation *de novo* because it is for this court to determine the meaning of a statute. *See McMickle v. Griffin*, 369 Ark. 318, 254 S.W.3d 729 (2007). The basic rule of statutory construction is to give effect to the intent of the legislature. *See id.* Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. *See id.* 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. *See id.* We construe the statute so that no word is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible. *See id.*

Arkansas Code Annotated § 21-9-301 reads:

> (a) It is declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the state *and any of their boards, commissions, agencies, authorities, or other governing bodies* shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.
>
> (b) No tort action shall lie against any such political subdivision because of the acts of its agents and employees.

Ark. Code Ann. § 21-9-301 (emphasis added).

While the circuit court was correct in concluding that an educational cooperative differs from a school district, in 1999, the Arkansas General Assembly amended section 21-9-301 by Act 984, which added the above-emphasized language to include and protect additional entities. When reading the Public School Education Cooperative Act of 1981, codified by Ark. Code Ann. §§ 6-13-901 – 6-13-906 (Repl. 1999), it is apparent that an educational cooperative qualifies as a board, commission, agency, authority, or other governing body of school districts and, therefore, would be subject to the immunity granted by Ark. Code Ann. § 21-9-301.

An educational cooperative is a voluntary association of school districts to share resources, personnel, materials, and equipment and to provide and improve services and programs to students. *See* Ark. Code Ann. § 6-13-902. More specifically, "cooperatives *will act as an agency* for all or some of the member districts in dealings with other governmental and private agencies." Ark. Code Ann. § 6-13-904(a) (emphasis added).

[redacted] This court has previously recognized the close connection between cooperatives and school districts:

> Significantly, the legislation governing co-ops is nested within the legislation governing school districts and not within the statutes governing the State Department of Education. Described in section 6-13-1002 as "intermediate service units," the co-op entity is comprised of school districts and, like school districts, co-ops must report to the Department of Education. The growth of a co-op begins at a grassroots level. Although the tentative geographic boundaries of co-ops are established by the Department of Education, 75% of the school districts in a proposed co-op must request formation of the co-op by formal resolutions. The decisions to initiate, activate, or participate in a co-op are made by school districts. Further, co-op personnel are employed and terminated using the same procedures applicable to school districts and, only when the co-op's governing body approves, will the Department of Education assign state personnel to the co-op. Clearly, the growth, utilization, and maintenance of the co-op stems from the participating school districts and, as an entity, the co-op is comparable to a school district.

Ozarks Unlimited Res. Co-op., Inc. v. Daniels, 333 Ark. 214, 222, 969 S.W.2d 169, 173 (1998). After considering the relationship between educational cooperatives and school districts, we hold that an educational cooperative is an agency of a school district and, therefore, is an entity that comes within the ambit of Ark. Code Ann. § 21-9-301.

[redacted] The immunity provided by section 21-9-301 does have one exception. The entities specified in the statutes 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. Appellees argue that even if ARESC were entitled to immunity, it is undisputed that ARESC has sufficient funds through insurance which would allow recovery of damages. ARESC avers that the proper inquiry is not whether or not there

are sufficient funds, but whether or not there is insurance coverage for the alleged damages. ARESC further contends that sufficient evidence was presented to the circuit court illustrating that it did not maintain liability insurance coverage for the damages alleged in the appellees' complaint. However, the insurance issue has not yet been decided by the circuit court and any discussion or analysis by this court would be premature and would constitute an advisory opinion, which this court will not issue. *See Arkansas Diagnostic Ctr., P.A. v. Tahiri*, 370 Ark. 157, 257 S.W.3d 884 (2007). To date, the circuit court has simply denied ARESC's motion for summary judgment based upon its conclusion that an educational cooperative is not an entity covered by the immunity provided in Ark. Code Ann. § 21-9-301. We disagree with the circuit court's conclusion and, therefore, reverse and remand.

Reversed and remanded.

$1834 U.S. CURRENCY (Carlos Alexander Solis) *v.* STATE of Arkansas

07-561 267 S.W.3d 593

Supreme Court of Arkansas
Opinion delivered November 8, 2007

Ken David Swindle, for appellant.

Dustin McDaniel, Att'y Gen., for appellee.

PER CURIAM. Appellant Carlos Alexander Solis appeals from the circuit court's order granting default judgment to the appellee, the State, which declared the State the new owner of Solis's $1,834.00 U.S. Currency. Appellant raises four points on appeal: (1) that Ark. Code Ann. § 5-64-505(g)(4) was satisfied; (2) that Ark. Code Ann. § 5-64-505(g)(4) is unconstitutional and violates Appellant's due-process rights; (3) that the summons in the instant case was insufficient; and (4) that the circuit court erred in granting the default judgment. However, Appellant did not include an abstract in his brief and the State did not include a supplemental abstract. The record and the addendum both reflect that an in-chambers conference took place on January 11, 2007, and a hearing regarding the State's motion for a default judgment took place on February 16, 2007. However, there is neither a transcript of those activities included in the record, nor an abstract provided by either party. In addition, neither party has provided an explanation to this court why transcripts are not provided.

Under Ark. Sup. Ct. R. 4-2(a)(5) the abstract should consist of the following:

> an impartial condensation, without comment or emphasis, of only such material parts of the testimony of the witnesses and colloquies between the court and counsel and other parties as are necessary to an understanding of all questions presented to the Court for decision.

Ark. Sup. Ct. R. 4-2(a)(5) (2007).

Even if no witnesses testified at the hearing on the State's motion for default judgment, the arguments by counsel, or "colloquies," to the court are necessary for our analysis of the court's decision on the motion. *See Selmon v. Metropolitan Life Ins. Co.*, 371 Ark. 306, 267 S.W.3d 593 (2007). For that reason, Appellant's abstract is deficient. *See id.* Not only is the abstract deficient, but the record is also incomplete because it does not contain a transcript of the hearing or any possible transcript from the in-chambers meeting. *See id.*

Here, the notice of appeal did not make a request for the entire record of the proceedings below; rather, it simply stated that the order of default judgment is being appealed and that "the record of the clerk includes all pleadings and exhibits attached thereto, including the Motion and Brief for Reconsideration, filed on March 5, 2007, and should include any subsequent order made by the Court in Response to said Motion." As we stated in *Gilbert v. Moore*, 362 Ark. 657, 210 S.W.3d 125 (2005), pursuant to Ark. R. App. P.–Civil 6(c), where the parties in good faith abbreviated the record by agreement or without objection from opposing parties, this court "shall not affirm or dismiss the appeal on account of any deficiency in the record without notice to the appellant and reasonable opportunity to supply the deficiency." Ark. R. App. P.–Civil 6(c) (2007). Further, pursuant to Rule 6(e), this court can *sua sponte* direct the parties to supply any omitted material by filing a certified, supplemental record. *See* Ark. R. App. P.–Civil 6(e); *Gilbert v. Moore, supra.*

We recognize that the record presently before us is abbreviated due to the materials requested by Appellant in his notice of appeal and designation of the record. *See, e.g., Selmon v. Metropolitan Life Ins. Co., supra.* However, the State failed to object to the abbreviated record and did not file a designation of any additional materials it believed should have been included in the record. Thus, the State tacitly consented to the record. *See id.* (citing *Gilbert v. Moore, supra*).

Pursuant to Rule 6(c) and (e), we order Appellant to supply this court with a certified, supplemental record that includes a transcript of the hearing on the motion for a default judgment and, if applicable, a transcript of the in-camera hearing held before the circuit court on January 11, 2007, within sixty (60) days of the

issuance of this opinion. Appellant is further ordered to file a substituted brief that includes an abstract of the relevant "colloquies between the court and counsel" that are essential to this court's understanding of the case and issue presented as required by Ark. Sup. Ct. R. 4-2(a)(5) and (a)(8) (2007).

Raye Lynn HARRISON *v.* STATE of Arkansas

CR 07-109 268 S.W.3d 324

Supreme Court of Arkansas
Opinion delivered November 15, 2007

[Rehearing denied January 10, 2008.]

Smith & Moore, PLC, by: *Kara Bideler Moore*, for appellant.

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

JIM HANNAH, Chief Justice. Raye Lynn Harrison appeals the denial of her petition for postconviction relief filed under Ark. R. Crim. P. 37. Harrison's conviction and sentence were affirmed by the court of appeals in an unpublished opinion. *Harrison v. State*, CACR 03-111 (Ark. App. Mar. 3, 2004). In *Harrison v. State*, 360 Ark. 597, 203 S.W.3d 122 (2005), this court granted a motion for rule on the clerk for failure to timely file the record in the appeal from the June 15, 2004, order denying her petition for relief under Rule 37. In an unpublished opinion in *Harrison v. State*, CR05-64 (Ark. Feb. 23, 2006), this court remanded the case for written findings of fact and conclusions of law. Harrison now appeals from the circuit court's order denying Rule 37 relief on remand.

On January 23, 2002, Arkansas State Trooper Jason Aaron stopped Harrison and Sondra Vaughn on Interstate 40 in Crawford County for cutting in and out of traffic, making unsafe lane changes, and following a tractor trailer too closely. Aaron approached the vehicle and asked for Harrison's driver's license, registration, and insurance certificate. Harrison produced her driver's license and a rental agreement. The rental agreement revealed that the car was rented in California by Connie Jones, was to be operated in California only, and was due back to the rental office the day before on January 22, 2002, and was only to be operated by Jones who was not in the car. Further, the agreement showed that payment for the rental was in cash. Additionally, the manufacturer-supplied jack and associated tools were out of their factory packing and visible on the floor of the car.

Aaron completed his traffic stop by returning Harrison's driver's license and the rental agreement and issuing a warning. However, Aaron did not release Harrison, instead stating, "I'm concerned. I'd like to ask you a couple more questions." After noting to Harrison that the person who rented the car was not present and that no other driver was permitted, he asked if Harrison and Vaughn had "marijuana, cocaine, meth, anything like that?" Harrison responded "no," and Aaron asked for consent

to search. While Harrison and Vaughn argue that consent was not granted, the video tape and consent form indicate that consent was given. In addition, in their motion to suppress filed prior to trial, they indicated consent was given. Approximately 16.7 pounds of cocaine were discovered in packages placed between the spare tire and the car body where the spare tire was stowed beneath the car. Harrison and Vaughn were tried together on charges of possession with intent to deliver. Vaughn was acquitted. Harrison was convicted and sentenced to forty years. The court of appeals affirmed.

Upon remand of the Rule 37 petition, the circuit court ruled (1) that Harrison suffered no prejudice from her counsel's decision not to seek severance, (2) that Harrison suffered no prejudice from her counsel's decisions and actions taken on the motion to suppress, (3) that Harrison suffered no prejudice as a result of her counsel's failure to give the required notice to compel the attendance and testimony of the state's chemist, and (4) that sufficient evidence was presented at trial and any motion challenging the sufficiency of the evidence would have been properly denied.

In an appeal from a trial court's denial of a Rule 37 petition, the question presented to this court is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). The petitioner must show first that counsel's performance was deficient. *Id.* This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment. *Id.* A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* Second, the petitioner must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id.*

Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.* The petitioner must show there is a reasonable probability that, but for counsel's errors, the fact finder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* The lan-

guage, "the outcome of the trial," refers not only to the finding of guilt or innocence, but to possible prejudice in the sentencing. *Id.* In making a determination of ineffective assistance of counsel, the totality of the evidence must be considered. *Id.* Furthermore, trial strategy is not a basis for postconviction relief. *Id.*

Severance

In her Rule 37 petition, Harrison argued that her trial counsel "should have asked the court to grant a severance seeing the lack of evidence and also so that I could achieve a fair determination of my innocence." She argues that she and Vaughn should have been tried separately. Harrison argued in her petition that because she and Vaughn had the same attorney, representing them in the same court, on the same criminal episode, Vaughn should not have obtained an acquittal and she a conviction. The circuit court concluded that there were no statements made during trial where one of the defendants blamed the other for the crime, and that the defense of both was that neither knew of the drugs in the car. Harrison argues on appeal that there is an obvious danger in representing co-defendants because of conflicts that could arise. Indeed, joint representation is inherently suspect. *Townsend v. State*, 350 Ark. 129, 85 S.W.3d 526 (2002). However, joint representation is not a per se violation of constitutional guarantees of effective assistance of counsel. *McGahey v. State*, 362 Ark. 513, 210 S.W.3d 49 (2005). Harrison cites us to *Ingle v. State*, 294 Ark. 353, 353-54, 742 S.W.2d 939, 940 (1988), where we also discussed the issue of joint representation:

> It is settled that "[r]equiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978). In many cases, " '[a] common defense gives strength against a common attack.' " *Id.* at 482-83 (quoting *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting)). However, appointing or permitting a single attorney to represent codefendants does create a possible conflict of interest that could prejudice either or both clients. *See Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3120 (1987). The possibility of prejudice does not justify "an inflexible rule that would presume prejudice in all cases." *Id.* Instead, prejudice is presumed " 'only if the defendant demonstrates that counsel "actively represented conflicting interests" and "an actual conflict of interest adversely affected his lawyer's perfor-

> mance." ' " *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980) (footnote omitted)).

Harrison notes that Aaron asked and obtained Vaughn's help in trying to catch the persons to whom the drugs were to be delivered, although nothing came of the effort. Aaron further testified that she told him she was told beforehand to say the car was rented by an aunt if she were stopped by police. Aaron further testified at trial that he overheard a cell phone conversation by Vaughn with an unknown person to whom she stated, "Hi, the police stopped us, and they found the drugs."

Harrison asserts that her trial counsel was ineffective for failing to use cross-examination as a means to show that the telephone call connected Vaughn to the drugs but not Harrison. She asserts that trial counsel could not vigorously represent her without prejudicing Vaughn and that the evidence introduced against Vaughn also incriminated Harrison. The issue of a conflict was not decided by the circuit court. The circuit court concluded only that Harrison was not prejudiced by her trial counsel's decision not to seek severance. The failure to obtain a ruling precludes this court from considering the issue. *Thomas v. State*, 370 Ark. 70, 257 S.W.3d 92 (2007).

Motion to Suppress

On the issue of suppression, we first resolve the question of appellate counsel's failure to include a transcript of the suppression hearing in the record on appeal. Because she fails to show that she would have prevailed on her motion to suppress, the question of whether trial or appellate counsel was ineffective in failing to assure that the transcript from the suppression hearing was included in the record on appeal is moot. We do not address moot issues. *Scott v. State*, 355 Ark. 485, 139 S.W.3d 511 (2003).

As to the issue of suppression, Harrison argues that trial counsel's performance fell below the standard of objective reasonableness when in the suppression hearing he completely abandoned his original argument. She alleges that he ceased arguing that there was a lack of reasonable suspicion to detain Harrison after the traffic stop (making the request to search made during that detention unlawful) and instead argued that there was no probable

cause for the initial traffic stop. She notes that there was no discussion of reasonable suspicion at the suppression hearing. She cites us to *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004), and argues that she was prejudiced by her trial counsel's ineffective assistance of counsel when he failed to challenge reasonable suspicion justifying the detention.

We again note the facts as Aaron knew them. Harrison and Vaughn flew to California, stayed a very short while, and then returned to Tennessee by car. They were in a rental car. Connie Jones, who rented the car, was not present. The rental agreement provided that the car was to be operated in California, only by Connie Jones, and that it was to be returned to the rental agency the day before the traffic stop. Finally, although the car was nearly new, the manufacturer-provided jack and associated tools were lying on the floor of the car.

Detention without arrest may transpire only under certain circumstances as set out in Ark. R. Crim. P. 3.1. *Sims, supra.* "The rule is precise in stating that the reasonable suspicion must be tied to the commission of a felony or misdemeanor involving forcible injury to persons or property." *Sims*, 356 Ark. at 513, 157 S.W.3d at 534. Rule 2.1 of the Arkansas Rules of Criminal Procedure defines "reasonable suspicion" as "a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion." In *Laime v. State*, 347 Ark. 142, 158, 60 S.W.3d 464, 475 (2001), we applied the requirement of reasonable suspicion to the question of whether a detention was lawful:

> The background check first revealed a drug conviction which Laime lied about. The trooper's suspicions were magnified by the couple's ignorance of their destination and the names of their friends as well as Laime's ever-increasing agitation. All of this led to the canine sniff and the positive alert to drugs by the drug dog. We hold that the Fourth Amendment protection afforded Laime and Dodd was not violated in this case, and we affirm the circuit judge on this point.

There are more facts supporting detention in the present case than in *Laime*. Based on the proof offered by Harrison, she would not have prevailed on her motion to suppress even if it had been argued as she

alleges it should have been argued. Thus, we cannot say that the circuit court was clearly erroneous in rejecting this claim.

The State's Chemist

Harrison argues that her trial counsel was ineffective for failing to give the required notice and obtain at trial the presence of the State's chemist for examination. Trial counsel testified at the Rule 37 hearing that he did not give notice to have the chemist present, but that it really did not matter whether or not a chemist was there. Their defense was that they did not know there were drugs or any other substance being transported in the car. Trial counsel considered that what the substance turned out to be was immaterial to their defense because the theory was that Harrison's boyfriend was a drug runner and that he had placed the drugs in the car and was using his girlfriend to get the drugs to Nashville. Harrison testified at trial that she did not know the drugs were in the car. Vaughn also testified that she was unaware of drugs being in the car. Whether the substance found in the car was drugs was not at issue. There would have been no rational basis for giving a jury instruction on whether the substance was drugs when Harrison asserted she had no idea anything was in the car. *See, e.g., Brunson v. State*, 368 Ark. 313, 216 S.W.3d 145 (2006). The circuit court was not clearly erroneous in denying Harrison's claim for Rule 37 relief on this issue.

Sufficiency of the Evidence

Harrison argues she received ineffective assistance of counsel when her attorney failed to make a specific motion for directed-verdict at the close of the State's case and failed to make a directed-verdict motion at the close of all the evidence. The circuit court found that even had trial counsel made effective directed-verdict motions, they would have been denied. We agree.

The drugs were found under a car operated by Harrison and in which Vaughn was a passenger. Vaughn had no valid driver's license. The manufacturer-supplied jack and accompanying tools that come with the purchase of the vehicle were behind the seat on the floor and were not fully repacked after use. This court's opinion in *Malone v. State*, 364 Ark. 256, 261-62, 217 S.W.3d 810, 813 (2005), is controlling:

The question before us is whether there was substantial evidence to show that Malone was in constructive possession of the contraband found in the trunk of the car he was driving. To prove constructive possession, the State must establish that the defendant exercised "care, control, and management over the contraband." *McKenzie*, 362 Ark. at 263, 208 S.W.3d at 175. While we have held that constructive possession may be implied when the contraband is in the joint control of the accused and another, joint occupancy of a car, standing alone, is not sufficient to establish possession. *Jones v. State*, 355 Ark. 630, 634, 144 S.W.3d 254, 256 (2004); *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995). There must be some other factor linking the accused to the contraband. *Id.* In other words, there must be some evidence that the accused had knowledge of the presence of the contraband in the vehicle. *Jones, supra.* Other factors to be considered in cases involving vehicles occupied by more than one person are:

> (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion and control over it; and (5) whether the accused acted suspiciously before or during the arrest.

McKenzie, supra (citing *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994)).

In this case, in order to prove constructive possession, the State must show more than the fact that Malone occupied a car in which contraband was discovered. As the driver of the car, Malone exercised dominion and control over it and had keys to the trunk; the odor of marijuana in the trunk was strong, supporting an inference that anyone who opened the trunk would know that the trunk contained contraband. There was evidence supporting an inference that the male clothing found in one of the bags in the trunk was too small for Richardson and could reasonably have been found to belong to Malone. Finally, Officer Wilson testified that Malone, the driver of the car, did not know where he was going other than "somewhere in Arkansas," and was nervous and shaking uncontrollably during the traffic stop, even though the stop was for a minor infraction. Viewing the evidence in the light most favorable to the State, as we must, we find that there was sufficient evidence of

> Malone's knowledge of and control over the contraband to support his conviction. *See Dodson, supra.*

Given the facts proven in this case and the argument offered by Harrison, we cannot say that the circuit court was clearly erroneous in rejecting this claim for relief under Rule 37.

All remaining issues raised by Harrison on appeal were not ruled on by the circuit court and cannot be considered on appeal. The failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes review on appeal, and we must decline to address such an issue. *Thomas, supra.* Harrison does raise other issues on appeal, including an assertion that the circuit court failed to address all the issues she believes were presented in her petition; however, in bringing an appeal, she avails herself of this court's appellate jurisdiction. This means that this court has jurisdiction to review an order or decree of a lower court. *Lewellen v. Supreme Court Comm. on Prof'l Conduct*, 353 Ark. 641, 110 S.W.3d 263 (2003). Under Amendment 80, this court holds general superintending control over all courts of this state; however, the remedy to compel a circuit court to act is not found under this court's appellate jurisdiction. The issue may not be addressed on appeal.

Affirmed.

Laurie MARTIN *v.*
SIMMONS FIRST TRUST COMPANY

07-93 268 S.W.3d 304

Supreme Court of Arkansas
Opinion delivered November 15, 2007

Mary Thomason, for appellant.

Ramsay, Bridgforth, Harrelson and Starling, LLP, by: *Anthony A. Hilliard*, for appellee.

JIM HANNAH, Chief Justice. Appellant Laurie Martin appeals the order of the Union County Circuit Court finding that it is the proper venue to probate the estate of Martin's mother, Mary Ann Daley. On appeal, Martin contends that the Union County Circuit Court is not the proper venue for the probate of Daley's estate because at the time of Daley's death her residence was in Ventura County, California, and she had no intent of ever returning to Arkansas. The court of appeals certified this case to this court as one involving an issue of first impression. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1). We find no error and, accordingly, we affirm.

In April 2005, Martin, Daley, and Daley's brother, Robert Decker, appeared before the same circuit judge in a guardianship proceeding. The circuit judge determined that Daley, who was then residing at the Beverly Nursing Home in El Dorado, was

incompetent to manage her affairs. By order of the circuit court, Decker was appointed to be guardian of the person, over Martin's objection. A separate guardian of the estate, a financial institution in Arkansas, was also named. The guardianship order recited that Decker had secured for Daley a private room in a nursing home in Omaha, Nebraska, where he resided. The order also stated that the circuit court had authorized Martin to take Daley to California for her grandchild's high school graduation. The circuit court noted that Martin had given the court assurances that she would comply with the orders of the court. Finally, the court directed Martin to consult with Decker about appropriate arrangements for the transportation of Daley to Omaha and to assist in the performance of those travel plans.[1]

In April 2005, after the guardianship hearing, Martin moved Daley from Arkansas to California. During the time that Daley spent in California, Martin had her placed in a nursing home there and helped her obtain a California senior-citizen's identification card. Daley ultimately died in California on February 27, 2006.

On March 16, 2006, Martin filed a petition to probate Daley's estate, intestate, in Ventura County, California. Thereafter, on March 23, 2006, the guardian of the estate, appellee Simmons First Trust Company, filed a petition for probate of the will and appointment of a personal representative of Daley's estate in Union County, Arkansas. Probate was opened in Union County, and Simmons First was appointed executor. On May 16, 2006, Martin filed an objection to the probate of Daley's will in Union County, arguing that California had jurisdiction of the probate of Daley's estate because Daley was a resident of California at the time of her death.

Following a hearing on the objection and a telephone deposition of Decker, the circuit court overruled Martin's objection to probate the estate of Daley in Union County. After stating that it was familiar with the parties due to prior and pending litigation regarding the guardianship and noting that the majority of the assets of the estate were within the jurisdiction of the court, the circuit court made the following findings:

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[1] Martin subsequently appealed the order appointing Decker as guardian of the person. The appointment was affirmed by the court of appeals. *Martin v. Decker*, 96 Ark. App. 45, 237 S.W.3d 502 (2006).

> The Court has read with interest the argument that decedent was a resident of California at the time of her death. That defense has been constructed in violation of the letter and spirit of the order of this Court. At the request of Laurie Martin and over the objection of Robert Decker, the Court allowed Mary Ann Daley to travel to California for a temporary visit. The specific purpose of the visit was to attend the high school graduation of a granddaughter. The duration of the visit was anticipated to be only a matter of days, depending on travel arrangements. The poor health of Mary Ann Daley and the failure of Laurie Martin to effect the transportation of Mary Ann Daley to Omaha caused the visit to extend to months. Laurie Martin did not take the necessary action to send her mother to Omaha as she had assured the Court she would. Mary Ann Daley did not have the mental competency to establish residency for herself. The indicia of citizenship were created by Laurie Martin. Laurie Martin now seeks to benefit from her misconduct by claiming residency for her mother in California and removing probate proceedings from this venue. Her claim that Robert Decker abandoned his sister in California is inconsistent with the observations and findings of this Court and a fair and reasonable reading of Robert Decker's deposition.
>
> The fact that the petition to probate in California was filed before the one in Arkansas is not that significant and is not determinative of [the] issue. Being the first to file does not serve to validate the improper conduct of Laurie Martin in keeping Mary Ann Daley beyond a temporary visit in violation of this Court's order.
>
> Under normal circumstances, the California court may have sufficient contacts with decedent to justify concurrent jurisdiction. However, these unique facts, the pending guardianship proceedings, and judicial economy require that jurisdiction and venue remain in Union County, Arkansas.

Martin now brings this appeal.

We review probate matters de novo on appeal, and we will not disturb the probate judge's findings absent an abuse of discretion or upon findings that the judge's decision was clearly erroneous. *Reynolds v. Guardianship of Sears*, 327 Ark. 770, 940 S.W.2d 483 (1997). We begin by noting that Martin couches her argument on appeal in terms suggesting that Ark. Code Ann. § 28-40-102 (Repl. 2004), the venue statute for probate of a will, governs the standard for determining whether a decedent's estate may be probated in Arkansas. We disagree. Generally, the principal ad-

ministration of a decedent's estate will take place in the state where the decedent was domiciled. *See, e.g.*, *Phillips v. Sherrod Estate*, 248 Ark. 605, 610, 453 S.W.2d 60, 63 (1970); 95 C.J.S. *Wills* § 525 (2001) ("[P]rimary probate of a will should be made in the place of the testator's domicile regardless of where the testator died.") (footnotes omitted).[2] Thus, we turn to the question of where Daley was domiciled at the time of her death. We find instructive the case of *Phillips v. Sherrod Estate*, *supra*. There, we observed:

> [T]he Perry County Probate Court entered an order on October 1, 1963, finding Sherrod incompetent, and this at a time when no one questions but that Sherrod was a resident of, and domiciled, in this state. We know that Sherrod was still incompetent at the time of his death and this fact was testified to by Mrs. Miller; the guardianship was also still in effect[.]
>
> We have held that to effect a change in domicile from one locality or state to another, there must be actual abandonment of the first domicile, coupled with an intention not to return to it and there must be a new domicile acquired by actual residence in another place or jurisdiction, with intent of making the last acquired residence a permanent home. *Weaver v. Weaver*, 231 Ark. 341, 329 S.W.2d 422, and cases cited therein. Here, there is no showing that there was any intention on the part of Sherrod to establish a domicile in Texas; to the contrary, Sherrod had been held incompetent before he was taken to Texas in 1963 and the record reveals no change in that condition prior to his death in 1969.

Id. at 612-13, 453 S.W.2d at 64.

In the instant case, the original guardianship order determined that Daley was mentally incapacitated to such an extent that she was incapable of handling her personal and business affairs. In addition, the record reveals that Daley was wheelchair bound with serious memory and reasoning problems and that the circuit court's finding of incompetence was based largely on a psychological evaluation indicating a diagnosis of dementia of Alzheimer's type.

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[2] We recognize that it is not unusual for the administration of an estate to take place in more than one state. *Phillips*, 248 Ark. at 610, 453 S.W.2d at 63 (citing 34 C.J.S. *Executors and Administrators* § 989 (1942)). In such cases, Arkansas follows the traditional rule that principal or domiciliary administration is to take place in the state of the decedent's last domicile. *Id.*

In *Phillips*, this court observed that there was no question that Sherrod was a resident of and domiciled in Arkansas at the time the guardianship order was entered and that there was no intention on the part of Sherrod to establish a domicile in Texas. Likewise, in the instant case, there is no allegation that Daley was not a resident of and domiciled in Arkansas at the time the guardianship order was entered in Union County, and there is no showing that Daley regained competency and was capable of forming the intent to establish a domicile in California. Moreover, the record is devoid of evidence to suggest that Daley was competent and able to form the necessary intent to abandon her domicile in Arkansas.[3] In addition, Martin's contention that Daley's obtaining a California identification card is evidence that she intended to make California her home is without merit because Martin presented no evidence to suggest that Daley possessed the capacity while in California to express her intent. For these reasons, we cannot say that the circuit court clearly erred.

Affirmed.

IMBER, J., concurs.

ANNABELLE CLINTON IMBER, Justice, concurring. I concur in the result but write to express my disagreement with the majority's reliance on the concept of domicile in determining which of two states is the proper forum for the probate of an estate. Specifically, the majority's reliance on *Phillips v. Sherrod Estate*, 248 Ark. 605, 453 S.W.2d 60 (1970), is misplaced. In *Phillips*, we interpreted Texas statutes, which operate in terms of domicile. *Id.* Conversely, a review of Arkansas statutes reveals that a standard of residence applies in determinations of forum for the administration of estates. The probate statutes repeatedly refer to residence as opposed to domicile.

[3] We note that at the guardianship hearing in April 2005, Daley was unaware that, at that time, she was living at the Beverly Nursing Home in El Dorado. Rather, she testified that she lived in Little Rock and "just knew people" at the nursing home. *Martin v. Decker*, 96 Ark. App. at 48, 237 S.W.3d at 504. Further, Decker stated in deposition testimony that when he spoke to Daley out in California, "she still thought she was in Arkansas. Her mental state was that. She never really, even when she was there, knew that she was not in Arkansas in my talking to her."

The Arkansas venue statute dictates the proper forum for the administration of an estate. The statute reads as follows, in pertinent part:

> (a) The venue for the probate of a will and for administration shall be:
>
> (1) In the county in this state where the decedent *resided* at the time of his or her death;
>
> (2) If the decedent did not *reside* in this state, then in the county wherein is situated the greater part, in value, of the property of the decedent located in this state;
>
> (3) If the decedent had no *residence* or property in this state, but died in this state, then in the county in which he or she died; and
>
> (4) If the decedent had no *residence* or property in this state and died outside of this state, then in any county in which a cause of action may be maintained by his or her personal representative.

Ark. Code Ann. § 28-40-102(a) (Repl. 2004) (emphasis added).

Furthermore, the Arkansas statute dealing with time limits for probate states that, to the extent that it relates to real property, the will of a *nonresident* admitted to probate in another jurisdiction may be admitted here without regard to the time limit. Ark. Code Ann. § 28-40-103(c)(1) (Repl. 2004). A petition for probate of a will or for the original appointment of a general personal representative must state the *residence* of the decedent and, if the decedent did not *reside* in this state at the time of death, must provide a general description of the property located in each county. Ark. Code Ann. § 28-40-107(c)(1), (4) (Repl. 2004). The chapter dealing with ancillary administration states that "the law and procedure relating to the administration of estates of *resident* decedents shall apply to the ancillary administration of estates of *nonresident* decedents." Ark. Code Ann. § 28-42-101 (Repl. 2004) (emphasis added). It is clear from the probate statutes that residence is the applicable standard in Arkansas.

Our case law supports this conclusion. For example, as early as 1920, we held that letters testamentary and of administration are to be issued in the county in which the testator or intestate *resided*. *Groschner v. Winton*, 146 Ark. 520, 226 S.W. 162 (1920). In

addition, we have held that "the will of a *nonresident* of this state may have original probate in this state, if the testator owned property in this state which might be the subject of administration in this state, or where there was a debt or demand due the testator which required administration to collect." *McPherson v. McKay*, 205 Ark. 1135, 1138-1139, 172 S.W.2d 911, 912 (1943) (emphasis added). Several cases have expressed the importance of residence in determining venue. *See Lawrence v. Sullivan*, 90 Ark. App. 206, 205 S.W.3d 168 (2005); *Smith v. Rudolph*, 221 Ark. 900, 256 S.W.2d 736 (1953); *Shelton v. Shelton*, 180 Ark. 959, 23 S.W.2d 629 (1930).

In short, we have never relied on domicile in determining the proper forum for the administration of an estate. Residence has always been the applicable standard. In the instant case, the circuit court found that the greater part of Mary Ann Daley's estate was located in Arkansas. Thus, I would affirm the circuit court's decision under Ark. Code Ann. § 28-40-102(a)(2).

Renda KIDWELL *v.* Margie RHEW

07-886 268 S.W.3d 309

Supreme Court of Arkansas
Opinion delivered November 15, 2007

Hyden, Miron & Foster, PLC, by: *Lori L. Holzwarth, Lyle D. Foster*, and *Guy W. Murphy, Jr.*, for appellant.

Millar Gibson, P.A., by: *Buck C. Gibson*, for appellee.

TOM GLAZE, Justice. In this case, appellant Renda Kidwell asks our court to determine whether Arkansas's pretermitted-heir statute, Ark. Code Ann. § 28-39-407(b) (Repl. 2004), should apply to a revocable *inter vivos* trust. Irene Winchester established the Irene Winchester Revocable Trust on January 25, 2000. The trust named Winchester as trustee and her daughter, appellee Margie Rhew, as successor trustee upon Winchester's death. Winchester conveyed various parcels of property to the trust during her life, including tracts of real property in Jackson and White counties.

Although Winchester created the trust, she never executed a will, and she died intestate on March 14, 2004. Following her death, Kidwell was appointed as special administrator of Winchester's estate on October 15, 2005. As special administrator, Kidwell identified three separate assets that were potentially includable in Winchester's estate, including the parcels of real estate that had been transferred to the trust during Winchester's lifetime. On September 26, 2006, Kidwell petitioned the Probate Division of the White County Circuit Court for an injunction against Rhew, preventing Rhew from disposing of the property "until rightful ownership shall be determined." In a brief supporting her motion for injunction, Kidwell argued that the pretermitted-heir statute should apply to "dispositions made by testamentary will substitutes, such as an inter vivos trust."

The circuit court entered an order on March 13, 2007, rejecting Kidwell's argument and finding that § 28-39-407(b) was "clear on its face and, by explicit terms, applies only to wills and not to trusts created during the life of the settlor." Accordingly, the court denied Kidwell's request to receive an intestate share of Winchester's estate; the court also discharged Kidwell as administrator of the estate and declared that the estate was closed. Kidwell filed a timely notice of appeal,[1] and now raises three points for

[1] On May 18, 2007, Kidwell filed a motion pursuant to Ark. R. App. P.–Civ. 4(b)(3) for an extension of time to file her notice of appeal. In that motion, she alleged that, despite repeated phone calls to the White County Clerk's office, she was never notified that the circuit

reversal; however, because each of her three arguments are similar, we treat them together in this opinion.

The fundamental question in this case involves the interpretation of § 28-39-407(b). Our standard of review for issues involving the interpretation of a statute is *de novo* on appeal. See *Health Facilities Management Corp. v. Hughes*, 365 Ark. 237, 227 S.W.3d 910 (2006); *Wal-Mart Stores, Inc. v. P.O. Market, Inc.*, 347 Ark. 651, 66 S.W.3d 620 (2002). The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *See Hughes, supra.* When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Id.* Moreover, the probate court is a court of special and limited jurisdiction, having only such jurisdiction and powers as are conferred by the constitution or by statute, or are necessarily incident to the exercise of the jurisdiction and powers granted, and the authority and jurisdiction of probate courts are to be strictly construed. *See Poe v. Case*, 263 Ark. 488, 565 S.W.2d 612 (1978); *Hilburn v. First State Bank*, 259 Ark. 569, 535 S.W.2d 810 (1976).

A pretermitted heir is a "child or spouse who has been omitted from a will, as when a testator makes a will naming his or her two children and then, sometime later, has two more children who are not mentioned in the will." *Black's Law Dictionary* 742 (8th ed. 2004). Arkansas's pretermitted-heir statute provides as follows:

> If, *at the time of the execution of a will*, there is a living child of the testator, or living child or issue of a deceased child of the testator, whom the testator shall omit to mention or provide for, either specifically or as a member of a class, the testator shall be deemed to have died intestate with respect to the child or issue. The child or issue shall be entitled to recover from the devisees in proportion to the amounts of their respective shares, that portion of the estate which he or she or they would have inherited had there been no will.

§ 28-39-407(b) (emphasis added).

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court's order had been entered; she did not receive word that the order had been filed until May 16, 2007. The trial court granted Kidwell's motion on May 25, 2007, finding that neither Kidwell nor her attorney had received notice of the signing or entry of the court's order; in addition, the court found that less than 180 days had elapsed since the filing of the order, and no party would be prejudiced by the requested extension. Kidwell filed her notice of appeal on May 31, 2007.

The purpose of the pretermitted-child statute is to avoid the inadvertent or unintentional omission of children or issue of deceased children unless an intent to disinherit is expressed in the will. *Alexander v. Estate of Alexander*, 351 Ark. 359, 93 S.W.3d 688 (2002); *Holland v. Willis*, 293 Ark. 518, 739 S.W.2d 529 (1987). This court has stated that the object of the statute is "to prevent injustice to a child or descendant from occurring by reason of the forgetfulness of a testator who might, at the time of making his will, overlook the fact that he had such child or descendant." *Petty v. Chaney*, 281 Ark. 72, 73, 661 S.W.2d 373, 374 (1983).

On appeal, Kidwell argues that, "if Irene Winchester's testamentary disposition of her estate had been by a Last Will and Testament containing the same terms of the Irene Winchester Revocable Trust, Renda Kidwell would have rights as a pretermitted heir." The immediate and obvious difficulty with that argument is that Winchester *did not* dispose of her property by way of a will. Instead, Winchester disposed of her property through an *inter vivos* trust.

A will and a trust are two different things entirely. A will is a disposition of property to take effect upon the death of the maker of the instrument. *See Edmundson v. Estate of Fountain*, 358 Ark. 302, 189 S.W.3d 427 (2004); *Faith v. Singleton*, 286 Ark. 403, 692 S.W.2d 239 (1985). A trust, on the other hand, is a fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another. *See, e.g.*, *Halliburton Co. v. E.H. Owen Family Trust*, 28 Ark. App. 314, 773 S.W.2d 453 (1989). As the terms are not interchangeable, it follows that the pretermitted-heir statute, which speaks only in terms of the "execution of a will," does not apply in instances in which there is no will.

Nonetheless, Kidwell argues that this court should look to the Restatement (Second) of Property, Donative Transfers § 34.2 (1992), which provides as follows:

> (2) If the donative transfer is under a substitute for a will, or under a transfer revocable by the donor at the time of the donor's death, and an issue of the donor who would take a share of the donor's property on the donor's death intestate is omitted as a beneficiary, in the absence of a statute in the controlling state, the policy of the statute in the controlling state applicable to an omitted issue in a will should be applied by analogy to the omitted issue in the substitute for a will, or in the transfer revocable by the donor at the time of the donor's death.

Kidwell urges the court to adopt this language, claiming that when there is no controlling case law, this court will "consistently rely on the Restatements." However, Kidwell fails to note that the Statutory Note and Reporter's Notes on Section 34.2 do not favor her position. The preface to the Statutory Note to Section 34.2 points out that the statutes cited therein "are applicable in terms only to wills. No statutes have been found which apply generally to any omitted intestate beneficiary. In addition, no statutes were found that extend the policy governing the omitted child statutes to will substitutes." Further, the Reporter's Note to Section 34.2 states the following:

> No cases have been found in which the protections by statute or case law afforded to a child omitted from a will have been extended to apply to a child omitted from a will substitute used as a comprehensive dispositive plan. Courts that have addressed the issue have decided against expanding the policy.

[redacted] We decline to adopt the Restatement's provisions. According to its clear language and express terms, Arkansas's statute applies only to wills. When the language of the statute is clear and unambiguous, there is no need to resort to rules of statutory construction, as Kidwell would have us do. *See City of Fort Smith v. Carter*, 364 Ark. 100, 216 S.W.3d 594 (2005) (if the language of the statute is plain and unambiguous, the analysis need go no further). Here, the pretermitted-heir statute speaks only in terms of wills, and not of trusts, and Kidwell cites no convincing authority that would compel this court to reach the conclusion she urges. Accordingly, we affirm the trial court's finding that § 28-39-407(b) applies only to wills and not to trusts created during the life of the settlor.

HANNAH, C.J., not participating.

Eric Keith HOYLE *v.* STATE of Arkansas

CR 06-1249 268 S.W.3d 313

Supreme Court of Arkansas
Opinion delivered November 15, 2007
[Rehearing denied January 10, 2008.]

The Law Offices of J. Brent Standridge, P.A., by: *J. Brent Standridge*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

DONALD L. CORBIN, Justice. Appellant Eric Keith Hoyle appeals the order of the Polk County Circuit Court convicting him of one count of battery in the first degree and two counts of manslaughter. On appeal, he argues that the trial court erred in: (1) denying his motion for a directed verdict on all counts; (2) denying his motion to suppress evidence of chemical test results; (3) allowing certain expert testimony. This case was certified to us from the Arkansas Court of Appeals as involving an issue of first impression, a question pertaining to the interpretation of the federal constitution, and a substantial question of law concerning the interpretation of an act of the Arkansas General Assembly; hence, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(1), (3), and (6). We find no error and affirm.

Facts

On July 29, 2004, while driving a tractor trailer with a loaded chip hauler attached, Hoyle crossed the center line and struck an on-coming motor home driven by Hilda Dean. Hilda and her grandson Gary Dean, a passenger, were killed in the collision, while a third passenger, Dillon Holbrook, also Dean's grandson, was seriously injured. During the course of investigating the accident, officers believed that Hoyle might have been driving under the influence of drugs or alcohol at the time of the accident. Hoyle, who was transported by ambulance to a local hospital, was presented with a consent form to allow authorities to obtain a blood and urine sample from him. The samples later revealed the presence of amphetamine and methamphetamine in his system.

Hoyle was charged by felony information with one count of battery in the first degree and two counts of manslaughter. Prior to trial, he filed a motion in limine seeking to exclude any mention that he had controlled substances in his system at the time of the accident. A pretrial hearing was held on November 29, 2005, to consider Hoyle's motion to suppress evidence of his blood and urine test on the basis that such evidence was the fruit of an unlawful search and seizure and also violated his rights under the Health Insurance Portability and Accountability Act (HIPAA), codified at 42 U.S.C. §§ 1320d et seq. Additionally, Hoyle filed a motion to declare Ark. Code Ann. § 5-65-202 (1987) unconsti-

tutional.[1] Hoyle raised several arguments in support of his suppression motion, including that the taking of his blood and urine was an unlawful search and seizure because it was not consensual. The State argued that it was consensual, as evidenced by Hoyle's signing of the "Blood Alcohol/Controlled Substances Rights Form." Alternatively, the State argued that an officer who suspects alcohol or drug use in an accident where there is a fatality is required to seek consent for a blood or urine test, pursuant to state statute.

In response to Hoyle's motion, Deputy Price testified that he had previously arrested Hoyle for possession of a Schedule II controlled substance, methamphetamine. On the day of the accident, he had reason to believe that Hoyle was under the influence of a controlled substance based on this previous arrest, as well as information developed at the scene, particularly a lack of any other contributing factor that would have caused Hoyle to leave the roadway and hit another vehicle.

Additionally, Corporal Wendell Adams, with the Arkansas State Police, testified that he investigated the accident scene on July 29, and as his investigation progressed, he became concerned that Hoyle might have been under the influence of drugs or alcohol. Hoyle's demeanor and overall appearance concerned Adams. Also, Adams interviewed the driver of a truck who had been behind Hoyle and who stated that he never saw Hoyle apply his brakes prior to the collision and that he had almost run a tanker off the road prior to this accident. Thus, according to Adams, he believed he had enough probable cause to request a chemical test. The trial court denied Hoyle's motion, ruling that the State had proven that Hoyle consented to the blood draw and, alternatively, that there was probable cause to request the test.

Finally, Hoyle argued that the samples were obtained in violation of his rights under HIPAA. Specifically, he argued that the presence of law enforcement officers at the hospital while he was being treated violated HIPAA, which supersedes any state statute, and that he did not consent to any disclosure of his medical information. The State countered that HIPAA does not apply in cases where consent has been given, such as the present case.

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[1] As required by law, notice was given to the Attorney General that Hoyle was challenging the constitutionality of a state statute. The Attorney General agreed that the prosecutor would be able to handle any arguments regarding such a challenge.

Additionally, the State argued that there was no evidence that any officer overheard or was provided with medical information relating to Hoyle. The trial court agreed with the State, ruling that there was no evidence of a HIPAA violation, where Hoyle consented to the taking of the samples and no officers were given any of Hoyle's medical information.

On February 9, 2006, a pretrial hearing was held to conduct a *Daubert* analysis of expert testimony regarding the effects of methamphetamine on an individual's physical and mental faculties that the State sought to introduce at trial. The State produced the testimony of Dr. Alex Pappas, a board certified pathologist, regarding the effects of Hoyle having methamphetamine in his system at the time of this accident. Dr. Pappas testified that he has had experience dealing with individuals who have methamphetamine in their system and that they are usually agitated, show irrational behavior, may be psychotic, fatigued, have a rapid pulse, and show signs of paranoia. In regards to a person on methamphetamine operating a motor vehicle, Dr. Pappas testified that the person might drift in and out of a lane, exhibit risky behavior, or drive off the road. The court inquired of Dr. Pappas if he believed that his opinions regarding the behavioral effect of methamphetamine, particularly driving behavior, are widely accepted in the scientific community, to which Dr. Pappas replied, "Yes." The trial court then ruled that Dr. Pappas was qualified to testify as an expert witness and that his opinion testimony was based on reliable scientific evidence that was not particularly novel.

Hoyle was tried by a jury on March 9, 2006. At trial, Corporal Adams testified about his investigation of the accident. According to Adams, he was called to work a crash site on Highway 71 south of Mena. When he first arrived, Adams saw an unidentified metal frame and a chip trailer with tractor trailer attached to it. The tractor trailer was on fire, and the chip trailer was partially on fire. Adams soon discovered that the metal frame was the remnants of a 1990 Chevrolet Motor Home, estimated to have been thirty feet long. The driver of the motor home and her two passengers had been taken from the scene to area hospitals prior to Adams's arrival. Adams then noticed a man, later identified as Hoyle, sitting up on a hill in front of a feed store. According to Adams, in reconstructing the accident, he was able to determine that the Hoyle vehicle, which originated in Mansfield, Arkansas, and weighed over 82,000 pounds, was originally traveling southbound, while the Dean vehicle was headed northbound, when

Hoyle's vehicle crossed the center line and hit the Dean vehicle at a forty to forty-five degree angle. The impact of Hoyle's vehicle pushed the Dean vehicle backwards before Hoyle's vehicle went through the motor home. Adams stated that as part of his investigation he requested Hoyle to submit to a blood and urine test.

Deputy Price testified that he first came into contact with Hoyle at the scene of the accident and then followed him to the Mena Medical Center. There, Price presented Hoyle with a "Blood Alcohol/Controlled Substances Rights Form" and explained the document to him prior to having hospital staff administer urine and blood samples.

Elizabeth Lowman-Smith, testifying as an expert, stated that her testing of Hoyle's urine sample revealed the presence of both amphetamine and methamphetamine in his system. A subsequent blood screen revealed an amount of methamphetamine quantified at .221 micrograms per milliliter.

James Gann, a truck owner who was driving a commercial truck that was behind Hoyle's vehicle immediately prior to the accident, also testified. According to Gann, he heard an encounter over his CB radio where the driver of a tanker "chewed on somebody" whom Gann believed to be Hoyle. Evidently, the driver of a chip hauler almost hit the tanker driver after crossing the center line. The driver of the chip hauler apologized and then later Gann heard this same person become quite talkative as they approached Mena. Shortly thereafter, just outside of Wickes, Gann witnessed the chip hauler cross the center line and crash into an oncoming vehicle, causing that vehicle to explode. According to Gann, the brake lights on Hoyle's vehicle had previously been activated but never came on before Hoyle crashed into the motor home. According to Gann, he never saw anything that would have caused Hoyle to swerve into the on-coming traffic lane.

Dr. Pappas testified that he is familiar with the effects of methamphetamine on the human body. Specifically, Dr. Pappas testified that such effects include euphoria, self-grandisment, reckless behavior, and the inability to sleep. In addition, Dr. Pappas testified about studies that have been done on the effect of methamphetamine and driving, and such studies link methamphetamine with reckless driving behavior, particularly crossing the center line and hitting another vehicle. According to Dr. Pappas, not only does methamphetamine cause a deterioration in driving abilities, it causes problems because it makes a person stay up for so

long that they can nod off when driving. While Dr. Pappas admitted that there are some legitimate issues for prescribing methamphetamine, including ADD and narcolepsy, such doses would be at a therapeutic level of .02 or .03 micrograms per milliliter. Dr. Pappas also stated that based on the testimony that he had heard in court, at the time of the accident, Hoyle "was either coming up, going up or he was certainly under the effect" of methamphetamine. He further elaborated that the .221 micrograms per milliliter without a doubt had a negative effect on the driving in this case.

Following the presentation of the State's evidence, Hoyle moved for a directed verdict on both counts of manslaughter, as well as the count of battery in the first degree. Hoyle renewed these motions at the close of all the evidence. The jury was instructed and subsequently returned guilty verdicts as previously set forth. A judgment and commitment order was entered on March 24, 2006, and a timely notice of appeal was filed.

I. Sufficiency of the Evidence

As his first point on appeal, Hoyle argues that there was insufficient evidence to support his convictions for battery and manslaughter. Specifically, with regard to the battery conviction, Hoyle avers that there was no evidence that he acted "under circumstances manifesting extreme indifference to the value of human life." With regard to the manslaughter convictions, Hoyle argues that the evidence failed to establish that he acted recklessly. With respect to both the battery and manslaughter convictions, Hoyle argues that they should be reversed or, alternatively, reduced to lesser-included offenses. The State counters that there was sufficient evidence to support each of Hoyle's convictions.

We treat a motion for directed verdict on appeal as a challenge to the sufficiency of the evidence. *See Young v. State*, 370 Ark. 147, 257 S.W.3d 870 (2007). We will affirm the circuit court's denial of a motion for directed verdict if there is substantial evidence, either direct or circumstantial, to support the jury's verdict. *See id.* This court has repeatedly defined substantial evidence as "evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture." *Id.* at 151, 257 S.W.3d at 875. Furthermore, "[t]his court views the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered." *Id.*

a. Battery in the First Degree

We turn first to the battery conviction. Hoyle was charged with violating Ark. Code Ann. § 5-13-201(a)(3) (Supp. 2005), which provides that a person commits battery in the first degree if: "He or she causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life." According to Hoyle, the phrase "under circumstances manifesting extreme indifference to the value of human life" means deliberate conduct with a knowledge or awareness that one's actions are practically certain to bring about the prohibited result.

In *Tarentino v. State*, 302 Ark. 55, 786 S.W.2d 584 (1990), this court explained that the primary way in which first-degree battery differs from second- and third-degree battery is the state of mind of the actor. The court went on to explain that in order to be convicted of first-degree battery, a defendant must act with the purpose of causing serious physical injury to another person. Moreover, the circumstances of the first-degree battery must by necessity be more dire and formidable in terms of affecting human life. *See Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994). The attendant circumstances must be such as to demonstrate the culpable mental state of the accused. *Id.* The *Tigue* court further elaborated that first-degree battery involves actions which create at least some risk of death and which, therefore, evidence a mental state on the part of the accused to engage in some life-threatening activity against the victim. *Id.*

[redacted] Here, the evidence showed that Hoyle acted recklessly under circumstances manifesting extreme indifference to human life. Specifically, the evidence demonstrated that Hoyle drove a fully loaded commercial vehicle weighing over 82,000 pounds while under the influence of methamphetamine. Ms. Lowman-Smith testified that she tested Hoyle's urine for drugs and discovered the presence of amphetamine and methamphetamine. A subsequent test on Hoyle's blood confirmed the presence of methamphetamine. Dr. Pappas testified that an individual's physical abilities are affected by the presence of methamphetamine in his system, including his driving abilities. According to Dr. Pappas, methamphetamine can cause a driver to weave across lanes of traffic, take undue risks, or leave the roadway. In this case, Hoyle's entire vehicle, with the exception of the right rear axel, crossed into the oncoming-traffic lane, striking the motor home, and

ultimately driving through it. Hoyle never attempted to brake prior to the accident or to return to the proper lane of traffic. It is apparent based on the evidence in this case that Hoyle exhibited reckless conduct that involved a conscious disregard of a perceived risk. Accordingly, we cannot say that the trial court erred in denying Hoyle's motion for directed verdict on the first-degree battery charge.

b. Manslaughter

Next, we consider Hoyle's argument that there was insufficient evidence to support his manslaughter convictions on the basis that there was no evidence that he acted recklessly. Hoyle was charged with manslaughter pursuant to Ark. Code Ann. § 5-10-104(a)(3) (Repl. 1997), which provides that a person commits manslaughter if he recklessly causes the death of another person. Arkansas Code Annotated § 5-2-202(3) (Repl. 1997) provides:

> A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Thus, the relevant inquiry is whether the evidence in the instant case demonstrated that Hoyle consciously disregarded a substantial and unjustifiable risk in driving while under the influence of methamphetamine. We think it does.

At trial, James Gann testified that he believed Hoyle almost ran another vehicle off the road, that Hoyle was extremely talkative at one point and then totally silent immediately prior to the accident, that Hoyle never braked immediately before striking the Dean motor home, and that Hoyle did not attempt to assist any of the victims at the scene of the accident. Trooper Adams testified that his investigation revealed that Hoyle's truck was originally traveling southbound, while the Dean vehicle was headed northbound, when Hoyle's vehicle crossed the center line and hit the Dean vehicle at a forty to forty-five degree angle. According to Corporal Adams, the impact of Hoyle's vehicle pushed the Dean vehicle backwards before Hoyle's vehicle went through the motor home. Adams also stated that while investigating the crash, he noticed Hoyle sitting by himself on a hill near the accident scene.

This evidence coupled with the toxicology report that established that Hoyle had methamphetamine in his system at the time of the accident and Dr. Pappas's expert opinion that .221 micrograms per milliliter of methamphetamine without a doubt had a negative effect on the driving in this case clearly demonstrates that Hoyle acted recklessly in driving while under the influence of methamphetamine.

[redacted] We simply do not agree that the jury had to resort to speculation or conjecture in order to conclude that the methamphetamine in his system so altered his motor skills that it was the cause of the wreck. The foregoing evidence constituted substantial evidence that Hoyle recklessly caused the deaths of Hilda Dean and Gary Dean, in that he consciously disregarded a substantial and unjustifiable risk that death might occur if he operated a commercial vehicle after ingesting methamphetamine, and the disregard thereof constituted a gross deviation from the standard of care that a reasonable person would observe in Hoyle's situation.

II. Motion to Suppress

Hoyle next argues that the trial court erred in failing to suppress evidence of blood-alcohol test results, as the obtaining of samples of his blood and urine constituted (a) an unlawful search and seizure; and (b) a violation of his rights under HIPAA. The State argues that suppression was not warranted because there was no illegal search and seizure where there was implied consent, probable cause, and a reasonable search. We first turn to his argument that the taking of the samples was an unlawful search and seizure.

a. Unlawful Search and Seizure

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 . . . ." It is well settled that the taking of blood by a law enforcement officer amounts to a Fourth Amendment search and seizure. *Polston v. State*, 360 Ark. 317, 201 S.W.3d 406 (2005); *Haynes v. State*, 354 Ark. 514, 127 S.W.3d 456 (2003); *Russey v. State*, 336 Ark. 401, 985 S.W.2d 316 (1999). *See also Schmerber v. California*, 384 U.S. 757 (1966).

Pursuant to Ark. R. Crim. P. 12.3(a), a search of an accused's blood stream may be made only:

(i) if there is a strong probability that it will disclose things subject to seizure and related to the offense for which the individual was arrested; and

(ii) if it reasonably appears that the delay consequent upon procurement of a search warrant would probably result in the disappearance of destruction of the objects of the search; and

(iii) if it reasonably appears that the search is otherwise reasonable under the circumstances of the case, including the seriousness of the offense and the nature of the invasion of the individual's person.

Here, the trial court ruled that there was probable cause warranting the taking of Hoyle's blood and urine samples. Deputy Price testified that he had reason to believe that Hoyle was intoxicated at the time of the accident. According to Price, there was no other legitimate explanation of what would have caused Hoyle to leave his lane of traffic and crash into the motor home. Price also stated that he was familiar with Hoyle, having previously arrested him for possession of methamphetamine. Corporal Adams also testified that he believed Hoyle to be under the influence at the time of the accident based on his reconstruction of the accident. Adams stated that Hoyle's vehicle caused a head-on collision in the wrong lane, there were no skid marks, and based on a witness's statement, Hoyle never applied the brakes before hitting the motor home. Adams also pointed to the fact that there were no other conditions present that seemed to be contributing factors and that Hoyle's demeanor and appearance caused him to suspect Hoyle was under the influence. This evidence complies with the first requirement of Rule 12.3. In addition, if officers had waited to obtain samples from Hoyle, it is quite possible that his blood would have metabolized the methamphetamine, resulting in the destruction of this evidence. Finally, the intrusion caused by the taking of the blood and urine samples was minor and the seriousness of the offense was obvious, considering that the accident involved two fatalities and a third serious injury. Accordingly, because there was probable cause supporting the taking of Hoyle's blood and urine samples, it is unnecessary for us to consider Hoyle's argument regarding his lack of consent or his challenge to the constitutionality of section 5-65-202.

b. HIPAA Violation

In addition to his illegal search and seizure argument, Hoyle contends that suppression was warranted in this case because the taking of the samples violated his rights under HIPAA. According to Hoyle, the State used medical personnel to obtain medical evidence from him without complying with HIPAA. The State counters that Hoyle has the burden of establishing how HIPAA applies and why suppression is warranted in this instance and fails in both regards.

[redacted] In advancing his HIPAA argument, Hoyle simply states that "by utilizing hospital personnel the government obtained medical evidence from Appellant without utilizing any of the accepted measures under HIPAA." Hoyle then seems to argue that pursuant to HIPAA, officers were required to seek a subpoena, warrant, or court order prior to taking any samples from him. At a pretrial hearing below, however, Hoyle argued that the taking of his samples was a HIPAA violation because officers were present while he was being treated for injuries related to the accident. Because Hoyle has changed his argument on appeal, it is unnecessary to address his argument on this point. *See Hunter v. State*, 330 Ark. 198, 952 S.W.2d 145 (1997) (holding that an appellant cannot change his argument on appeal and that he is limited to the scope and nature of the argument made below).

III. Admission of Expert Testimony

As his final point on appeal, Hoyle argues that the trial court abused its discretion in allowing the expert testimony of Elizabeth Lowman-Smith, a toxicologist, and Dr. Alex Pappas, a pathologist, over his objections. According to Hoyle, their testimony was not helpful to the jury and was not sufficiently reliable and, thus, inadmissible as expert testimony. Hoyle also appears to argue that the admission of Dr. Pappas's testimony about the effects of methamphetamine was unduly prejudicial. The State counters that the trial court did not abuse its discretion in admitting the expert testimony of Lowman-Smith and Dr. Pappas and that any argument regarding prejudicial effect is not preserved for review.

At the outset, we note our agreement with the State that Hoyle never challenged the admissibility of Dr. Pappas's testimony on the basis that it was unduly prejudicial; thus, any such argument is precluded on appeal. *See, e.g.*, *White v. State*, 370 Ark. 284, 259

S.W.3d 410 (2007) (holding that an argument may not be raised for the first time on appeal). Now, we turn to the issue of whether the expert testimony presented in this case comports with the rules of evidence.

Arkansas Rule of Evidence 702, which governs expert testimony, states that 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." In *Farm Bureau Mutual Insurance Co. of Arkansas v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000), this court adopted the United States Supreme Court's interpretation of Federal Rule of Evidence 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Under *Foote* and *Daubert*, the trial court must make a preliminary assessment of whether the reasoning or methodology underlying expert testimony is valid and whether the reasoning and methodology used by the expert has been properly applied to the facts in the case. This court has also adopted the subsequent Supreme Court decision in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), holding that Rule 702 applies equally to all types of expert testimony and not simply to scientific expert testimony and that they must be shown to be both reliable and relevant. *See Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003).

Here, Lowman-Smith testified at trial that she found .221 micrograms per milliliter of methamphetamine in the blood sample Hoyle submitted. Lowman-Smith explained that she tested the 4.5 milliliter sample of blood using a mass spectrometer and a gas chromatograph, which are generally accepted and recognized procedures for testing blood to determine a quantifiable amount. On appeal, Hoyle argues that Lowman-Smith's testimony was unreliable because she used an extrapolation to arrive at the quantifiable amount. This argument is wholly without merit as Lowman-Smith never testified at trial regarding the extrapolation amount; rather, she only testified to the quantifiable amount determined to be in the 4.5 milliliter sample.

As to Dr. Pappas's testimony, Hoyle argues that Dr. Pappas had never been qualified to give testimony regarding the effect of methamphetamine in Arkansas state courts and his testimony regarding methamphetamine had not previously been accepted before. Simply because this specific testimony had never

been accepted before does not render it unreliable or not helpful to the jury. Here, the trial court inquired of Dr. Pappas if the information regarding the effects of methamphetamine was widely accepted in the scientific community, to which Dr. Pappas stated that it was. Moreover, Dr. Pappas was qualified by training and experience to testify regarding his opinion on the effects of methamphetamine. Finally, the opinion testimony of Dr. Pappas was helpful to the jury in that his testimony provided insight into the mental and physical effects of methamphetamine on an individual. This case is simply not analogous to the situation in *Middleton v. State*, 29 Ark. App. 83, 780 S.W.2d 581 (1989), a case relied on by Hoyle. In *Middleton*, the court of appeals held that an officer's testimony fixing appellant's alcohol level at a specific level based on physical test was inadmissible and manifestly prejudicial because the proper foundation had not been laid to establish the reliability, accuracy, and validity of the test. The same does not hold true here, where the trial court conducted a *Daubert* hearing and Dr. Pappas testified to his training and experience and also testified to the fact that his opinion testimony was widely accepted by the scientific community. Accordingly, we cannot say that the trial court erred in admitting the expert testimony of Dr. Pappas.

Affirmed.

Crystal RYDER *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. and Ronald Froud

07-448 268 S.W.3d 298

Supreme Court of Arkansas
Opinion delivered November 15, 2007

Nolan, Caddell & Reynolds, P.A., by: *Bill G. Horton*, for appellant.

Brian Wood, for appellee.

Brian G. Brooks, for amicus curiae Arkansas Trial Lawyers Association.

ROBERT L. BROWN, Justice. Appellant Crystal Ryder and Ronald Froud were involved in an automobile accident in Washington County on March 7, 2005.[1] Ryder later filed a complaint against Froud and alleged that Froud had operated his automobile in a negligent manner, which caused the accident and resulted in property damage and personal injury to Ryder.

On August 4, 2006, Ryder filed a motion to approve a proposed settlement, in which Ryder stated that she and Froud had reached a settlement in the amount of $15,000. The motion stated that State Farm Mutual Automobile Insurance Company ("State Farm"), Ryder's automobile insurance carrier, claimed an interest in the settlement proceeds due to its payment of $5,000 in medical benefits on Ryder's behalf. The motion further stated that the proposed settlement amount between Ryder and Froud did not make Ryder whole. State Farm subsequently filed a motion to enter appearance for the purpose of determining its "subrogation rights" and asserted that it was entitled to reimbursement for the $5,000 it paid in medical payments coverage on behalf of Ryder, less the cost of collection.

This was followed by Ryder's amended motion to approve the settlement and for a declaratory judgment in which Ryder claimed that State Farm had no right to be reimbursed for the amount of medical benefits it had paid because she had not been made whole. She further asserted that State Farm was guilty of bad faith by attempting to avoid liability under the insurance policy that it had issued to her. Ryder then filed a motion for partial summary judgment and argued that there was no genuine issue of material fact that she would not be made whole by the $15,000 settlement. In that motion, she asked the circuit court to rule that State Farm's lien against that settlement amount was unenforceable.

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[1] The circuit court's order contains a caption that lists Ronald Froud as the only defendant. However, the record in this case lists State Farm as an appellee, and State Farm is the only appellee to file a brief with this court.

State Farm answered and filed its own motion for summary judgment, stating that there were no genuine issues of material fact regarding State Farm's right of reimbursement and that the made-whole doctrine did not apply to claims made under Arkansas Code Annotated § 23-89-207. State Farm further alleged that it had agreed to allow Ryder to be paid the sum of $2,000 for her proportional share of the cost of collection but that it was entitled to the remaining $3,000.

Following a letter opinion, the circuit court issued its order on January 25, 2007, in which it granted State Farm's motion for summary judgment. In that order, it dismissed Ryder's motion for partial summary judgment as well as her amended motion to approve the proposed settlement and her motion for a declaratory judgment. The circuit court determined that State Farm was asserting its right of reimbursement under § 23-89-207 against Ryder and was not making a claim for subrogation. The circuit court additionally ruled that the statutory right of reimbursement under § 23-89-207 was different from a claim of subrogation and that the made-whole doctrine did not apply to these circumstances. The circuit court found, as a final point, that State Farm's assertion of its right to be reimbursed was not in bad faith and that State Farm was entitled to the $3,000 in dispute.

Ryder first contends in her appeal that the circuit court erred in ruling that State Farm's claim for reimbursement under § 23-89-207 was not a claim for subrogation. She further argues that the circuit court erred in deciding that the made-whole doctrine does not apply to claims made under § 23-89-207, and that because she was not made whole in the settlement, State Farm's lien against the settlement proceeds is unenforceable. Ryder urges in support of this argument that previous cases involving the construction of § 23-89-207 have considered a claim for reimbursement under this section to be a claim for subrogation. Ryder asserts, in addition, that there is no difference between subrogation arising by statute, as in this case, or arising under the terms of an insurance policy, and that even in cases of subrogation arising by statute, equitable principles, such as the made-whole doctrine, apply. She insists that a repayment claim for benefits paid, whether based on the terms of an insurance policy or by statute, is a claim for subrogation and that the made-whole doctrine is applicable.

This court's standard of review for the grant of a motion for summary judgment is as follows:

> A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" on the issue set forth in the party's motion. Ark. R. Civ. P. 56(c)(2) (2007). The burden of proving that there is no genuine issue of material fact is upon the moving party. *Windsong Enterprises, Inc. v. Upton*, 366 Ark. 23, 233 S.W.3d 145 (2006). On appellate review, we must determine whether summary judgment was proper based on whether the evidence presented by the moving party left a material question of fact unanswered. *Id.* This court views the proof in the light most favorable to the party resisting the motion, resolving any doubts and inferences against the moving party, to determine whether the evidence left a material question of fact unanswered. *Id.*

Price v. Thomas Built Buses, Inc., 370 Ark. 405, 407-08, 260 S.W.3d 300, 303 (2007).

The statute at issue in this case, § 23-89-207, provides in part:

> (a) Whenever a recipient of benefits under § 23-89-202(1) and (2) recovers in tort for injury, either by settlement or judgment, the insurer paying the benefits has a right of reimbursement and credit out of the tort recovery or settlement, less the cost of collection, as defined.
>
> . . . .
>
> (c) The insurer shall have a lien upon the recovery to the extent of its benefit payments.

Ark. Code Ann. § 23-89-207(a) and (c) (Repl. 2004) (amended 2005). Section 23-89-202 requires that all automobile liability insurance policies provide minimum medical and hospital benefits pursuant to subsection (1), income disability benefits pursuant to subsection (2), and accidental death benefits pursuant to subsection (3) to insured parties without regard to fault. *See* Ark. Code Ann. § 23-89-202 (Repl. 2004).

State Farm contends, and the circuit court agreed, that under these statutes, it has an absolute right of reimbursement, less cost of collection, for the medical benefits it paid on behalf of Ryder as well as a statutory lien to the extent it made benefit payments. The carrier contends, nevertheless, that this statutory right to reim-

bursement is not subrogation. Hence, whether the right to reimbursement pursuant to § 23-89-207 is subrogation is an issue we must first resolve.

This court has defined subrogation as follows:

> Subrogation is the substitution of one party for another. The party asserting subrogation is making a demand under the right of another. Subrogation is a normal incident of indemnity insurance. That is to say that because insurers pay the obligations to their insureds, a right in equity to subrogation in the insurer arises. This assures against unjust enrichment by way of double recovery.

Southern Farm Bureau Casualty Ins. Co. v. Tallant, 362 Ark. 17, 22-23, 207 S.W.3d 468, 471 (2005) (internal citations omitted). A right to subrogation arises by convention in cases in which the insurance policy or contract contains a subrogation provision. *See Tallant, supra.* Legal or equitable subrogation arises by operation of law based on the facts or underlying circumstances of the case. *See id.* Subrogation rights may also arise by statute. *See id.* In *Daves v. Hartford Accident & Indemnity Company*, 302 Ark. 242, 248, 788 S.W.2d 733, 736 (1990), this court said the right of reimbursement under § 23-89-207 "is in the nature of subrogation," and that "[t]he underlying principle of subrogation rights is to avoid double recovery by the insured."[2] We further note that in State Farm's motion to enter an appearance, it did so "for the purpose of determining State Farm's subrogation rights." We hold, therefore, that the right to reimbursement under § 23-89-207 is a right to subrogation vested in the insurer that is established by statute.

The general rule regarding the right to subrogation is that "an insurer is not entitled to subrogation unless the insured has been made whole for his loss . . . ." *Shelter Mutual Ins. Co. v. Bough*, 310 Ark. 21, 28, 834 S.W.2d 637, 641 (1992). This court has explained that "the insurer should not be precluded from employing its right of subrogation when the insured has been fully compensated and is in a position where the insured will recover twice for some of his or her damages." *Id.*

The *Bough* case involved the same statutory lien as that involved in the instant case, and the issue was whether this statute

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[2] In *Daves, supra*, this court held that the insurer was entitled to reimbursement from the insured's settlement proceeds for the amount the insurer had paid in benefits to the insured. Whether the insured had been made whole was not at issue in that case.

created a right to subrogation. In analyzing the application of § 23-89-207, we considered the statute as one that provides subrogation rights for the insurer subject to the made-whole doctrine:

> Although we have no criticism of the cases cited by Bough, the rule limiting the insurer's right to subrogation in those cases is not applicable to the facts here. The equitable nature of subrogation is granted an insurer to prevent the insured from receiving a double recovery. Thus, while the general rule is that an insurer is not entitled to subrogation unless the insured has been made whole for his loss, the insurer should not be precluded from employing its right of subrogation when the insured has been fully compensated and is in a position where the insured will recover twice for some of his or her damages. That is the situation here.

310 Ark. at 28, 834 S.W.2d at 641.

In *Franklin v. Healthsource of Arkansas*, 328 Ark. 163, 942 S.W.2d 837 (1997), this court expanded the use of the made-whole doctrine and held that an insurer is not entitled to subrogation unless the insured has been fully made whole, regardless of whether the insurance contract between the insurer and insured expressly gave the insurer a right of subrogation for benefits paid.

Later, in *General Accident Ins. Co. of America v. Jaynes*, 343 Ark. 143, 33 S.W.3d 161 (2000), this court invoked *Bough, supra*, and *Franklin, supra*, and held that the made-whole doctrine applies not only to equitable and conventional rights as well as statutory rights as discussed in *Bough*, but also to statutory rights of subrogation provided under Workers' Compensation statutes. In *Jaynes, supra*, an employee of J.T. Shannon Lumber Company was killed in an automobile accident while driving a truck for his employer. The employer's workers' compensation carrier, General Accident Insurance Company, paid over $100,000 in benefits to the employee's family. The employee's estate later filed a wrongful death action against the third parties responsible for the employee's death, and the parties reached a settlement whereby the defendants agreed to pay the estate $18,500. General Accident intervened and asserted that it was entitled to a first lien on two-thirds of the estate's net recovery pursuant to Arkansas Code Annotated § 11-9-410 (Repl. 1996). The circuit court ruled that General Accident's right of subrogation did not arise because the settlement amount was insufficient to make the employee's survivors whole.

General Accident appealed, and this court affirmed the ruling of the circuit court. In doing so, we referred specifically to § 23-89-207 and said:

> First, we point out that this court premised its decision in *Franklin* on its holding in *Shelter Mutual Insurance Co. v. Bough*, 310 Ark. 21, 834 S.W.2d 637 (1992), where an insurer sought subrogation in return for its payment to its insured for no-fault medical and wage-loss benefits under Ark. Code Ann. § 23-89-202(1) and (2) (Repl. 1991). As in the instant case, the insurer's right to subrogation was statutory. Ark. Code Ann. § 23-89-207 (Repl. 1991) provides as follows:
>
> > (a) Whenever a recipient of § 23-89-202(1) and (2) benefits recovers in tort for injury, either by settlement or judgment, the insurer paying the benefits has a right of reimbursement and credit out of the tort recovery or settlement, less the cost of collection, as defined.
> >
> > . . . .
> >
> > (c) The insurer shall have a lien upon the recovery to the extent of its benefit payments.
>
> Although the insurer's subrogation lien right in *Bough* was established by the General Assembly, the *Bough* court held the insurer's right to subrogation did not arise until the insured was made whole. That same rationale applies to the situation before us now.

Jaynes, 343 Ark. at 152, 33 S.W.3d at 166.

Similar to the carriers in *Bough* and *Jaynes*, the insurer in the instant case, State Farm, maintains that because it has been afforded a statutory lien by the General Assembly pursuant to § 23-89-207, its right of reimbursement is not conditioned upon whether the insured, Ryder, has been made whole. We disagree with State Farm.

In a typical insurance scenario, the insured pays premiums to the insurer to assume risks. If the insurer is entitled to reimbursement of the benefits it previously paid to the insured after the insured receives a settlement from a third-party tortfeasor

but has still not been made whole, then a windfall is created for the insurer because it is not being forced to assume all of the risks that it has been paid by the insured to assume. Moreover, nothing in the language of § 23-89-207 creates an exception to the general rules regarding subrogation and the made-whole doctrine. It is well settled that this court will not read into a statute a provision that was not included by the General Assembly, *see Potter v. City of Tontitown*, 371 Ark. 200, 264 S.W.3d 473 (2007), and this court will not construe a statute to yield an absurd result. *See Nabholz Constr. Corp. v. Contractors for Public Protection Ass'n*, 371 Ark. 411, 266 S.W.3d 689 (2007). We note, in addition, that the General Assembly has not seen fit to amend § 23-89-207 in response to our decisions in *Bough* in 1992 and *Jaynes* in 2000 to state that the made-whole doctrine does not apply to this statutory lien. This is an important consideration in the construction of our statutes. *See Brewer v. Poole*, 362 Ark. 1, 207 S.W.3d 458 (2005). In sum, we hold that the made-whole doctrine applies to reimbursement claims under § 23-89-207.

Ryder next claims that a genuine issue of material fact exists as to whether she was made whole by the $15,000 settlement, and, therefore, summary judgment was inappropriate. She asserts that State Farm, in its motion for summary judgment, did not show that there were no genuine fact issues because it did not address whether she had been made whole. Because State Farm did not present a sustainable motion for summary judgment under Rule 56 of the Arkansas Rules of Civil Procedure, Ryder maintains that she was not required to meet proof with proof, and that summary judgment was improperly entered for State Farm.

The fact that both Ryder and State Farm filed motions for summary judgment does not necessarily eliminate a material question of fact. *See Ison v. Southern Farm Bureau Casualty Co.*, 93 Ark. App. 502, 221 S.W.3d 373 (2006); *Wood v. Lathrop*, 249 Ark. 376, 459 S.W.2d 808 (1970). In some cases, when both parties file opposing motions for summary judgment, the parties essentially agree that no material facts are in dispute, and, therefore, summary judgment may be an appropriate means for resolution of the case. *See McCutchen v. Patton*, 340 Ark. 371, 10 S.W.3d 439 (2000). In others, our court of appeals has pointed out that "a party may concede that there is no issue if his legal theory is accepted and yet maintain that there is a genuine dispute as to material facts if his

opponent's theory is adopted." *Ison*, 93 Ark. App. at 507, 221 S.W.3d at 377; *see also Wood*, *supra* (finding that opposing motions for summary judgment must both be denied if this court finds that material facts are in dispute). That is the situation in the case before us.

Because we hold that the made-whole doctrine does apply to this case, it is clear that a question of fact remains as to whether Ryder was made whole by the $15,000 settlement. We remand for further proceedings to resolve that factual issue.

Reversed and remanded.

Rep. Arnell WILLIS *v.* Jack CRUMBLY;
the St. Francis County Election Commission, Frederick Freeman, Chair; Maceo Hawkins and Chris Oswalt, all in Their Individual Capacities as Members of the St. Francis County Election Commission

07-572 268 S.W.3d 288

Supreme Court of Arkansas
Opinion delivered November 15, 2007

Vickery & Carroll, P.A., by: *Robin J. Carroll*; *J. Leon Johnson*; and *Dion Wilson*, for appellee Jack Crumbly.

Fletcher Long, Jr., for appellees St. Francis County Election Commission, Frederick Freeman, Maceo Hawkins, and Chris Oswalt.

ROBERT L. BROWN, Justice. Representative Arnell Willis appeals for the second time from a dismissal by the St. Francis County Circuit Court of his complaint challenging the validity of the runoff election between Jack Crumbly and him in the Democratic Primary for the Arkansas State Senate District 16 elec-

tion. We reverse the order dismissing the case in favor of Crumbly and the St. Francis County Election Commission, and we remand for additional proceedings.

The facts leading up to the circuit court's dismissal are these. Willis, Crumbly, and Alvin Simes were candidates in the Democratic Primary election held on May 23, 2006, for the Arkansas State Senate District 16. A runoff election between Willis and Crumbly was held on June 13, 2006, in which Crumbly received seventy-eight more votes than Willis and was certified as the winner. On July 7, 2006, Willis filed a petition in the St. Francis County Circuit Court against Crumbly, the St. Francis County Election Commission, Frederick Freeman as Chair of the Election Commission, and Maceo Hawkins and Chris Oswalt, all in their official capacities as members of the Election Commission (hereafter collectively referred to as "Crumbly"), to oust Crumbly, or, alternatively, to void the runoff election and hold a special runoff election.

In the petition, Willis, among other things, challenged the validity of certain votes and alleged voter fraud on behalf of Crumbly's supporters during the course of the election. On motion by Crumbly, the circuit judge dismissed Willis's complaint, ruling that the office of state senator is a "state office" and that the case was nonjusticiable because Willis had failed to join the Secretary of State and the Democratic Party of Arkansas State Committee. Willis appealed from the order of dismissal, and in *Willis v. Crumbly*, 368 Ark. 5, 242 S.W.3d 600 (2006), we reversed and remanded the case and held that the office of state senator is a district office rather than a state office, that the Secretary of State and the Democratic Party of Arkansas State Committee were not necessary and indispensable parties, and that venue was proper in St. Francis County because that was the county where the alleged wrongful acts occurred.

On remand, the circuit judge set a trial date for December 6, 2006. At the bench trial, Willis presented a forensic expert, Dawn Reed, who questioned the signatures of forty voters. He also presented testimony of six instances of double voting and one incident of nonresident voting for a total of forty-seven challenged votes. He sought to go forward and present evidence of irregularities for certain nursing home voters listed in his petition, but was foreclosed from doing so.

After Willis presented his evidence at the bench trial, Crumbly moved for dismissal, which the circuit judge granted orally from the bench on December 8, 2006.[1] A written order granting the defendants' motion for dismissal was filed on May 24, 2007.[2] In the order, the circuit judge ruled that even if taken as true that all of the ballots called into question by Willis were irregularly cast, and assuming that all of those ballots were cast for Crumbly, there was still an insufficient number of fraudulent ballots to change the outcome of the election. The circuit judge dismissed Willis's complaint with prejudice and ordered the results of the June 13, 2006, runoff primary to stand as certified.

I. Challenged Ballots

Willis maintains that the circuit judge abused his discretion by sustaining the appellees' objections and by not allowing his testimony and evidence to be introduced regarding the invalidity of certain ballots, which were primarily absentee ballots involving nursing home residents. More specifically, he contends that the circuit judge erred in barring this evidence and in ruling that permitting the evidence would be a substantive amendment to his complaint made more than twenty days after certification, which is prohibited under Ark. Code Ann. § 7-5-801(d) (Repl. 2000). He claims that the circuit judge failed to make the distinction between: (1) an amendment to the pleadings to plead a new cause of action; and (2) a situation where additional facts are offered to support an existing cause of action.

Willis further insists that the circuit judge erred in holding him to a strict-compliance standard and in precluding him from presenting evidence of additional facts to prove voter irregulari-

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[1] Though termed a motion for directed verdict by counsel and the circuit court, because the trial was a bench trial, the motion was in actuality a motion to dismiss. *See* Ark. R. Civ. P. 50(a) (2007). We will refer to the motion as a dismissal motion in this opinion.

[2] Willis made repeated attempts to secure a written order from the circuit judge so he could appeal, but the circuit judge did not respond to his requests for nearly six months. Willis finally filed a petition for a writ of mandamus with this court to compel the circuit judge to enter a final order. The circuit judge entered a written order in the interim, and in a per curiam opinion, this court declared Willis's petition for writ of mandamus moot. *See Willis v. Crumbly*, 370 Ark. 374, 259 S.W.3d 417 (2007) (per curiam). This court, however, said it was concerned with the circuit judge's failure to issue a final order promptly and respond to Willis's requests, and a copy of the per curiam opinion was submitted to the Arkansas Judicial Disability and Discipline Commission for its consideration. *See id.*

ties. He contends that he alleged a *prima facie* cause of action by stating in his petition the number of votes in contention, the total number of votes cast, and the fact that exclusion of the contested votes would cause a different result. He further insists that he alleged these facts sufficiently in his petition to give his opponent reasonable notice that certain ballots were at issue in this case due to statutory irregularities. He was entitled, he maintains, to introduce evidence supporting these allegations.

Crumbly disagrees and contends that by attempting to introduce evidence of facts not included in his complaint, Willis was essentially amending his complaint. Crumbly further responds that Willis only offered proof that forty-nine votes should be impeached and that the circuit judge excluded evidence as to two of these votes, leaving only forty-seven votes properly challenged. Crumbly maintains that though Willis proffered two binders of voting records, which, Willis contends, contain proof of more invalid ballots, he did not argue to the circuit judge at trial or to this court on appeal which ballots in the binders are invalid or the reasons why they should be excluded.

We begin by noting that our standard of review regarding evidentiary rulings requires that a circuit judge be given broad discretion in evidentiary rulings, and this court will not reverse a circuit judge's ruling on the admissibility of evidence absent an abuse of discretion. *See McCoy v. Montgomery*, 370 Ark. 333, 259 S.W.3d 430 (2007).

Election contests are purely statutory, and "a strict observance of statutory requirements is essential to the exercise of jurisdiction by the court, as it is desirable that election results have a degree of stability and finality." *Tate-Smith v. Cupples*, 355 Ark. 230, 237, 134 S.W.3d 535, 538 (2003). This court has further explained that "the purpose of election contests is to aid the democratic processes upon which our system of government is based by providing a ready remedy whereby compliance with election laws may be assured to facilitate, not hinder by technical requirements, the quick initiation and disposition of such contests." *Id.* at 237, 134 S.W.3d at 538-39.

Our Election Code, at Arkansas Code Annotated § 7-5-801 (Repl. 2000), explains the procedure for contesting an election, and this court has construed that statute to require that an election complaint state a *prima facie* case and plead sufficient facts to give the defendant reasonable information as to the grounds of the

contest. *See, e.g., Tate-Smith, supra*; *Womack v. Foster*, 340 Ark. 124, 8 S.W.3d 854 (2000). Furthermore, this court has explained that "[a]t a minimum, the complaint for affirmative relief must include the number of votes received by each candidate, so that it appears, after subtracting the alleged invalid votes, that the claimant has more votes than his opponent." *Womack*, 340 at 151, 8 S.W.3d at 870.

In *McCastlain v. Elmore*, 340 Ark. 365, 10 S.W.3d 835 (2000), this court explained that a complaint in an election contest that was deficient when filed may not later be amended to allege a cause of action properly after the twenty-day filing period for the complaint has expired under § 7-5-801(d). This court specifically said that "*where a complaint fails to allege sufficient facts to state a cause of action in an election contest, it may not be subsequently amended by pointing to facts outside the complaint after the time for contesting the election has expired.*" *McCastlain*, 340 Ark. at 369, 10 S.W.3d at 837 (emphasis in original).

Our *McCastlain* language makes it clear that a complaint may not be amended to state a new cause of action after the twenty-day period has expired. Once a deficient complaint has been filed, to allow the plaintiff to amend the complaint to properly state a cause of action would in effect be allowing the plaintiff to state a cause of action for the first time after the expiration of the twenty-day time limit. *See King v. Whitfield*, 339 Ark. 176, 5 S.W.3d 21 (1999) (Glaze, J., concurring).

This reasoning, however, does not apply when the original complaint sufficiently stated a cause of action when filed, and a new cause of action is not later being alleged. In *Ptak v. Jameson*, 215 Ark. 292, 295, 220 S.W.2d 592, 593-94 (1949), this court said:

> We have held that in an election contest the contestant cannot, after the expiration of the time for filing the contest, amend his complaint so as to set up a new cause of action, but that he may amend his complaint to make it more definite and certain as to any charge in the original complaint, and that the refusal to allow contestant to file an amendment setting up a new ground of contest was proper when the time for filing an amendment had expired.

See also Winton v. Irby, 189 Ark. 906, 909, 75 S.W.2d 656, 657 (1934) (quoting *Robinson v. Knowlton*, 183 Ark. 1127, 1133, 40 S.W.2d 450, 452 (1931)) (An election contestant may, "even after the time has expired, amend his complaint by making it more definite and certain

as to any charge in his original complaint, and, if a motion to make it more specific is filed, it would be his duty to make the amendment.").

We turn then to Willis's Petition to De-Certify the Election Results. Willis alleges that he lost to Crumbly by seventy-eight votes (4721 for Crumbly and 4643 for Willis) and that he would have won the election but for the fraudulent votes cast for Crumbly. His petition is eleven pages in length and contains an Exhibit A, which is ten pages in length and contains 265 voter names and addresses. To the side of each name and address in Exhibit A are four reasons for challenging the votes — Signature, No Signature in the book, Miscellaneous Other, and Double Voting. Exhibit A also notes that 173 ballots were not found.

The body of the Willis petition states the following regarding Miscellaneous Other voter irregularities, as well as other deficiencies in the voting process:

> B. At least one nursing home resident "voted" on the signature of his wife — he having been in a nursing home, and incompetent. The procedures required by ACA § 7-5-403(b) were not followed, and as a result, his vote was counted for Crumbly. The votes of other nursing home residents who purportedly voted by absentee were counted, despite the fact that mandatory statutory procedures governing absentee ballots were not observed. See all voters listed in Exhibit "A" column marked "miscellaneous other" and ACA § 7-5-411.
>
> C. The clerk failed to mail out approximately 60 absentee ballots that had been requested by absentee voters.
>
> D. She automatically sent out absentee ballots that had not been requested, merely because she had sent them out in the past.[3]
>
> E. She or her employees routinely allowed bearers of absentee ballots to take absentee ballots from her office without signing for them in the "bearer book." (This violates ACA § 7-5-409[a]).

[3] "Plaintiff does not refer here to absentee ballots automatically sent out to voters who had requested absentee ballots in the primary election three weeks before; he is referring to absentee ballots requested more than one year prior to this election." Appellant's Petition to De-Certify, p. 4, n. 4.

F. She or her employees routinely allowed bearers of absentee ballots to take more than two (2) absentee ballots from her office, in violation of law.[4]

G. During the early voting process, she did not insist that voters show picture identification to poll workers, thus allowing impersonators to vote in the runoff election.

H. During the voter registration process, she allowed voters to list more than one residence, which allowed them to vote twice in this election.

I. She allowed former residents of St. Francis County who have moved outside the county, or outside the state to vote, without any affirmative effort being made to determine whether they were also voting in the state or county of their new residence. This allowed non-residents in this election to vote improperly. (See Exhibit "A," "Misc other")

Section 7-5-411, which is specifically referenced in the quoted language from Willis's petition, sets the mandatory requirements for absentee ballots, including absentee voting methods for voters in long-term care and residential-care facilities and voters who are physically disabled. Section 7-5-409(f), which is also referenced in Willis's petition, describes the procedure for absentee voting, including the procedure for designated bearers. There are more than one hundred voters named with addresses that are challenged under the category of Miscellaneous Other in Exhibit A in addition to the forty-seven ballots challenged at the hearing for signature irregularities and double voting. Willis, therefore, has given names, addresses, a statutory reference for the challenge, and pointed specifically to procedural defects surrounding absentee votes by nursing home residents and others. In doing so, Willis not only alleged a valid cause of action in his petition, but he set out a *prima facie* case with sufficient facts to give the defendants reasonable information as to the grounds of the contest. *See Tate-Smith, supra.* In addition, he proffered absentee applications and voter statements in binders purport to show why and how the ballots were illegal.

[4] "ACA § 7-5-409(f)" Appellant's Petition to De-Certify, p. 4, n. 5.

The following colloquy at trial, however, illustrates the circuit judge's faulty understanding about amending the petition as opposed to providing proof to make allegations more definite and certain:

> THE COURT: It's not complicated to me. Show it to me in the complaint. If it's there, you can put it on. If it is not there, the objection is sustained.
>
> MR. EASLEY (Counsel for Willis): I understand, your Honor, may I proceed.
>
> THE COURT: You may proceed.
>
> BY MR. EASLEY, continuing:
>
> Q Tell me where we are.
>
> A We are on number 15.
>
> Q 16?
>
> A Are we through with Earnestine Barksdale?
>
> Q I don't know. Let's see.
>
> A Number 15. We have two bearers.
>
> MR. LONG (Counsel for Election Commssion): Judge, that was my objection.
>
> THE COURT: Sustained unless it's in the complaint.
>
> MR. EASLEY: It's not. Yes, your Honor, we have miscellaneous other.
>
> MR. LONG: Judge, miscellaneous other doesn't get it. Miscellaneous other refers back to allegations made in his complaint. There is no allegation in his complaint that a vote is invalid because there was a bearer out and the bearer in. Miscellaneous other, if he's just going to grab that —
>
> THE COURT: Gentlemen, it's not complicated to me. If the Supreme Court wants to change the law that allows

> a person to make a general allegation in a trial and describe this miscellaneous other act, however they want to describe it, that's up to them to do. I don't believe that's the law. The objection is sustained.

Willis was then precluded from presenting testimony from other voters in the Miscellaneous Other category, even while his petition expressly stated that these were absentee voters in nursing homes whose votes did not comply with procedures required under § 7-5-411 or other deficiencies under § 7-5-409.[5] The circuit judge later dismissed Willis's petition on the basis that Willis was attempting to amend his petition at trial.

We conclude, first, that the circuit judge abused his discretion in ruling that Willis was attempting to amend his complaint with a new cause of action by offering proof of absentee-ballot irregularities under the Miscellaneous Other category. We hold that Willis was perfectly within his rights to make his allegations of absentee-ballot irregularities for nursing home residents, in particular, more definite and certain by offering proof of those violations. *See Ptak v. Jameson, supra.*

In his appeal, Willis does not ask that this court declare him to be the winner of the run-off election or that the election be voided as unfair. That would be premature at this juncture. He merely seeks the opportunity to present his proof in support of the *prima facie* case alleged in his petition. Our holding allows him to do this.

II. Amendment 81

Willis also claims that the circuit judge erred in granting a dismissal in favor of Crumbly in part because he could not prove for which candidate the challenged voters voted. Willis maintains that Amendment 81 to the Arkansas Constitution mandates the secrecy of individual votes and makes it impossible to determine for whom each voter voted. He contends that though he warned

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[5] Willis proffered into evidence two binders, which include actual voting documents for the 265 challenged votes which, he contends, support his claims regarding the Miscellaneous Other category for nursing home voters and other absentee ballots.

the circuit judge that Amendment 81 had changed the law, the circuit judge relied on case law decided prior to the adoption of Amendment 81.[6]

Crumbly responds that Amendment 81 has no relevance to this case. He argues that there are two types of election contests — one in which the losing candidate contests the results of the election and seeks to oust and replace the winning candidate, and one in which the losing candidate contests the election in general and seeks to have the election declared void altogether. He contends that only in the first type of election contest where the losing candidate seeks to replace the winner does it matter how the challenged voters voted and that this case is of the second type of election contest. Crumbly insists that in this case, the circuit judge merely stated that Willis had failed to submit proof of how each challenged voter voted to emphasize the point that Willis failed to submit sufficient proof to prevail in either type of election contest.

Under Amendment 50, § 3 to the Arkansas Constitution, which has since been repealed, ballots were numbered, and those numbers were recorded by election officers when the ballots were presented in an election so that the specific vote of each voter could be traced in the event of an election contest. Amendment 81 repealed Amendment 50, § 3 in 2002, thereby ensuring the secrecy of individual votes. Following the adoption of Amendment 81, it became impossible to determine for whom a voter in an election voted by simply tracing the ballots by their numbers. As a result, a plaintiff in an election contest, though he or she is required to allege that the invalid ballots were cast for his or her opponent, is no longer able to prove at trial for whom the invalid ballots were actually cast under the old tracing system.

In the instant case, we hold that the circuit judge erred to the extent that he based his decision to grant Crumbly's motion for a dismissal on the failure of Willis to prove specifically how each challenged voter voted. From the record, it appears that the circuit judge did take Willis's failure in this regard into consideration. For example, during Willis's case, Crumbly objected and argued that Willis was attempting to amend his complaint by presenting evidence of facts not stated in the complaint. In sustaining Crumbly's objection, the circuit judge said:

[6] Amendment 81 was adopted at the November 2002 general election.

> [T]he court believes that this *McCastlain v. Elmore* [340 Ark. 365, 10 S.W.3d 835 (2000)] is very, very important in this case. It says Arkansas law does not allow an election contest complaint that was deficient when it is filed, i.e. let me be sufficient, name me the voters, show me the invalid ballots, *show me they voted for the other candidate*, and show me that there is a total sufficient number to change the outcome of the election.

(Emphasis added.)

Crumbly's counsel argued, in addition, during his motion for dismissal that "there has been no proof as to how any of these people voted." Finally, the circuit judge, in his written order granting Crumbly's motion for dismissal, stated:

> The plaintiff did not put on any proof indicating how the alleged irregular ballots were tallied *or for whom the ballots were cast* in the Senate District 16 race. Even if the Court were to agree with the plaintiff that all of the ballots called into question by the plaintiff were irregularly cast, and even if the Court assumed that each one of those ballots were cas[t] for the defendant, Jack Crumbly, there still would not be sufficient irregular ballots cast to change the outcome of the election.

(Emphasis added.)

[redacted] The circuit judge clearly looked to old case law, which predated Amendment 81, and required proof of how the challenged voters voted. Without question, Willis should not have been required to present tracing evidence of how each challenged voter voted when he was foreclosed from doing so by Amendment 81.

III. Ballot Illegality

We turn then to the question of how to prove ballot ineligibility. In *Womack*, *supra*, this court rejected Womack's argument that ballots should not be invalidated simply because voters violated our election laws by not indicating a reason for voting absentee on the election-ballot applications. In recognizing that there must be strict compliance with statutory provisions regarding the application for and casting of absentee ballots, we noted that the absentee-ballot applications form provided to each voter was clear and accurate, and nothing on the form prevented a voter from knowing what information was being requested, or

from properly inserting the requested information on the form. *Id.* In short, we concluded that where it can be determined that the ballots are illegal on their face, the votes must be invalidated. *Id.*

Adhering to the rational in *Womack*, Willis, as already stated, attached to his petition as Exhibit A a list of 265 voters, and he set out categories of alleged irregularities, including (1) signature problems, (2) no signature in book, (3) miscellaneous other, and (4) double votes. Willis also proffered two binders that contained 265 names, which identified the voter by name in an effort to establish how and why the ballots were alleged to be illegal. Both the attachment to the petition and the binders are self explanatory.

But there is also the question of how to prove for which candidate the illegal votes were cast. Because Amendment 81 of the Arkansas Constitution repealed Amendment 50, § 3 to ensure the secrecy of individual votes, it may appear to the appellees to be impossible to determine for whom a voter cast his or her ballot as is required by § 7-5-801 *et seq.* and Arkansas's longstanding precedent regarding election contests to purge illegal and fraudulent ballots. By approving Amendment 81, the people of Arkansas intended to secure the voter's right to a secret ballot by doing away with the tracing method provided under Amendment 50. And yet, there is nothing in Amendment 81 to protect the secrecy of the ballot for a person who casts an illegal or fraudulent ballot.

Other states have addressed this precise issue. In *Kiehne v. Atwood*, 604 P.2d 123, 127 (1979), the New Mexico Supreme Court explained:

> [I]n the case of illegal voters[,] [i]t is universally recognized that the right to examine the voters in such a case is in affirmance and vindication of the essential principle of the elective system, that the will of the majority of the qualified voters shall determine the right to an elective office, and that the testimony of the voter, after it has been shown that he voted illegally, is competent, and should be received by the court or jury for what it is worth. (Citation omitted.) The law protecting the secrecy of the ballot is intended to apply only to lawful voters, and does not ordinarily apply to or protect illegal voters, who can be required to testify as to how they voted at an election.
>
> . . . .

> Were the courts to close their doors to the reception of evidence as to how an illegal voter has voted, it would tend to promote fraud and encourage corruption. (Citation omitted.)

(citing *Montoya v. Ortiz*, 175 P. 335, 337-38 (1918)).[7] In *Appeal of Harper*, 456 S.E.2d 878, 880 (1995), the North Carolina Court of Appeals further reiterated this point, noting:

> In *Boyer v. Teague*, 106 N.C. 576, 625, 11 S.E. 665, 679 (1890), our Supreme Court established that "[a]s between contestants for office . . . the testimony of the elector [i.e., the voter], if pertinent and relevant, is always admissible." In fact, the Court held, while an honest voter may not be compelled to disclose for whom he voted, as such compulsion would intrude upon the sanctity of the secret ballot system, an illegal voter may be so compelled, save an invoking of his right against self-incrimination. *Id.*

See also 29 C.J.S. *Elections* § 480 (2007); 26 Am. Jur. 2d *Elections* § 426 (2007).

In short, while Amendment 81 protects the secrecy of ballots, its intent is to protect an honest voter, not an illegal one. As a result, this court is convinced that in election contests, where there is evidence of an illegal ballot, the person who illegally voted can be forced to testify as to whom they voted, and such is permissible under Amendment 81. We reverse and remand this case for further proceedings in accordance with this opinion.

There are two other matters pending before this court in connection with this appeal. The first is Willis's motion for appointment of a special judge in the event of reversal and remand. We deny that motion. The second matter is also a motion by Willis to disqualify counsel for the Election Commission. That motion is also denied.

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[7] As the New Mexico Supreme Court noted in *Kiehne v. Atwood*, *supra*, the case law of other states is overwhelming in holding that, although legal voters may not be compelled to disclose how they voted, illegal voters do not enjoy this same privilege. *See Sims v. Atwell*, 556 S.W.2d 929 (Ky. App. 1977); *Singletary v. Kelly*, 242 Cal. App. 2d 611 (1966); *Oliphint v. Christy*, 299 S.W.2d 933 (1957); *Wehrung v. Ideal School District No. 10*, 78 N.W.2d 68 (N.D. 1956); J.T.W., Annotation, *Privilege or Exemption of Voter Against Testifying as to Candidate for Whom He Cast His Vote, or as to His Vote on Submitted Questions*, 90 A.L.R. 1362 (1934).

Reversed and remanded. Motion for Appointment of Special Judge and Motion to Disqualify Counsel for the Election Commission are denied.

GLAZE, J., concurs.

TOM GLAZE, Justice, concurring. Although this case has been a long time getting here, this court has shown its will to decide this election-contest case on its merits rather than dismissing it on the questionable procedural issues offered by the appellees, Crumbly and the St. Francis County Election Commission. The winners are the voters of Arkansas, because they now can be assured that, in future elections, illegal and fraudulent votes can be purged from election results that are proved to be questionable. Today's decision sets out a clear "road map" by which the integrity of our election system can be assured.

While I fully agree with the court's opinion, I do not agree that the circuit judge should sit on this case on remand.

For whatever reasons, the Judge failed to expedite this election case even though he was required to do so by law, and was asked to do so repeatedly by Willis's counsel. It has taken about seven months to reach this stage of the election contest, and the case still must be remanded for further proceedings with no assurance anything different will occur to get this matter resolved. Even though the Judge had this matter pending for the seven-month period, he omitted it from his quarterly report which is required by this court's Administrative Order No. 3. This court should promptly assign a special judge who has the time and "grit" to bring this case to an end.[1]

[1] Willis also requests that the prosecuting attorney, representing the St. Francis County Election Commission, should be disqualified because of a conflict of interest. If that is a real issue, a newly assigned special judge can handle it with dispatch.

Andrew Tremaine BREWER *v.* STATE of Arkansas

CR 07-1023 268 S.W.3d 332

Supreme Court of Arkansas
Opinion delivered November 15, 2007

Petitioner *Andrew Tremaine Brewer,* pro se.

No response.

PER CURIAM. A jury found petitioner Andrew Tremaine Brewer guilty of possession of a controlled substance (Darvocet) and residential burglary and sentenced him as a habitual offender to an aggregate term of 840 months' imprisonment. The Arkansas Court of Appeals affirmed the judgment. *Brewer v. State*, CACR 06-1403 (Ark. App. Sept. 19, 2007). Petitioner filed a motion to proceed pro se, and a pro se petition for review under Ark. Sup. Ct. R. 1-2(b) was filed. Those matters are now before us.

In his motion, petitioner requests that we permit him to proceed pro se and that this court review the decision by the court of appeals through his pro se petition. Yet, counsel was appointed to represent petitioner at trial and on appeal. An appellant is not entitled to accept appointment of counsel to represent him, and also proceed pro se. *Hamilton v. State*, 348 Ark. 532, 74 S.W.3d 615 (2002). Moreover, this court will not permit an appellant to compete with his attorney to be heard in an appeal. *Franklin v. State*, 327 Ark. 537, 939 S.W.2d 836 (1997) (per curiam); *see also Monts v. Lessenberry*, 305 Ark. 202, 806 S.W.2d 379 (1991) (per curiam). We will not allow a petitioner to substitute his judgment concerning how and whether to request review for that of his attorney.

Petitioner here contends that he is unable to adequately communicate with counsel in the short time required to petition for review and also contends that counsel raised patently frivolous claims on appeal while not pursuing what petitioner perceives as more viable claims. Appellant's allegations do not constitute good cause to relieve counsel or to permit petitioner to proceed pro se.

Petitioner has not explained how it is that further consultation with his client is necessary in order for counsel to evaluate whether adequate grounds to pursue a petition under Rule 1-2(e) exist, nor is it evident to us. An appellant has no constitutional right to participate in his representation on direct appeal. *Fudge v. State*, 341 Ark. 652, 19 S.W.3d 22 (2000) (per curiam). Representation by trained appellate counsel is of distinct benefit to the appellant as well as the court. *Id.*

As we explained in *Monts*, counsel possesses the superior ability to examine the record, research the law and marshal arguments in the defendant's behalf. With the exception of certain fundamental decisions, it is the attorney's duty to take professional responsibility for the conduct of the case, after consulting with his client. *Monts*, 305 Ark. at 206, 806 S.W.2d at 381-82. Despite petitioner's contention, our review of the decision by the court of

appeals shows that the arguments raised by counsel were not frivolous. The court of appeals devoted considerable discussion to each of the three issues raised.

An accused is not guaranteed a meaningful attorney-client relationship or an exemplary rapport with his appointed attorney. *Burns v. State*, 300 Ark. 469, 780 S.W.2d 23 (1989). Further, the right to counsel does not provide the right to counsel who substitutes the judgment of the accused for his or her professional judgment. *Hadley v. State*, 322 Ark. 472, 910 S.W.2d 675 (1995). Petitioner has failed to show good cause to relieve counsel and permit petitioner to proceed pro se in his direct appeal. We accordingly deny his motion, and the petition is therefore moot.

Motion denied; petition moot.

Tiffiny RATLIFF *v.* ARKANSAS DEPARTMENT of HEALTH and HUMAN SERVICES, and D.K.R, D.R., & A.R.

07-987 268 S.W.3d 322

Supreme Court of Arkansas
Opinion delivered November 15, 2007

Cauley, Bowman, Carmen & Williams, PLLC, by: *Deborah R. Sallings*, for appellant.

Gary R. Sammons and *Gray Allen Turner*, Office of Chief Counsel, for appellee Arkansas Dep't of Health & Human Services.

Keith L. Chrestman, for appellees D.K.R, D.R., & A.R.

PER CURIAM. Appellees D.K.R., D.R., and A.R. move the court to dismiss the appeal of an order terminating parental rights. They argue that Appellant Ratliff did not timely file her notice of appeal, and as such, this court is deprived of jurisdiction. Appellees point out that the notice of appeal was filed on July 17, 2007, forty-seven days after the May 31, 2007 order terminating parental rights. Appellant responds, asserting that a motion for reconsideration filed within ten days of an order terminating parental rights extends the deadline for filing of a notice of appeal by thirty days from the deemed-denied date.

Rule 6-9 (b)(2) sets fourteen days as the time within which the notice of appeal must be filed in cases involving the termination of parental rights. Ark. Sup. Ct. R. 6-9(b) (2007). The express purpose of this rule is "to expedite the appellate process in dependency-neglect cases . . . curtailing extensions, and establishing time lines." *In re Adoption of Rule 6-9 and 6-10 of the Rules of the Supreme Court and Court of Appeals (Rules for Appeals in Dependency-Neglect Cases)*, 366 Ark. App'x 628 (2006) (per curiam). Rule 4(b)(1) of the Arkansas Rules of Appellate Procedure–Civil allows the deadline for a notice of appeal to be extended to the deemed-denied date. Ark. R. App. P.–Civ. 4(b)(1) (2007). Appellant asks us to extend this appellate rule to dependency-neglect cases; however, we find that extending this rule would vitiate the purpose of Rule 6-9(b), and we will not do so.

■ While the instant case is not a criminal case, we have afforded indigent parents appealing from a termination of parental rights similar protections as those afforded indigent criminal defendants. *S.F. v. Arkansas Dep't of Health and Human Servs.*, 370 Ark. 475, 261 S.W.3d 462 (2007). Because expedition of the appellate process is our stated goal in dependency-neglect cases, we find that to simply deny this motion would contradict that purpose, requiring counsel for Appellant to file a motion for belated appeal and

further delaying this appeal. We will therefore deny Appellees' motion to dismiss and treat Appellant's response as a motion for belated appeal.

Relief from the failure to perfect an appeal is provided as part of the appellate procedure granting the right to an appeal. *Id.* (citing *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004)). In *McDonald*, we clarified our treatment of motions for rule on clerk and motions for belated appeal in criminal cases, explaining:

> 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. at 116, 146 S.W.3d at 891 (footnote omitted). While this court no longer requires an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where he or she has erred and is responsible for the failure to perfect the appeal. *See Martin v. Ark. Dep't of Health & Human Servs.*, 369 Ark. 477, 255 S.W.3d 830 (2007) (per curiam). When it is plain from the motions, affidavits, and record that relief is proper based on error or good reason, the relief will be granted. *McDonald, supra.* If there is attorney error, a copy of the opinion will be forwarded to the Committee on Professional Conduct. *Id.*

As it is plain from the motions that relief is proper, we grant Appellant's motion for belated appeal. Because we grant Appellant's motion for belated appeal, we deny Appellee's motion to dismiss.

Motion to dismiss denied; motion for belated appeal granted.

Lisa Ann RIVERS *v.* STATE of Arkansas

CR 07-1126 268 S.W.3d 334

Supreme Court of Arkansas
Opinion delivered November 15, 2007

Denny Hyslip, for appellant.

No response.

PER CURIAM. Appellant Lisa Ann Rivers, by and through her attorney Denny Hyslip, has filed a partial record and petition for writ of certiorari to complete the record. While the circuit court entered an order extending time to file record on appeal, that order makes no indication that all parties had the opportunity to be heard on the motion pursuant to Ark. R. App. P.–Civ. 5(b)(1)(C). The clerk cannot docket the record because the order granting an extension made no reference to an opportunity to be heard. This court has made it very clear that strict compliance with Rule 5(b) is required. The granting of an extension is not a mere formality. The rule requires that the order indicate that all parties have had the opportunity to be heard on the motion. Here, the order does not comply with Rule 5(b)(1)(C). Accordingly, we remand this matter to the circuit court for compliance with Rule 5(b)(1)(C). *See Jones v. State*, 367 Ark. 324, 239 S.W.3d 483 (2006).

Richard WEISS, Director, Arkansas Department of Finance and Administration; Steve Dozier, Director, Department of Arkansas State Police; Gail H. Stone, Executive Secretary, Arkansas State Police Retirement System; Steve Smith, Steve Dozier, Tim Carter, W.H. McWhirter, Blake Wilson, David Rosegrant, George B. Harp, Trustees, Arkansas State Police Retirement System *v.* Roger McLEMORE, Charles McLemore, and Mike Hall, Individually and on Behalf of a Class Consisting of Members of the Arkansas State Police Retirement System

07-12 268 S.W.3d 897

Supreme Court of Arkansas
Opinion delivered November 29, 2007

Dustin McDaniel, Att'y Gen., by: *Patricia Van Ausdall Bell*, Ass't Att'y Gen., for appellant.

Newell & Hargraves, by: *C. Burt Newell*, for appellees.

TOM GLAZE, Justice. This appeal questions whether Ark. Code Ann. § 24-6-205 (Repl. 2000) evidences an intent on the part of the General Assembly to waive the State's sovereign immunity. The underlying lawsuit began in 2005, when several Arkansas State Police officers filed suit against the State alleging that the Arkansas State Police Retirement System (ASPRS or "Retirement System") had been systematically underfunded.

The plaintiff officers in this case were active and retired "Tier I" members of the Retirement System.[1] The defendants — now Appellants — are Richard Weiss, the Director of the Arkansas Department of Finance & Administration; Steve Dozier, the Director of the Arkansas State Police; Gail H. Stone, the Executive Secretary of the Arkansas State Police Retirement System; and Steve Smith, Steve Dozier, Tim Carter, W.H. McWhirter, Blake Wilson, David Rosegrant, and George B. Harp, Trustees of the Arkansas State Police Retirement System. Collectively, the Appellants are referred to as "the State."

For many years, State Police officers received allowances for their uniforms and travel. These allowances came in the form of additional payments, received at the same time as every other paycheck, of $125.00 for "expenses" and $166.66 for a "clothing allowance." The total of these additional payments was $3,500 per year. Until 1992, this additional $3,500 per year for "expenses" and "clothing allowances" was not included on the W-2 forms issued by the Department of Finance & Administration. Beginning in 1992, apparently upon inquiry from the Internal Revenue Service, this additional sum was included on the officers' W-2 forms. However, even after the $3,500 began being reported as taxable income, that sum was not included when calculating each officer's contributions to the ASPRS.

Pursuant to Act 1071 of 1997, the Department of State Police's contributions to the Retirement System was a sum equal to 22% of "active member payroll," although that term was not

[1] The term "Tier I" refers to those participants in the Retirement System who were members of the System prior to Act 1071 of 1997, which created a second tier of employees in the Retirement System. Prior to 1997, members of the Retirement System were required to contribute a portion of their income to the ASPRS; after Act 1071, however, contribution was no longer mandatory.

defined by the Act. Between 1997 and 2003, the Retirement System was funded based on the 22% formula, but those calculations did not take into account the $3,500 per year that the officers were receiving for expenses and clothing allowances.

Act 1609 of 2003 provided for a one-time annual salary adjustment of $3,500 for commissioned officers.[2] Following passage of Act 1609, the State began to include the additional $3,500 as "active member payroll" for purposes of funding the Retirement System. In addition, the $3,500 began to be included in calculating retiring officers' final average compensation. It was apparently this change in the funding calculations that constituted the impetus for the instant lawsuit.

In November of 2005, the officers filed their class-action lawsuit, contending that the various state defendants had violated the law by failing to properly fund the ASPRS between 1992 and 2003. The officers also alleged that the improper funding of the retirement system constituted an illegal exaction and an impairment of contractual obligations in violation of Ark. Const. art. 2, § 17. Their complaint sought a writ of mandamus directing the State to "immediately correct the records of all class members individually and the ASPRS as a system[.]" In addition, the officers' complaint asked for a declaratory judgment to the effect that "the current method of calculation of [the plaintiffs'] retirement benefits by [the State] is in violation of statutory intent and is in breach of plaintiffs' contract with [the State]."

The State filed a motion to dismiss on December 27, 2005, in which it asserted that the officers' claims were barred by sovereign immunity. In addition, the State asserted that the officers had failed to state claims for an illegal exaction or a breach of contract.

On January 5, 2006, the officers responded to the State by filing an amended complaint in which they asserted a new cause of action based on 42 U.S.C. § 1983. In essence, the officers contended that, by failing to properly fund the ASPRS, the State had deprived them of their property without just compensation.

The trial court considered the matter solely on the pleadings and entered an order on September 5, 2006. In that order, the court found that the officers had failed to state a claim for an illegal exaction;

[2] In addition, Act 1609 repealed Ark. Code Ann. § 12-8-209 (Repl. 1995), the statute in which the travel and uniform allowances had previously been codified.

however, the court did find that the complaint adequately set out a claim for breach of contract. Regarding the State's sovereign immunity argument, the trial court found that § 24-6-205 provided "a limited waiver of sovereign immunity." Finally, the court agreed with the State that the plaintiffs had failed to state a claim pursuant to 42 U.S.C. § 1983, and it dismissed that claim. The State filed a timely notice of appeal on October 3, 2006, and now raises three arguments for reversal in this interlocutory appeal.

In this appeal, we are asked to interpret § 24-6-205 and decide whether that statute provides a limited waiver of sovereign immunity. We review issues of both statutory construction and constitutional interpretation *de novo*. *See Weiss v. Maples*, 369 Ark. 282, 253 S.W.3d 907 (2007); *Harris v. City of Fort Smith*, 366 Ark. 277, 234 S.W.3d 875 (2006). On review of an issue of statutory interpretation, we are not bound by the decision of the trial court; however, in an absence of a showing that the trial court erred in its interpretation of the law, that interpretation will be accepted as correct on appeal. *See Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998).

In its primary point on appeal, the State contends that the officers' suit is one against the State, and it is therefore barred by article 5, § 20 of the Arkansas Constitution, which provides that "[t]he State of Arkansas shall never be made defendant in any of her courts." This court has consistently interpreted this constitutional provision as a general prohibition against awards of money damages in lawsuits against the state and its institutions. *See, e.g.*, *Cross v. Arkansas Livestock & Poultry Comm'n*, 328 Ark. 255, 943 S.W.2d 230 (1997); *Fireman's Ins. Co. v. Arkansas State Claims Comm'n*, 301 Ark. 451, 784 S.W.2d 771 (1990). We have held that this constitutional prohibition is not merely declaratory that the state could not be sued without her consent, but that all suits against the state were expressly forbidden. *Ark. Pub. Defender Comm'n. v. Burnett*, 340 Ark. 233, 12 S.W.3d 191 (2000); *Brown v. Arkansas State HVACR Lic. Bd.*, 336 Ark. 34, 984 S.W.2d 402 (1999); *Page v. McKinley*, 196 Ark. 331, 336, 118 S.W.2d 235 (1938). Where the pleadings show that the action is, in effect, one against the state, the trial court acquires no jurisdiction. *Burnett, supra.*

The doctrine of sovereign immunity is rigid and may only be waived in limited circumstances. *Office of Child Support Enforcement v. Mitchell*, 330 Ark. 338, 954 S.W.2d 907 (1997). This court has recognized only two ways in which a claim of sovereign immunity may be surmounted: (1) where the state is the moving party seeking specific relief; and (2) where an act of the legislature has created a specific waiver of immunity. *Id.*; *see also Burnett, supra.*

The issue in this case is whether § 24-6-205 provides such a waiver. That statute provides as follows:

> (a) Should any change or error in the records of the State Police Retirement System or the Department of Arkansas State Police result in any person's receiving from the system *more or less* than he would have been entitled to receive had the records been correct, *the Board of Trustees of the State Police Retirement System shall correct the error* and, as far as is practicable, *shall adjust the payment* in such manner that the actuarial equivalent of the benefit to which the person was correctly entitled shall be paid.
>
> (b) The board shall have the right to recover any overpayment any person may have received from funds of the system.

(Emphasis added.)

As mentioned above, the trial court found that this statute provided a limited waiver of the State's sovereign immunity. On appeal, the State urges that, while this court has recognized legislative waivers of sovereign immunity, it has only done so when the waiver is express. For example, the State cites *Arkansas Department of Finance & Administration v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996), and *State v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996), in which this court found an express legislative waiver of sovereign immunity in Ark. Code Ann. § 26-18-507(e)(3) (Supp. 1992). That statute specifically provides that a taxpayer may seek judicial relief in the face of improperly collected sales taxes, provided that a refund has been sought and the request is refused or no response is made by the Arkansas Department of Finance & Administration. In *Staton*, this court refused to certify a class action against the State where only a single taxpayer had complied with the provisions of § 26-18-507; however, the court held that, because that sole taxpayer had complied with the statute, the State's sovereign immunity was waived as to her. *Staton*, 325 Ark. at 347, 942 S.W.2d at 806. The *Tedder* court reached a similar conclusion, holding that because the proposed class of taxpayers had not complied with § 26-18-507, only the named class representative could maintain a suit against the State.

Relying on these cases, the State contrasts the "elaborate scheme" of administrative and judicial remedies established by § 26-18-507 with the language of § 24-6-205, which the State claims "provides no remedial scheme at all." Because § 24-6-205

does not provide for judicial remedies similar to those in § 26-18-507 or expressly declare that the State may be sued pursuant to § 24-6-205, the State argues that its sovereign immunity has not been waived.

The police officers, on the other hand, point to *Arkansas Department of Human Services v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (1998). In that case, the juvenile court ordered the Department of Human Services (DHS) to provide adequate housing, including electric and water utilities, to a family that had been adjudicated in need of services. On appeal, DHS argued, among other things, that the trial court lacked the authority to order it to restore the family's utilities. In essence, DHS argued that the court's order coerced the agency into bearing a financial burden, which DHS contended was barred by sovereign immunity. *R.P.*, 333 Ark. at 531, 970 S.W.2d at 232.

This court disagreed, concluding that there was "a waiver of sovereign immunity under the circumstances presented." *Id.* The court noted that the General Assembly may create a specific waiver of immunity, and the court concluded that the legislature had done so when it enacted Ark. Code Ann. § 9-27-332(1) (Repl. 1993), which provided that when a family is found to be in need of services, the court may order family services; among the services the court was empowered to order was the provision of cash assistance. The court held as follows:

> Given that the trial court is empowered to order family services in FINS cases to prevent a juvenile from being removed from a parent, which by definition includes cash assistance, we conclude that the General Assembly has specifically waived sovereign immunity as to DHS in such instances. Any other interpretation would effectively eviscerate the court's power to order family services in FINS cases.

Id. at 533, 970 S.W.2d at 233.

In the instant case, the pertinent statute, § 24-6-205, provides that, in the event of an error that results in a State Police retiree from receiving more or less than he or she would have been entitled to receive, the Board of Trustees of the ASPRS "*shall* correct the error" and "*shall* adjust the payment" so that the person may be paid correctly. (Emphasis added.) Subsection (b) of the statute gives the Board the right to recover any overpayment an officer may have received from the system. Thus, the Board is

specifically empowered to recover any overpayments. Conversely, even though the statute does not spell out the mechanism by which the Board must adjust an erroneous payment, the statute mandates that the Board "shall adjust the payment" and "shall correct the error" that led to the underpayment (or the overpayment, although that is not the situation in this case). From this mandatory language, it can easily be inferred that the legislature intended to waive the State's sovereign immunity so that an underpaid retiree might sue to have his or her underpayment corrected.

[redacted] We acknowledge the State's argument that, because § 24-6-205 granted the Board the right to recover any overpayment to the officers but did not provide a concomitant right for an aggrieved retiree, the General Assembly must not have intended to waive the State's sovereign immunity. However, we cannot agree with such a conclusion. To construe § 24-6-205 in such a way as to preclude State Police retirees from bringing suit to compel the State to "correct [its] error" and "adjust the payment" would eviscerate the purpose of the statute. *See Ark. Dep't of Human Servs. v. R.P., supra.* Such a consequence could not have been intended by the General Assembly. *Id.* Accordingly, we hold that § 24-6-205 constitutes a limited waiver of the State's sovereign immunity.

Because we affirm the trial court on this issue, we need not reach or address the State's second argument on appeal, wherein it suggests that the officers' attempt to characterize their suit as one for injunctive and declaratory relief is merely a disguised claim for monetary relief. Because we conclude that sovereign immunity does not bar the officers' suit, it is irrelevant whether the claims for injunctive and declaratory relief are actually claims for monetary damages.[3]

Affirmed.

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[3] The State initially raised a third point on appeal, wherein it suggested that the officers' claims for monetary, retroactive relief pursuant to 42 U.S.C. § 1983 are also barred by sovereign immunity. However, the trial court dismissed the officers' § 1983 claims because § 1983 protects only federal rights, and the officers claimed rights under Arkansas law. In its reply brief, the State withdraws its argument, conceding that the trial court dismissed this claim and stating that it "do[es] not challenge the circuit court's decision on this issue."

Gregory HONEYCUTT *v.* Judge Phillip FOSTER,
Ouachita County District Court

07-665 268 S.W.3d 875

Supreme Court of Arkansas
Opinion delivered November 29, 2007

Wm. C. Plouffe, Jr., for appellant.

Rainwater, Holt & Sexton, P.A., by: *Michael R. Rainwater, JaNan Arnold Davis*, and *Jason E. Owens*, for appellee.

DONALD L. CORBIN, Justice. This appeal arises from the Ouachita County Circuit Court's order denying Appellant Gregory Honeycutt's petition and amended petition for writ of mandamus directed at Appellee Ouachita County District Court

Judge Phillip Foster (referred to as the "District Court"), as well as the circuit court's order granting Honeycutt's motion to voluntarily nonsuit his petition for writ of prohibition and denying his motion for additional ruling and for new trial/reconsideration/relief from order. On appeal, Honeycutt raises two arguments for reversal: the circuit court (1) improperly delayed ruling on the petitions to Honeycutt's prejudice; and (2) clearly erred and abused its discretion when it failed to compel the District Court to rule on his second motion to transfer. Because this is a case of mandamus, jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(3). We dismiss the appeal as it is moot.

In 2004, Honeycutt brought a cause of action against Stone Timber Co., Inc., in Union County District Court. In August 2004, Stone Timber filed a motion to dismiss the case alleging that venue was improper in Union County because Stone Timber's residence was Ouachita County. On September 27, 2004, the Union County District Court dismissed the case because venue was improper. Then, on October 6, 2004, Honeycutt filed a complaint against Stone Timber in the District Court.

The following has occurred since Honeycutt's complaint was filed in the District Court. On March 24, 2005, Honeycutt filed a motion to transfer his case against Stone Timber back to Union County District Court because venue was proper there and that court erred in dismissing the case. Honeycutt filed a second motion to transfer, on April 12, 2005, alleging that the District Court lacked subject-matter jurisdiction and that venue was proper in Union County Circuit Court. After filing this second motion, Honeycutt's attorney sent multiple letters to the District Court inquiring about the status of the case against Stone Timber.

Then, on November 21, 2006, Honeycutt filed a petition for writ of mandamus in Ouachita County Circuit Court asking the circuit court to direct the District Court to issue an order on the motions to transfer. On December 6, 2006, the District Court issued an order denying Honeycutt's motion to transfer based upon its finding that venue was appropriate. The next day, the District Court responded to Honeycutt's petition in circuit court stating that it had ruled on the motions to transfer by denying them by its December 6 order.

On December 27, 2006, Honeycutt filed an amended petition for writ of mandamus in the circuit court claiming that the District Court's December 6 order failed to address the jurisdictional issue he raised in his second motion to transfer. Thus, he

sought a writ of mandamus to compel the District Court to fully and completely rule on the matter. The District Court again responded that it had ruled on the motions by denying them. On January 25, 2007, Honeycutt filed another amended petition for writ of mandamus and a petition for writ of prohibition in the circuit court.

The circuit court, on February 7, 2007, issued an order of dismissal denying Honeycutt's petition and amended petition for writ of mandamus because the District Court had issued an order denying Honeycutt's motion to transfer. Following this order, the District Court filed a motion to dismiss, on February 12, 2007, asking the circuit court to dismiss the amended petition for mandamus and the petition for prohibition. In April 2007, Honeycutt filed a motion for summary disposition and a request for findings of fact and conclusions of law, as well as a motion for additional ruling and for new trial/reconsideration/relief from order.

On April 23, 2007, Honeycutt filed a motion to voluntarily nonsuit his petition for writ of prohibition. The circuit court, on April 24, 2007, granted the motion to voluntarily nonsuit, but denied Honeycutt's motion for additional ruling and for new trial/reconsideration/relief from order. That same day, Honeycutt filed a notice of appeal from the February 7 and April 24 orders.

A few months later, on September 7, 2007, the District Court issued an order transferring Honeycutt's case against Stone Timber to the Ouachita County Circuit Court. Specifically, the District Court found Honeycutt's second motion to transfer to be without merit because the District Court had subject-matter jurisdiction over the matter. However, because the circuit court had concurrent jurisdiction with the District Court on this matter, "upon its own motion, *sua sponte*, and out of an abundance of caution," the case was transferred to the Ouachita County Circuit Court. A notice of transfer was filed with the circuit court on September 12, 2007.

As stated above, Honeycutt raises two arguments for reversal. First, he argues that the circuit court improperly delayed ruling on the petitions to his prejudice. In support of this argument, Honeycutt claims that the circuit court violated Ark. Code Ann. § 16-115-103 (Repl. 2006) and his rights to due process by not ruling on his petition for writ of mandamus, amended petitions for mandamus, and petition for writ of prohibition "for months."

Second, Honeycutt argues that the circuit court clearly erred and abused its discretion when it failed to compel the District Court to rule on the second motion to transfer. Specifically, Honeycutt argues that his petition and amended petitions for writ of mandamus were improperly dismissed, without requiring the District Court to rule on the second motion, when the District Court had only ruled on Honeycutt's first motion to transfer.

The standard of review on a denial of a writ of mandamus is whether the circuit court abused its discretion. *Republican Party of Garland County v. Johnson*, 358 Ark. 443, 193 S.W.3d 248 (2004). However, as a threshold matter, this court must determine whether the issues before it are moot. As a general rule, appellate courts of this state will not review issues that are moot. *Ball v. Phillips County Election Comm'n*, 364 Ark. 574, 222 S.W.3d 205 (2006). To do so would be to render advisory opinions, which this court will not do. *Id.* A case becomes moot when any judgment rendered would have no practical legal effect upon a then-existing legal controversy. *Id.* This court has recognized two exceptions to the mootness doctrine. *Id.* The first exception involves issues that are capable of repetition, but that evade review. *Id.* The second exception concerns issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation. *Id.*

[redacted] In the present case, the issues raised by Honeycutt are moot. Honeycutt's petition for writ of mandamus asked the circuit court to compel the District Court to rule on his motions for transfer filed in his case against Stone Timber. On December 6, 2006, the District Court issued an order denying Honeycutt's motion to transfer on the issue of venue. On January 25, 2007, Honeycutt filed an amended petition for writ of mandamus as well as a petition for writ of prohibition. On February 7, 2007, the circuit court denied Honeycutt's petition because it found that the District Court had acted in the matter such that a writ of mandamus would not be proper. Honeycutt then filed a motion to nonsuit his petition for writ of prohibition, and a motion for additional ruling and for new trial/reconsideration/relief from order. The circuit court granted the motion to voluntarily nonsuit and denied Honeycutt's motion for additional ruling and for new trial/reconsideration/relief from order. Honeycutt appealed both of the circuit court's orders on April 24, 2007. Then, on September 7, 2007, the District Court issued an order finding Honeycutt's

motion to transfer on the issue of jurisdiction to be without merit, but transferring the case to the circuit court under an abundance of caution because that court had concurrent jurisdiction. Because the District Court has acted in this matter, Honeycutt has received the relief he requested, and both issues raised on appeal are moot. *See Barnett v. Howard*, 363 Ark. 150, 211 S.W.3d 490 (2005) (holding that, due to the county court's acting in the manner requested by the petition for writ of mandamus, the petition was moot).

Furthermore, despite Honeycutt's argument to the contrary, neither of the two exceptions apply. Honeycutt concedes that the District Court has ruled on both motions; however, he claims that what he had to do to force the District Court to do its duty is unconscionable. Thus, Honeycutt concludes that it is evident that this situation could be repeated and that the denial of his requested relief "would send the message that lower courts can sit on motions until just before they are compelled to do so would do little to maintaining respect for the judiciary." This argument is unpersuasive as this case clearly does not fall within the purview of those cases recognized by this court as those that are capable of repetition yet evade review. Neither does this case involve an issue of substantial public interest that, if addressed, would prevent future litigation. As such, any review of this case would constitute an advisory opinion. It is well established that this court will not render advisory opinions. *Ball*, 364 Ark. 574, 222 S.W.3d 205. Accordingly, this appeal is dismissed.

Antwain WILLIAMS *v.* STATE of Arkansas

CR 07-457 268 S.W.3d 868

Supreme Court of Arkansas
Opinion delivered November 29, 2007

Dunbar, Craytor & Morgan, LLP, by: *Bart C. Craytor*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Leeann J. Irvin*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Antwain Williams brings this interlocutory appeal from the circuit court's denial of his motions to dismiss based on double jeopardy and based on the failure to provide a speedy trial as well as the circuit court's *sua sponte* declaration of a mistrial. We affirm the circuit court's order in part and dismiss in part.

On September 6, 2004, N.C., the alleged victim in this case, and her mother reported to local police in Texarkana that the appellant, Antwain Williams, had raped N.C. on the night of September 3, 2004. A warrant for Williams's arrest was issued, and Williams was arrested. On January 5, 2005, a criminal information was filed, charging Williams with one count of rape.

After several continuances, a trial date was set for August 21, 2006. On the day of the trial, *voir dire* was conducted by both parties, and a jury was selected but not sworn. The next day, the prosecutor became aware of a rape kit and clothing that had been taken from the victim after the rape. The rape kit had been stored in the Texarkana police evidence locker but had never been sent to the Arkansas State Crime Lab. Upon discovery, the evidence was immediately sent to the crime lab for testing, and the prosecutor

moved for a continuance to wait for the results from the crime lab. Williams filed an objection to the State's motion for continuance, arguing that the State had not acted with diligence in discovering and testing the rape kit and that allowing a continuance after the selection of a jury would be substantially unjust to the defense. The circuit court granted the State's motion, and the case was continued.

On December 27, 2006, the circuit court ordered a mistrial *sua sponte* on the basis that the results from the crime lab had yet to be completed, that the jury's term of service was nearing an end, and that the trial could not be resumed and completed within the jury's term of service. The circuit court noted that the jury, though selected, had not been sworn under oath, and, therefore, double jeopardy had not yet attached.

On February 2, 2007, Williams filed a motion to dismiss for denial of a speedy trial, a motion to dismiss due to double jeopardy, and an objection to the circuit court's declaration of a mistrial. Williams asked that the charges against him be dismissed with prejudice, or, in the alternative, that the circuit court withdraw its declaration of a mistrial and reinstate the previously selected jurors. A hearing was held on Williams's motion, after which the circuit court orally denied his motions from the bench. The circuit court ruled that Williams's right to a speedy trial had not been violated, as only 320 days could be counted against the State; that because the jury had not been sworn, double jeopardy had not attached; and finally that its declaration of a mistrial was proper because there was implied consent on the part of Williams and also that a mistrial was necessary because the jury had reached the end of its term of service. Williams filed this interlocutory appeal and asserted that the circuit court's denial of his motions was error.[1]

I. Double Jeopardy

Williams first claims that double jeopardy should attach in this case because the jury had been selected by both parties and the ministerial act of administering an oath to the jury does little to

[1] Williams filed a notice of appeal on February 12, 2007. The circuit court did not enter a written order denying Williams's motions until March 29, 2007. According to Rule 2(b)(1) of the Arkansas Rules of Appellate Procedure – Criminal, "[a] notice of appeal filed after the trial court announces a decision but before the entry of the judgment or order shall be treated as filed on the day after the judgment or order is entered."

help protect his right to retain a chosen jury. He notes that he is not arguing that Arkansas Code Annotated § 5-1-112, which provides that double jeopardy attaches in a jury trial after the jury is sworn, is unconstitutional. Rather, he asserts that double jeopardy should attach when a mistrial is declared after the jury has been selected by both the prosecution and defense, notwithstanding § 5-1-112, as this section is independent of the constitutional protection against double jeopardy. Williams further urges that the mere withholding of the jury's oath should not govern whether double jeopardy attaches in a case, because such a standard does little to protect a defendant from the increased time and expense of his defense.

Williams goes further and contends that the State's continuance and the circuit court's subsequent declaration of a mistrial prejudiced his defense and violated his right to be tried by the selected jury. He states that a mistrial could have been prevented had the State acted diligently in having its evidence tested by the crime lab.

The State answers that Williams was not entitled to have his case tried by the selected jury and that his protection against double jeopardy was not violated. The State contends that § 5-1-112 governs this case and clearly provides that double jeopardy does not attach in a jury trial until after the jury is sworn. The State also maintains that Williams has misconstrued United States Supreme Court precedent to support his position and that because the jury was not sworn in this case, double jeopardy had not attached.

This court reviews a circuit court's denial of a motion to dismiss on double-jeopardy grounds *de novo*. *See Winkle v. State*, 366 Ark. 318, 235 S.W.3d 482 (2006). We have further said that "when the analysis presents itself as a mixed question of law and fact, the factual determinations made by the trial court are given due deference and are not reversed unless clearly erroneous." *Id.* at 320, 235 S.W.3d at 483. However, the ultimate decision by the circuit court that the defendant's protection against double jeopardy was not violated is reviewed *de novo*, with no deference given to the circuit court's determination. *Id.* A double-jeopardy claim may be raised by interlocutory appeal because if a defendant is illegally tried a second time, the right would have been forfeited. *See Zawodniak v. State*, 339 Ark. 66, 3 S.W.3d 292 (1999).

Both the Fifth Amendment to the United States Constitution and Article 2, § 8 of the Arkansas Constitution require that no person be twice put in jeopardy of life or liberty for the same

offense. The Double Jeopardy Clause protects criminal defendants from: "(1)a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *Hughes v. State*, 347 Ark. 696, 702, 66 S.W.3d 645, 648 (2002). The General Assembly has codified the protection against double jeopardy as an affirmative defense to criminal prosecution. *See* Ark. Code Ann. § 5-1-112 (Repl. 2006). The section relevant to the current case provides:

> A former prosecution is an affirmative defense to a subsequent prosecution for the same offense under any of the following circumstances:
>
> . . . .
>
> (3) The former prosecution was terminated without the express or implied consent of the defendant *after the jury was sworn* or, if trial was before the court, after the first witness was sworn, unless the termination was justified by overruling necessity.

(Emphasis added.)

[redacted] Williams's principal claim is that double jeopardy should have attached after the jury was selected but before the jury was sworn. We disagree. In addition to § 5-1-112, this court has held that "[d]ouble jeopardy attaches in a jury trial once the jury is sworn." *Phillips v. State*, 338 Ark. 209, 211, 992 S.W.2d 86, 88 (1999); *see also Smith v. State*, 307 Ark. 542, 545, 821 S.W.2d 774, 776 (1992) ("The law . . . is very clear that jeopardy does not attach until the jury has been sworn."). For his proposition that he has a right to be tried by a particular tribunal, Williams cites this court to *Crist v. Bretz*, 437 U.S. 28 (1978). His reliance on *Crist*, however, is misguided, as Williams simply quoted language in *Crist* out of context to support his argument. In *Crist*, 437 U.S. at 35, the United States Supreme Court said:

> Although it has thus long been established that jeopardy may attach in a criminal trial that ends inconclusively, the precise point at which jeopardy does attach in a jury trial might have been open to argument before this Court's decision in *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100. There the Court held that the Double Jeopardy Clause prevented a second prosecution of

> a defendant whose first trial had ended just after the jury had been sworn and before any testimony had been taken. The Court thus necessarily pinpointed the stage in a jury trial when jeopardy attaches, and the *Downum* case has since been understood as explicit authority for the proposition that jeopardy attaches when the jury is empaneled and sworn.

(Internal citations omitted.) *See also Serfass v. United States*, 420 U.S. 377, 388 (1975) ("In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn."). In the instant case, it is undisputed that the jury, though selected, was not sworn. According to this court's previous decisions, as well as those by the United States Supreme Court, double jeopardy did not attach, and the circuit court correctly denied Williams's motion to dismiss based on double-jeopardy grounds. This point has no merit.

II. Declaration of a Mistrial

Williams next contends that the circuit court erred in declaring a mistrial because no forceful and compelling circumstances existed to justify the dismissal of the jurors. He further maintains that reasonable diligence and care on the part of the State could have averted the circuit court's declaration of a mistrial. He urges, finally, that there was no implied consent on his part to the mistrial, and that if there was, it was because the State withheld the crime lab results and misled him.

The State's initial retort is that because the jury had not yet been sworn, double jeopardy did not attach, and, therefore, the trial had not commenced. Thus, according to the State, an analysis of Williams's consent or the necessity of the mistrial is not required, as there was not a trial, *per se*, to terminate. We disagree. Grounds for a mistrial could easily occur prior to the time that the petit jury is sworn. A prime example would be prejudice to the panel committed by improper comments made by counsel or other jurors during *voir dire*. *See generally Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996); *Alexander v. State*, 264 Ark. 11, 569 S.W.2d 106 (1978); *Winbush v. State*, 82 Ark. App. 365, 107 S.W.3d 882 (2003).[2]

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[2] In each of these cases, the circuit court's refusal to grant a mistrial following improper comments made during jury selection was affirmed on appeal. Though the cases differ from

The State, however, also insists that Williams implicitly consented to the declaration of the mistrial because he did not make a timely objection to the mistrial and because the mistrial was declared for his benefit. As a third point, the State contends that it exercised reasonable diligence and care and could not have taken any other action to prevent the mistrial. The State maintains that though the crime lab report was dated December 22, 2006, the prosecutor did not receive the report until January 29, 2007, and that the circumstances surrounding the mistrial were not within the control of the circuit court or any of the parties involved.

We initially emphasize that the circuit court has broad discretion in granting or denying a motion for a mistrial, and this court will not reverse the circuit court's decision absent an abuse of discretion. *See Holsombach v. State*, 368 Ark. 415, 246 S.W.3d 871 (2007). A defendant's consent to the declaration of a mistrial can be either express or implied. *See Phillips, supra.* If a defendant consents to a mistrial, then the demonstration of an overruling necessity is not required, and the defendant may be tried for the same charge again. *See id.* This court has held that the defendant's consent is implied if the defendant does not object to the mistrial, and the mistrial is for the benefit of the defendant. *See id; see also Woods v. State*, 287 Ark. 212, 697 S.W.2d 890 (1985). If the mistrial is for the benefit of the State, then the failure to object does not imply consent. *See id.*

In the case at hand, the mistrial was clearly for the benefit of Williams. The mistrial was declared because the jury was nearing the end of its term of service and the trial had not proceeded as scheduled. The circuit court stated its concern that the delay in time between the selection of the jury and the beginning of trial could possibly taint the jury. Furthermore, Williams did not object to the mistrial until he filed his motion to dismiss on February 2, 2007, more than five weeks after the mistrial was declared. Under these circumstances, we hold that Williams's consent to the mistrial was implied.

Moreover, the circuit court was also correct in alluding to the principle of overruling necessity for the mistrial. This court has said:

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the instant case in that in these cases the circuit court refused to grant a mistrial, they stand for the proposition that a mistrial may be granted before a jury is sworn.

> In making this determination, we have said that the State bears the burden of proving a manifest necessity, which is a circumstance that is "forceful and compelling" and is "in the nature of a cause or emergency over which neither court nor attorney has control, or which could not have been averted by diligence and care." *Jones v. State*, 288 Ark. 162, 702 S.W.2d 799 (1986); *Cody v. State*, 237 Ark. 15, 371 S.W.2d 143 (1963). We have also said that it is within the trial court's discretion to determine whether there is an "overruling necessity" that requires the grant of a mistrial, and we will not disturb that ruling absent an abuse of discretion. *Shaw v. State*, 304 Ark. 381, 802 S.W.2d 468 (1991).

Hale v. State, 336 Ark. 345, 362, 985 S.W.2d 303, 312 (1999).

In the case at bar, the circuit court observed that it was concerned that the jury could have become tainted within the four months after selection of the jury and that there was a possibility that the jury could no longer be fair and impartial. Furthermore, the end of the jury's term of service was nearing, and the trial could not be completed by the end of the jury's term. The circuit court, accordingly, discharged the jury. These circumstances were not within the control of the circuit court or the prosecutor, as the prosecutor did not receive the crime lab results until almost a month after the declaration of the mistrial. We hold that the circuit court did not abuse its discretion in finding that the possibility of a tainted jury due to the delay in time between jury selection and the beginning of trial was an overruling necessity.

III. Due Process

Williams next claims that his due-process rights were violated by the circuit court's *sua sponte* declaration of a mistrial, because the circuit court gave him no notice for a hearing and did not afford him an opportunity to be heard. He maintains that his interest in the selected jury was usurped and that he was further denied due process by the State's failure to give him the crime lab report in a timely manner. He insists that the circuit court's declaration of a mistrial without giving him an opportunity to be heard was an abuse of discretion.

We will not consider this point. Williams's argument in his brief consists of a mere two paragraphs of vague assertions that his due-process rights have been violated. He cites to no authority and makes no convincing arguments. Furthermore, we

cannot glean from the record that this precise point was ruled on by the circuit court. This court has said on numerous occasions that it will not consider arguments, even constitutional ones, that are not supported by legal authority or convincing argument and will not address arguments when it is not apparent without further research that the argument is well taken. *See Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005); *Flanagan v. State*, 368 Ark. 143, 243 S.W.3d 866 (2006). This court will not research and develop arguments for appellants. *See id.*

IV. Speedy Trial

Williams raises, as his final point, that the circuit court erred in calculating the amount of time charged to the defense in its speedy-trial calculation. Specifically, he maintains that the time period between January 31, 2006, and May 2, 2006, should not have been charged to the defense. He contends that though he gave a verbal waiver during the January 31 hearing, the waiver was not accepted by the circuit court or relied upon in setting a trial date. Williams insists, in addition, that the time period between September 8, 2005, and January 31, 2006, should not have been charged to the defense because the continuance was requested based on the State's failure to provide photographs taken from the sexual assault nurse's examination. In sum, Williams argues that 236 days should be added to the circuit court's speedy-trial calculation.

The State responds that the denial of Williams's motion to dismiss for a speedy-trial violation is not properly before this court. The State insists that an interlocutory appeal is not the proper procedure for having this court address a speedy-trial issue. Rather, the State maintains that the proper method is by a petition for a writ of prohibition or on direct appeal and that, accordingly, this court should not consider Williams's argument.

We agree with the State. Rule 28.1 of the Arkansas Rules of Criminal Procedure provides:

> (c) Any defendant charged after October 1, 1987, in circuit court and held to bail, or otherwise lawfully set at liberty, . . . shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

> (d) Motion for dismissal of a charge pursuant to subsection (b) or (c) hereof shall be made to the trial court, but if denied, *may be presented to the Arkansas Supreme Court by petition for writ of prohibition.*

Ark. R. Crim. P. 28.1(c) and (d) (2007) (emphasis added). This court has said that "an interlocutory appeal is not the proper procedure for bringing a pretrial speedy-trial issue" before this court. *Richards v. State*, 338 Ark. 801, 803, 2 S.W.3d 766, 767 (1999). The proper method for having this court address the denial of a motion to dismiss for a speedy-trial violation before trial is by petition for writ of prohibition. *See Richards, supra.* We decline to address Williams's speedy-trial argument in this interlocutory appeal, and we dismiss Williams's appeal on this point.

Affirmed in part. Dismissed in part without prejudice.

BENTON COUNTY, Arkansas *v.*
OVERLAND DEVELOPMENT COMPANY, INC.

07-613 268 S.W.3d 885

Supreme Court of Arkansas
Opinion delivered November 29, 2007

Davis, Wright, Clark, Butt and Carithers, PLC, by: *William Jackson Butt, II*, and *Tisha M. Harrison*, for appellant.

Penix and Taylor, by: *James A. Penix, Jr.*; *Stephen L. Wood*, for appellee.

ROBERT L. BROWN, Justice. Appellant Benton County, Arkansas appeals the grant of summary judgment in favor of appellee Overland Development Company, Inc. ("Overland"),

and the circuit court's ruling that there was no rational basis to deny Overland's permit application to operate a red-dirt mine. We reverse and remand.

Overland has a leasehold interest in certain land in Benton County which is in close proximity to the Cross Hollows cantonment. By all accounts, Cross Hollows is an important Civil War archeological site. On January 27, 2006, Overland submitted an application to the Benton County Planning Board, in which it requested permission to operate a red-dirt mine on the land. As part of the application process, Overland had an archeological study of the proposed mining site performed by Randall Guendling, an archeologist with Arkansas Archeological Survey. That study resulted in a report ("Guendling Report"), which was furnished to Overland. The Guendling Report found that the proposed mining site had not been occupied during the Civil War but had been used for prehistoric hunting and gathering, late 19th or early 20th century logging, and 20th century hunting. The Guendling Report concluded that red-dirt mining in the area would have no impact on significant archeological material unless it was conducted in one area of the proposed site that was identified as having an old logging cabin ("Locus I"). Nonetheless, on August 16, 2006, the Benton County Planning Board denied Overland's permit application on the basis that the mining operation was not consistent and compatible with existing development and the environment.

Overland appealed this decision to the Benton County Appeal Review Board, which affirmed the Planning Board's decision on October 12, 2006. On November 13, 2006, Overland appealed the Review Board's decision to a Benton County Circuit Court as allowed by Arkansas Code Annotated § 14-17-211 (Repl. 1998), which provides for de novo review by the circuit court.

On March 30, 2007, Overland moved for summary judgment and contended that: (1) Overland had complied with all state environmental regulations which, it argued, preempted any Benton County environmental regulations; (2) the proposed dirt mine was located in an area with several other dirt mines and therefore constituted "clustering" and was per se compatible with existing land use under Benton County regulations; (3) the Guendling Report demonstrated that no significant archeological materials would be disturbed by the mining; and (4) Benton County had failed to produce evidence that would demonstrate that red-dirt

mining was not compatible with the preservation of historical and archeological pursuits. Appended to the motion for summary judgment were, among other things, the Guendling Report and the affidavit of David E. Covington ("Covington Affidavit"), the owner of the proposed mining site and the president of Overland, who averred that a dirt-mining operation on the site would decrease traffic on historic roads.

Benton County filed a reply to the motion for summary judgment, in which it asserted that: (1) the proposed mining operation had the potential to impact the existing environment significantly and (2) the fact that other mining operations existed in the same area did not make Overland's operation per se compatible. One of the exhibits appended to Benton County's brief was the affidavit of Jerry Hilliard ("Hilliard Affidavit"), an archeologist also employed by the Arkansas Archeological Survey, who has conducted multiple archeological surveys in the Cross Hollows area. In the Hilliard Affidavit, Hilliard averred that it was his opinion "that the mine itself, the access roads, and the additional heavy equipment traffic that would necessarily occur as a result of this particular red-dirt mine would adversely impact the cultural, historical and archeological landscape of the Cross Hollow site."[1] Also included among the exhibits were excerpts from the deposition of Michael Evans, an archeological assistant with the Arkansas Archeological Survey ("Evans Deposition"), which discussed the historical significance of the Cross Hollows site as a Civil War camp and as part of the Trail of Tears and suggested that the Guendling Report had not adequately investigated potential prehistoric deposits at the proposed mining site.

A hearing was held on the summary-judgment motion, after which the circuit court granted Overland's motion. This ruling was memorialized in a May 18 judgment, which concluded that there was no genuine issue of material fact before the court and that there was no rational basis to deny Overland's permit application. It is from this judgment that Benton County appeals.

Benton County first points out that it is undisputed that Cross Hollows is the most significant non-battlefield Civil War site in Arkansas. The county argues that the conflicting opinions of Hilliard and Guendling, who are both archeologists employed by

[1] While the Guendling Report and the parties refer to the area as Cross Hollows, the Hilliard Affidavit refers to it as Cross Hollow.

the Arkansas Archeological Survey, demonstrate that there is a genuine issue of material fact as to whether the proposed mining operation will have an impact on significant archeological artifacts at Cross Hollows. The statements in the Hilliard Affidavit, it is contended, are buttressed by Hilliard's considerable expertise regarding the Cross Hollows area. In fact, Benton County points out, Hilliard's surveys of the area are cited as a major source in the Guendling Report.

Benton County also emphasizes the Evans Deposition's discussion of the potential impact of the proposed red-dirt mine. It argues that the Evans Deposition does not contain mere assertions but rather conclusions based on historical information. To the extent that Evans lacks academic credentials, Benton County argues that this goes only to the weight that should be given to his testimony, which is not an issue to be considered during summary judgment. Benton County further underscores the fact that, although traffic on some historic roads may be decreased by the operation of a mine at the proposed site, the ingress/egress location for the new mine would be at the intersection of Old Wire Road and Cross Hollows Road, which is the very "Cross Hollows" that is the most significant non-battlefield Civil War site in Arkansas.

Benton County notes, finally, that, despite the fact that the Guendling Report contains the broad conclusion that mining on the site will not disturb any significant archeological material, the report also observes that a new archeological site that may contain some important deposits was uncovered during the survey of the proposed mine site. While Overland may assert that it will not mine in that part of the permit area, Benton County contends that there is nothing to prevent it from doing so if it chooses.

Overland, on the other hand, claims that Benton County has failed to provide evidence to rebut the findings of the Guendling Report. Despite performing a thorough sweep of the area, Overland argues, Guendling's team failed to uncover any Civil War artifacts at the site. The company concedes that the Guendling Report uncovered one site, Locus I, that might contain important non-Civil War artifacts but argues that Overland has agreed not to disturb that site. Overland then points to the Covington Affidavit, which avers that the proposed mine will lead to decreased traffic on local historic roads.

Overland concludes by stating that the Hilliard Affidavit contains only speculation and opinion and is, therefore, insufficient to rebut, point for point, the information contained in the

Guendling Report and Covington Affidavit. Overland discounts the information contained in the Evans Deposition, noting that Evans gave only opinions, not facts, and has little academic background in archeology.

The standard of review used by this court in reviewing the grant of summary judgment is well established:

> 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 moving party is entitled to judgment as a matter of law. Once a moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. On appeal, 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. 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. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable men might reach different conclusions from those undisputed facts.

Heinemann v. Hallum 365 Ark. 600, 603-04, 232 S.W.3d 420, 422-23 (2006) (citations omitted) (quoting *Gonzales v. City of DeWitt*, 357 Ark. 10, 14-15, 159 S.W.3d 298, 301 (2004)). Speaking in the context of employment discrimination cases, this court has noted that an affidavit must contain "[m]ore than mere assertions or possibilities . . . to defeat a motion for summary judgment." *Mack v. Sutter*, 366 Ark. 1, 6, 233 S.W.3d 140, 145 (2006).

In the instant case, Overland supports its summary-judgment motion with the Guendling Report, which includes a detailed archeological survey of the proposed red-dirt mine site. The report concludes that the results of the survey were not consistent with any Civil War occupation of the site. The survey, however, did find evidence of prehistoric use of the land, and the report alludes to that fact. As to any Civil War or prehistoric artifacts, the report concludes that "[d]irt mine operation will not impact significant archeological material as survey and collection of the artifacts for curation have removed most of them." Through

the Guendling Report, Overland has made a prima facie case that no significant Civil War or prehistoric artifacts *located at the site itself* will be disturbed by red-dirt mining. Benton County, however, has not provided its own survey of the mining site and, therefore, has not "met proof with proof" to demonstrate the existence of a material issue of fact on these precise points. *Heinemann*, 365 Ark. at 604, 232 S.W.3d at 423.

Nevertheless, Overland has failed to make a prima facie case that it is entitled to summary judgment regarding two issues: (1) whether the mining operation will disturb significant artifacts from a late 19th or turn-of-the-20th century logging endeavor located at Locus I and (2) whether the transportation of red dirt from the mining site will have any significant impact on Civil War sites located outside of the mining area surveyed for the Guendling Report, particularly in the Cross Hollows area. On the first issue, the Guendling Report, which Overland itself introduced as proof that there was no genuine issue of material fact, stated that the remains of a small cabin at Locus I, which appeared to have been associated with logging in the late 19th or early 20th century, had been found on the site and that the area surrounding the cabin "may contain some important deposits." Although the report goes on to say that impact to this area "can easily be avoided by mining if it is confined to the west end of the ridge," Overland does not even suggest that a permit granted by Benton County would confine mining operations at the red-mine site to the west end of the ridge. Because of the admission of the historic cabin at Locus I and potential for important "deposits" made in the Guendling Report, Overland has failed to establish that there is no genuine issue of material fact as to mining in the permit area.

The second issue has to do with the off-site impact of mining operations on Civil War artifacts in the Cross Hollows area. The Guendling Report focuses on the mining area itself and does not purport to address off-site impacts; nor is it clear that Guendling examined the potential impact of building roads across the Covington property to remove the mined dirt. Although the Covington Affidavit addresses off-site impacts in asserting that traffic on local historic roads will decrease due to the operation of the proposed mine, this assertion, even if accepted as true, does not compel the conclusion that no off-site impacts will result from the proposed mine. The Hilliard Affidavit offered by Benton County, on the other hand, states that the access roads and heavy equipment

traffic that would occur as a result of the mining operations would have an adverse impact on the "cultural, historical and archeological landscape of the Cross Hollow[s] site." Hilliard's acknowledged expertise and extensive surveys of the Cross Hollows site are undisputed and give his conclusions more weight than "mere assertions." *Mack*, 366 Ark. at 6, 233 S.W.3d at 140. The affidavit of an expert, introduced in response to a motion for summary judgment, has been held by this court to demonstrate the existence of a material question of fact. *Four County (NW) Reg'l Mgmt. Dist. Bd. v. Sunray Servs., Inc.*, 334 Ark. 118, 132-33, 971 S.W.2d 255, 263 (1998). The Hilliard Affidavit does precisely that.

We conclude that a genuine issue of material fact does exist regarding whether there would be a significant archeological impact on the Cross Hollows area from the red-dirt mining proposed by Overland.

With regard to the second issue of whether Benton County had a "rational basis" for denying Overland's permit, it is unclear to this court what the circuit court meant by the use of this term in its judgment. The circuit court never expressly found that Benton County's treatment of Overland violated the company's equal protection rights, which would then lead to a rational-basis analysis. *See, e.g., Johnson v. Sunray Servs., Inc.*, 306 Ark. 497, 508, 816 S.W.2d 582, 588 (1991). Though Benton County argues in its brief that there was a legitimate government interest, or rational basis, to treat Overland's red-dirt mine differently from other mines in the area, we decline to address this constitutional issue, because of our uncertainty about whether it was fully developed before the circuit court or ruled upon. *See Knowlton v. Ward*, 318 Ark. 867, 878-79, 889 S.W.2d 721, 728 (1994).

Reversed and remanded.

James McGREW as Special Administrator of the Estate of Jeron Dean McGrew, Deceased; and Gary F. Zulpo and Christie Zulpo *v.* FARM BUREAU MUTUAL INSURANCE COMPANY of Arkansas, Inc.

07-421 268 S.W.3d 890

Supreme Court of Arkansas
Opinion delivered November 29, 2007

[Rehearing denied January 17, 2008.]

Elliott & Smith, P.A., by: *Don R. Elliott, Jr.*; *Julia L. Busfield*, for appellant.

Davis, Wright, Clark, Butt & Carithers, PLC, by: *Sidney P. Davis* and *Chad Gowens*, for appellee.

ANNABELLE CLINTON IMBER, Justice. The instant case arises out of a dispute as to whether the homeowner's insurance policy that Appellants Gary and Christie Zulpo purchased from Appellee Farm Bureau Insurance Company of Arkansas, Inc., (Farm Bureau) provides coverage for the death of Appellant James McGrew's son, Jeron. The Benton County Circuit Court granted summary judgment in favor of Farm Bureau, finding no coverage under the policy, and McGrew and the Zulpos filed this appeal.

In 2004, Christie Zulpo worked two twelve-hour shifts each weekend as a nurse's assistant at the Mercy Medical Center. The other five days of the week, Christie stayed home with her young child. During the months of December 2003 and January 2004, Christie placed the following advertisement in *The Morning News*:

> STAY AT home mom looking for responsible parents in need of child care. Good rates, clean environment. Lowell area [phone number].

As a result of the advertisement, Christie began caring for Jeron McGrew, a one-year-old child, on March 15, 2004. Jeron's parents agreed to pay Christie $100 per week, and for the next six months, she continuously provided childcare to Jeron for at least three days a week and five hours a day. In 2004, the Zulpos reported $1,626 in business income from Christie's childcare work on their joint tax return.

On September 2, 2004, Christie had a doctor's appointment, and she left the children in Gary's care. During the time while Christie was gone, a heavy object fell on Jeron, causing compression chest trauma and the rupture of the right atrium of his heart. Jeron later died from his injuries.

James McGrew, as special administrator of Jeron's estate, filed a negligence action against Gary. Gary then filed a claim with Farm Bureau under his homeowner's insurance policy, and Farm Bureau filed a complaint for declaratory judgment, arguing that the policy did not cover Jeron's accident. Farm Bureau argued that the policy specifically excluded coverage for business pursuits of an insured, and Christie's childcare services were a business pursuit.

Under the policy, bodily injuries, including death, were generally covered, but the policy contained the following exclusion:

> Unless special permission for coverage is granted by endorsement, certain types of losses are not covered by your policy . . . . bodily injury or property damage arising out of your business pursuits.

Business was defined in the policy as,

> [A] trade or profession, or occupation, including farming whether full or part-time. It does not include newspaper delivery, caddying, lawn care, nor any similar activity minors normally perform, unless the activity is **your** full-time occupation.

"You" and "your" were defined as "the policyholder first named in the policy declarations and his or her spouse . . . . 'You' and 'your' also includes dependent relatives if they are living on the residence premises."

Farm Bureau filed a motion for summary judgment, arguing that coverage was clearly excluded under the policy. The Zulpos, however, contended that the policy provisions were ambiguous. The circuit court granted Farm Bureau's motion, finding no ambiguity in the policy provisions. The Zulpos and James McGrew appealed the circuit court's decision to the Arkansas Court of Appeals. The court of appeals affirmed, and Appellants filed a petition for review with this court. When this court grants a petition for review from a decision of the court of appeals, we review the appeal as if it had originally been filed in this court. *See Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003).

Under our rules of procedure, a circuit court shall grant a party's motion for summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law on the issues specifically set forth in the motion." Ark. R. Civ. P. 56(c)(2) (2007). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000). Once the moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents or depositions, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.*

All proof submitted must be viewed in a light most favorable to the party resisting the motion. *Id.* On review, this court must determine whether the evidence presented by the moving party in support of the motion left a material question of fact unanswered. *Id.* A fact issue exists, even if the facts are not in dispute, if the facts may result in differing conclusions as to whether the moving party is entitled to judgment as a matter of law. *Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 343 Ark. 224, 33 S.W.3d 128 (2000).

For their first argument on appeal, McGrew and the Zulpos assert that it is clear from the language of the policy that Christie's childcare activities do not constitute a "business pursuit." Appellants argue that childcare, or babysitting, is an activity normally performed by minors, and, because the policy definition of "business" does not include activities "minors normally perform," Christie's childcare activities clearly are not a "business pursuit." They assert that the term "business" under the policy means the insured's "trade, profession or occupation," and Christie's childcare activities are not her trade, profession, or occupation, inasmuch as her occupation is nursing. Additionally, Appellants argue that even if Christie's childcare activities are considered a business, the activities are not her full-time occupation; rather, her principal occupation is being a nurse's assistant. In the alternative, Appellants argue that the policy language is ambiguous, and, therefore it should be construed against Farm Bureau.

Farm Bureau, on the other hand, insists that the business-pursuits exclusion precludes coverage under the policy. It asserts on appeal that Christie's activities fit the policy's basic definition of business because full-time, continuous childcare is not an activity minors would normally perform. Specifically, Christie's activities were unlike that of a minor due to the fact that she advertised her services, kept very young children on a day-to-day basis, and kept children in her home during the hours a minor would normally be in school. In essence, Farm Bureau claims that Christie's childcare activities constituted her full-time occupation.

Our law regarding the construction of insurance contracts is well settled. *Elam v. First Unum Life Ins. Co.*, 346 Ark. 291, 57 S.W.3d 165 (2001). The language in an insurance policy is to be construed in its plain, ordinary, and popular sense. *Norris v. State Farm Fire & Casualty Co.*, 341 Ark. 360, 16 S.W.3d 242 (2000). If the language of the policy is unambiguous, we will give effect to the plain language of the policy without resorting to the rules of construction. *Elam v. First Unum Life Ins. Co., supra.* Once it is

determined that coverage exists, it then must be determined whether the exclusionary language within the policy eliminates coverage. *Norris v. State Farm Fire & Cas. Co., supra.* Exclusionary endorsements must adhere to the general requirements that the insurance terms must be expressed in clear and unambiguous language. *Id.* If a provision is unambiguous, and only one reasonable interpretation is possible, this court will give effect to the plain language of the policy without resorting to the rules of construction. *Id.* If, however, the policy language is ambiguous, and thus susceptible to more than one reasonable interpretation, we will construe the policy liberally in favor of the insured and strictly against the insurer. *Id.*

In order for Christie's activities to be excluded from coverage, the activities must constitute a "business pursuit," and to make that determination, this court must consider the provision in the policy defining business. As quoted above, "business" was defined by the policy as: "[A] trade or profession, or occupation, including farming whether full or part-time. It does not include newspaper delivery, caddying, lawn care, nor any similar activity minors normally perform, unless the activity is **your** full-time occupation." Thus, in reviewing the definition of "business," this court must consider three things: (1) whether Christie's childcare activities met the general definition for business, (2) whether the activities are those normally performed by minors, and (3) whether the activities constitute Christie's full-time occupation.

Under the policy, a "business" is generally defined as a trade, profession, or occupation. A "trade" is defined in Webster's Dictionary as "the business practices or the work in which one engages regularly." *Webster's Third International Dictionary*, 2421 (2002). Likewise, an occupation is "a craft, trade, profession or other means of earning a living." *Id.* at 1561. A profession is defined as "a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods . . . ." *Id.* at 1811. While under a plain reading of the terms defined above, one might agree that childcare is not Christie's profession because she has not received specialized training in the field, one would also conclude that Christie's childcare activities constitute either a trade or an occupation. Childcare services were certainly the work in which Christie engaged regularly. She watched children three to five days a week, every week, in her home. Additionally, Christie engaged in the childcare activities as a means of earning a living.

The next question to be answered, however, is whether childcare activities are normally performed by minors. Farm Bureau argues that the language regarding activities normally performed by minors is unambiguous because it indicates activities normally performed by minors, which were actually being performed by a minor at the time of the accident. Appellants contend that the policy language is ambiguous as written because it only indicates that activities normally performed by minors are excluded from the definition of business, but does not indicate whether the activities must be performed by minors to be excluded. We agree with Appellants and conclude that the phrase "activities minors normally perform" is ambiguous. A reasonable person might determine that the policy covered minors, as well as adults, who are caddying or performing newspaper delivery, lawn care, or any other similar activity minors normally perform, such as childcare or babysitting. Because the provision is ambiguous, we must construe it against Farm Bureau.

The question of whether Christie's childcare activities were covered by the policy is not conclusively answered by our decision concerning the ambiguity of the phrase "any similar activity minors normally perform." The exclusion of activities normally performed by minors from the definition of business was further qualified by the phrase "unless the activity is **your** full time occupation." In that regard, Farm Bureau points out that Christie's childcare activities were full-time, whereas a minor would normally perform such activities on a part-time basis. Thus, issues remain concerning what constitutes a "full time occupation" under the policy, and whether Christie's childcare activities are a full-time occupation. Although the policy did not specifically define the term "full time occupation," the parties offered evidence in support of varying definitions to the circuit court.

Ordinarily, the question of whether the language of an insurance policy is ambiguous is one of law to be resolved by the court. *Elam v. First Unum Life Ins. Co., supra.* Where, however, parol evidence has been admitted to explain the meaning of the language, the determination becomes one of fact for the jury to determine. *Id.* Our case law demonstrates that where there is a dispute as to the meaning of an insurance contract term or provision, the circuit court must initially perform the role of gatekeeper, determining first whether the dispute may be resolved by looking solely to the contract or whether the parties rely on disputed extrinsic evidence to support their proposed interpreta-

tion. *See id.* Thus, where the issue of ambiguity may be resolved by reviewing the language of the contract itself, it is the circuit court's duty to make such determination as a matter of law. *Id.* However, when the parties go beyond the contract and submit disputed extrinsic evidence to support their proffered definitions of the term, this is a question of fact for the jury. *Id.* In the latter situation, summary judgment is not proper. *Id.*

A full-time occupation could be defined various ways, and the parties here presented evidence extrinsic to the policy, which could support several definitions. For instance, someone's full-time occupation could be that person's primary occupation, or calling. On the other hand, a full-time occupation might be defined by the number of hours worked at one job as compared to other jobs, or the amount of income derived from the work. In the instant case, the parties presented evidence that Christie considered her occupation to be nursing, but she spent just as many, and sometimes more, hours a week giving childcare as she did working as a nurse's assistant. Yet, the Zulpos' tax returns indicated that much less of Christie's income was attributed to her childcare services than her nursing job. Given the extrinsic evidence presented for the purpose of determining Christie's full-time occupation under the policy, the circuit court erred when it resolved the issue as a matter of law and granted summary judgment in favor of Farm Bureau. Accordingly, we reverse the circuit court's judgment and remand for the jury to determine whether childcare was Christie's full-time occupation. Such a question of fact must be determined by the jury in order for the circuit court to resolve the coverage question under the policy. *See Elam v. First Unum Life Ins. Co., supra; Smith v. Prudential Prop. & Cas. Ins. Co.*, 340 Ark. 335, 10 S.W.3d 846 (2000); *Minerva Enter., Inc. v. Bituminous Cas. Corp.*, 312 Ark. 128, 851 S.W.2d 403 (1993).

HELENA-WEST HELENA SCHOOL DISTRICT *v.*
Laketha Brown FLUKER, et al.

07-642 268 S.W.3d 879

Supreme Court of Arkansas
Opinion delivered November 29, 2007

Rieves, Rubens & Mayton, by: *Kent J. Rubens* and *Lawrence W. Jackson*, for appellant.

L. Ashely Higgins, P.A., by: *L. Ashley Higgins*, for appellee.

PAUL DANIELSON, Justice. Appellant Helena-West Helena School District appeals from the order of the Phillips County Circuit Court, which denied the school district's motion to dismiss and ordered it to pay the sum of $5,260 with interest to appellees, Linda Faye White, in her official capacity as the county clerk of Phillips County, and the Phillips County Election Commission (collectively "Phillips County"), in addition to an attorney's fee of $526. The school district raises two points on appeal: (1) that the circuit court erred in allowing overtime pay to the county clerk to be billed to the school district as an election expense; and (2) that the circuit court erred in ordering the school district to pay legal fees for Phillips County. We reverse the circuit court's order and dismiss.

A review of the record reveals that on March 4, 2003, the United States District Court for the Eastern District of Arkansas entered an agreed order of unitary status and dismissal, which found that the school district had complied with certain desegregation orders and had met the legal standards for a declaration of unitary status, thereby entitling it to a dismissal of the desegregation litigation. Thereafter, several individuals, including appellee Laketha Brown Fluker, filed with the circuit court an emergency verified petition for writ of mandamus and declaratory judgment and a temporary restraining order against the school district and several others, including Phillips County.

On August 5, 2005, the circuit court found that the school district, after being released from federal court supervision, had the duty to redraw the boundaries of the school zones in accordance with Ark. Code Ann. § 6-13-631(g)(3)(A) (Repl. 1999), which

had not been accomplished. Furthermore, the circuit court found that a map submitted by Phillips County would be adopted, that the county clerk had the duty of using her best efforts to move the affected voters according to said map and to implement the discussed zoning plan, and that the electors of the school district were entitled by law to elect a new school board. The circuit court also ordered that the then-existing board members would be required to stand for reelection in the September 2005 school election. On August 26, 2005, the circuit court denied the school board's motion to terminate the scheduled school board election after a hearing on said motion. In addition, the school district's motion for stay of proceeding to enforce judgment and amended motion for stay of proceedings were denied the same day.

The annual school election for the Helena-West Helena school district was held on September 20, 2005, and a run-off election followed on October 11, 2005. On November 8, 2005, Phillips County, "in the nature of a cross-claim against a co-party pursuant to ARCP Rule 13(f) for payment of an open account pursuant to Ark. Code Ann. § 6-14-118 and 6-14-119," filed a motion for judgment for election expenses against the school district. The motion submitted that Phillips County fulfilled its duty under the circuit court's order by completing the necessary rezoning, that it incurred great expense in doing so, and that because the expenses were a direct result of the failure of the school district to fulfill its duty to rezone, the school district was indebted to Phillips County in the amount of $37,840.74 and was responsible for an attorney's fee. Before the court ruled on the motion, the school district paid part of the debt claimed by Phillips County, but contested the portion that had been allocated to Linda Faye White for overtime and, on November 23, 2007, filed a motion to dismiss and response to the motion for election expenses.

On February 1, 2007, the circuit court denied the school district's motion to dismiss and ordered the school district to pay the sum of $5,260, plus interest, to Phillips County, in addition to an attorney's fee of $526. The school district filed a motion to reconsider, which was denied by the circuit court on March 9, 2007, and filed a timely notice of appeal on March 20, 2007.

I. Compensation to the Phillips County Clerk

The school district, for its initial point on appeal, argues that the circuit court erred in awarding overtime pay to the county clerk as an election expense. It first contends that, as a matter of

law, the clerk of Phillips County, as an elected official who receives a salary fixed by statute, is not entitled to be paid overtime for performing the statutory duties that she was legally elected to do. Phillips County responds that the circuit court did not award overtime pay to the clerk, rather the circuit court simply found that the school district was responsible for the additional costs Phillips County incurred from the election, which included overtime pay provided to the clerk. Furthermore, Phillips County argues that the statute that governs the clerk's salary, Ark. Code Ann. § 14-14-1204 (Supp. 2007), does not "fix" her salary, but instead it provides a range of compensation that is appropriate depending upon the population of the county.

The standard of review on appeal from a bench trial is whether the circuit court's findings were clearly erroneous or clearly against the preponderance of the evidence. *See Murphy v. City of West Memphis*, 352 Ark. 315, 101 S.W.3d 221 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, when considering all of the evidence, is left with a definite and firm conviction that a mistake has been committed. *See id.* This court views the evidence in a light most favorable to the appellee, resolving all inferences in favor of the appellee. *See Arkansas Transit Homes, Inc. v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000). However, a circuit court's conclusion on a question of law is reviewed de novo and is given no deference on appeal. *See Murphy, supra.*

In its order, the circuit court found that the school district, pursuant to Ark. Code Ann. § 6-14-118 (Repl. 1999), was charged with reimbursing Phillips County with the entire cost of the election, which in this case should include overtime expenses caused solely by the school district. Specifically, the circuit court found:

> 13. This court is of the opinion that the extraordinary expense of overtime pay was a direct result of the School Board's refusal to comply with Arkansas Code Annotated § 6-13-631. Had the board done so in a timely manner, it would not have been necessary for the Phillips County Clerk to be faced with a very short deadline to accomplish that which she is required by law to do. Under normal circumstances, the county clerk would have had sufficient time to place the registered voters in the proper wards during normal and regular office hours. She would not have been paid to do this work during normal and regular office hours. Some overtime could have been anticipated and would not have been paid. However, in this

> case, there were clearly not enough regular office hours to accomplish these two tasks. Many additional overtime hours were spent by the county clerk and her staff to accomplish these two critical tasks. The Phillips County Election Commission and Phillips County paid for the overtime expense which was attributable to the consolidation litigation.
>
> 14. Based on the above, it is this court['s] opinion that the Helena-West Helena School District is responsible for the school board election overtime expenses incurred by the Phillips County Election Commission and Phillips County. The School District shall pay to the Phillips County Election and Phillips County the sum of $5,260.00 for the overtime expenses incurred which is attributable solely to the school board elections.
>
> 15. Pursuant to Arkansas Code Annotated § 16-22-308, this court finds that the School District is obligated to pay a reasonable attorney's fee for the prosecution of this cross-claim against the School District. This court awards an attorney's fee of $526.00.

While Phillips County argues that the circuit court's order simply awarded reimbursement for election expenses, because those expenses included overtime pay to the county clerk, the circuit court had to consider whether or not the clerk was in fact entitled to that overtime pay. The circuit court clearly found she was.

It has long been held by this court that the imposition of extra duties to an officer does not entitle that officer to additional compensation. *See Goode v. Union County*, 189 Ark. 1123, 76 S.W.2d 100 (1934). In *Goode*, the clerk of the Union County Circuit Court alleged to be owed certain fees, emoluments, and commissions from performing duties as ex-officio clerk of the two chancery courts of Union County in addition to his duties as the clerk of the circuit court. However, this court held that the clerk was not entitled to additional compensation and his fixed salary was the full compensation he was entitled to receive. *See id.*

Prior to *Goode*, in *Barber v. Edwards*, 200 Ark. 940, 141 S.W.2d 831 (1940), this court determined that the salaries of both the secretary of the board of assessors and the pound keeper were fixed by statute and additional compensation was improper:

> It is next said the secretary was overpaid, to which we agree. Section 5 of Act 290 of 1905, p. 714, makes it the duty of the board of

> assessors to go "around said fence and seeing that it is being kept in good repair by said pound keeper and doing anything else necessary to be done for the good of said fencing district for which each of them shall receive the sum of $18.00 per year, or $1.50 per month." Mr. Edwards was paid an additional $18 per year for acting as secretary and we can find no statute authorizing the expenditure, and counsel have not called our attention to any such statute. It may be true, as found by the court, that this is a small matter, and that it is not contended that the work done was not worth the money, but the pay of the commissioners or assessors is fixed by the above act at $18 per year which covers "anything else necessary to be done for the good of said fencing district." Where the compensation of an officer is fixed by statute, no additional amount can be allowed based on quantum meruit.
>
> The same thing is true relative to the salary of the poundkeeper, Mr. T. D. Barber. Section 1 of said Act 290 of 1905 fixed his salary at "not exceeding thirty dollars ($30) per month in addition to his fees as now provided by law." Perhaps his duties were largely increased by reason of the annexation of the new territory in 1936, but his salary is still fixed by said act and may not now be increased by the board without authority of law.

Id. at 942-43, 141 S.W.2d at 832.

With these cases in mind, we note that even had there been a valid contract in which Phillips County and the circuit clerk agreed upon overtime pay for the extra hours she had to put in, the contract would have been void. *See, e.g., City of Stuttgart v. Elms*, 220 Ark. 722, 249 S.W.2d 829 (1952). This court has specifically held that even a contract to pay an officer more or less compensation than that fixed by law is contrary to public policy and void. *See id.*

In the instant case, Phillips County attempts to distinguish the facts in this case from our previous case law by stating that because the statute that governs compensation of elected county officers, Ark. Code Ann. § 14-14-1204 (Supp. 2007), provides for compensation within a range, the clerk's salary is not "fixed." However, that argument is without merit. While it is true that section 14-14-1204 provides the appropriate ranges for the salaries of county officers, it still instructs that, pursuant to those ranges, the annual salaries "shall be fixed by ordinance." Ark. Code Ann. § 14-14-1204(a). Here, the clerk was an elected county officer

with statutory duties and a fixed salary; therefore, she was not entitled to overtime pay and the circuit court's order must be reversed.

Moreover, we conclude that overtime pay to the county clerk is not an appropriate "election expense" pursuant to the statute. Arkansas Code Annotated section 6-14-118 states:

> (a) In school elections, the school districts in the county shall reimburse the county for the entire cost of the election . . .

Ark. Code Ann. § 6-14-118(a) (Supp. 2007).

The basic rule of statutory construction is to give effect to the intent of the legislature. *See McMickle v. Griffin*, 369 Ark. 318, 254 S.W.3d 729 (2007). Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. *See id.* 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. *See id.* We construe the statute so that no word is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible. *See id.* A statute is considered ambiguous if it is open to more than one construction. *See Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 370 Ark. 435, 260 S.W.3d 718 (2007). When a statute is ambiguous, we must interpret it according to legislative intent and our review becomes an examination of the whole act. *See Price v. Thomas Built Buses, Inc.*, 370 Ark. 405, 260 S.W.3d 300 (2007). In addition, we must look at the legislative history, the language, and the subject matter involved. *See id.*

[redacted] While the language included in the statute that reads "entire cost of the election" seems plain enough, it does not specifically define what costs qualify as election expenses. At the heart of the present controversy is whether or not the cost of the election includes overtime pay made to the county clerk. We hold that overtime pay to the county clerk is not an election cost that falls within the ambit of the statute.

[redacted] Given the history of this statute, it is clear that the legislature did not anticipate overtime pay of elected county officials when it created a law requiring the school district pay for election expenses. Section 6-14-118 has changed significantly throughout the years, however, it was originally section 85 of Act 169 of the 1931 Acts of Arkansas. In the original language of the

statute, the expenses first specifically included by the legislature were items such as the ballots, election supplies, tally books, poll books, and other needed stationary. *See* 1931 Ark. Acts 169. When the construction of a statute is at issue, we also presume that the General Assembly, in enacting the statute, possessed the full knowledge of the constitutional scope of its powers, full knowledge of prior legislation on the same subject, and full knowledge of judicial decisions under preexisting law. *See Davis v. Old Dominion Freight Line, Inc.*, 341 Ark. 751, 20 S.W.3d 326 (2000). Presuming the legislature has maintained an awareness of the existing case law on this subject, we will not assume the legislature meant to include overtime pay for elected county officials as an election expense. For all the above reasons, we hold that the circuit court erred in ordering the school district to reimburse Phillips County for payment distributed to their county clerk and we reverse the order of the circuit court.

II. Attorney's Fee

Because we reverse the circuit court's order regarding overtime pay to the county clerk, we further reverse the order awarding an attorney's fee.

Reversed and dismissed.

Bruce Edward LEAKS *v.* STATE of Arkansas

CR 07-912 268 S.W.3d 866

Supreme Court of Arkansas
Opinion delivered November 29, 2007

Appellant, pro se.

No response.

PER CURIAM. In 1997, appellant Bruce Edward Leaks was convicted by a jury of first-degree murder and sentenced as a habitual offender to 480 months' imprisonment. This court reversed the judgment of conviction from his first trial. *Leaks v. State*, 339 Ark. 348, 5 S.W.3d 448 (1999). On retrial, he was again convicted of first-degree murder and a sentence of 540 months was imposed. We affirmed. *Leaks v. State*, 345 Ark. 182, 45 S.W.3d 363 (2001).

In 2007, appellant filed in the trial court a pro se "second, or successive petition — to, vacate and/or set-side judgment" pursuant to Act 1780 of 2001 as amended by Act 2250 of 2005 and codified as Ark. Code Ann. §§ 16-112-201—16-112-208 (Repl. 2006). The trial court denied the petition without a hearing, and appellant has lodged an appeal here from the order.

Now before us is appellant's pro se motion for a copy of the record at public expense and for extension of time to file his brief-in-chief. We need not consider the motion as it is apparent that appellant could not prevail in this appeal if it were permitted to go forward. Accordingly, we dismiss the appeal and hold the motion moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (per curiam).

Appellant was convicted of murdering William Earl Littlejohn during a heated argument. Evidence adduced at trial showed that he went to his brother's apartment, where the victim had been staying, to confront the victim about various issues. During the ensuing argument, appellant shot Littlejohn from approximately four feet away with a .38 revolver. The victim was able to reach a bedroom where appellant's nephew had been sleeping and identified appellant as the shooter before he died. Appellant fled the scene of the crime and initially denied any involvement in the murder when questioned. However, appellant eventually gave the police a statement in which he admitted shooting the victim, but denied that he intended to kill the victim.

In his petition under the act, appellant asked for DNA testing, and for testing of "blood pattern splatter," "blood trace pattern" and "blood drops." Therein, he generally maintained that his innocence would be proven by these tests, and contended that his identity was at issue at trial.

Act 1780 provides that a writ of habeas corpus can issue based upon new scientific evidence proving a person actually innocent of the offense or offenses for which he or she was convicted. *See* Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2006) and sections 16-112-201–208; *see also Echols v. State*, 350 Ark. 42, 84 S.W.3d 424 (2002) (per curiam) (decision under prior law). It is a requirement of the statute that the "identity of the perpetrator was at issue during the investigation or prosecution of the offense being challenged[.]" Section 16-112-202(7).

At trial, appellant's nephew testified as to the victim's identification of appellant, and appellant's confession was introduced into evidence. Although appellant did not testify in his own behalf, his defense was that the victim's murder was accidental rather than deliberate and premeditated, and that there was insufficient evidence for the jury to find that appellant's mental state supported the charge of first-degree murder.

[redacted] Appellant's petition failed to provide any cogent explanation that supported his claim that his identity was at issue, and the evidence introduced at trial left no doubt that appellant committed the crime. The trial transcript pages to which appellant referred in the petition did not contain any indication that someone other than appellant could have committed the crime. Thus,

appellant failed to make a prima facie showing that his identity was at issue during either the investigation or prosecution of the criminal case.

Moreover, with regard to the requirement that the requested testing prove the petitioner's actual innocence, appellant failed to show that various tests of blood splatter patterns or blood drops would have proved that he was actually innocent of the crime. Instead, appellant made mere conclusory statements that he was innocent of the crime and that the testing would prove that he was innocent. Also, because appellant confessed to the crime, he cannot later claim actual innocence for the purpose of obtaining scientific testing.

As the arguments made by appellant did not present a proper basis for postconviction relief pursuant to Act 1780 with regard to actual innocence or identity, appellant could not be successful on appeal.

Appeal dismissed; motion moot.

Pervis Michael REDDEN *v.* The ARKANSAS STATE BOARD of LAW EXAMINERS

07-661 269 S.W.3d 359

Supreme Court of Arkansas
Opinion delivered December 6, 2007

Appellant, pro se.

W. Frank Morledge, P.A., by: *W. Frank Morledge*, for appellee.

JIM HANNAH, Chief Justice. Pervis Michael Redden appeals a decision of the State Board of Law Examiners that he failed to establish "good moral character" as contemplated by Rule XIII of the Arkansas Rules Governing Admission to the Bar. Redden has appealed to this court as allowed under Rule XIII(F). He seeks readmission to the bar after disbarment in 2000. We affirm and hold that the Board was not clearly erroneous.

On October 16, 2005, Redden filed an application for readmission to the Bar of Arkansas. Simultaneously, Redden sent a letter to the Board in which he apologized for his past misconduct. He stated that he came to a recognition that he was in the "wrong way," and that he had injured his family, his clients, and the profession. He characterized his "biggest problem" as an inability to handle financial matters, noting that he has since acquired financial expertise through education. He also stated, "I apolo-

gized to my clients and over time I reimbursed all the parties involved in my misconduct to the best of my knowledge." He further provided information that since being disbarred, he has become a credentialed secondary education teacher in Oklahoma (2001), Texas (2001), and California (2002), and notes that the credentialing required that he be in "good standing" in his community and of "high moral character." A recitation of the facts giving rise to the disbarment is necessary because Redden asserts that the Board's decision was in part based on his October 16, 2005 letter and its assertions relating to post-disbarment events arising from misconduct discussed in the disbarment proceedings.

On March 10, 1999, the Arkansas Supreme Court Committee on Professional Conduct filed an action for disbarment against Redden in Pulaski County Circuit Court pursuant to P. Reg. Prof'l Conduct (5)(K) (1998). A hearing was held on January 31, 2000. Redden was present and represented by counsel. On February 23, 2000, the circuit court entered an order finding that the allegations of misconduct were sustained by the proof and enjoining Redden from practicing law. The order further recommended that this court disbar Redden.

The circuit court found that Redden violated Ark. R. Prof'l Conduct 1.15(b) (1998) (safekeeping property of clients and third persons), Ark. R. Prof'l Conduct 8.4(c) (1998) (dishonesty, fraud, deceit or misrepresentation), and Ark. R. P. Conduct 8.4(d) (1998) (conduct prejudicial to the conduct to the administration of justice). The circuit court noted a number of instances of prior misconduct by Redden, specifically noting that in settling a tort action in 1995 on behalf of Karen Ramos, Redden obligated himself to pay all her medical bills but failed to do so. The circuit court further noted that Ramos was sued on a medical bill and satisfied the bill herself to resolve the lawsuit. Redden did reimburse Ramos over time, making the last payment in January 2000. The circuit court additionally noted that Redden was sanctioned by a suspension for six months on November 15, 1995 (commingling his funds with those of client Mary Ann Phillips), a one-year suspension on May 2, 1997 (commingling funds with client trust funds), a six-month suspension on November 13, 1997 (business transactions with former client Kenneth Van Dyke), and that he was reprimanded on December 29, 1998 (lack of contact with client Betty Smith).

The circuit court recited that Redden denied that he suffered from any chemical dependency or mental disability that

might have contributed to the conduct, and that the only mitigating factor offered was that he had a change in office personnel that caused trust account problems. The circuit court further noted that Redden felt the Committee was unfairly targeting him.

Under P. Reg. Prof'l Conduct § 5(L)(2) (1998), Redden had the right to appeal the decision of the circuit court. While he filed a notice of appeal, the appeal was never perfected. Based on the circuit court's findings, and its order recommending disbarment, the Committee filed a petition in this court requesting disbarment. On July 13, 2000, in *In re Pervis Michael Redden*, 341 Ark. Appx. 983, 20 S.W.3d 413 (2000), this court issued a per curiam opinion entering an order of disbarment and revoking Redden's license to practice law.

We note at the outset that much of Redden's argument in his brief is based on alleged errors committed by the circuit court in the disbarment proceedings in 2000. When Redden failed to perfect his appeal from the circuit court's order, the findings in that order became final and binding on all parties to the action. *Nat'l Enters., Inc. v. Lake Hamilton Resort, Inc.*, 355 Ark. 578, 142 S.W.3d 608 (2004). Under the doctrine of res judicata, a party is precluded from relitigating an issue that has already been decided. *McAdams v. McAdams*, 357 Ark. 591, 184 S.W.3d 24 (2004). Thus, the decision and findings by the circuit court are not subject to collateral attack on this appeal.

The issue before this court is whether the Board was clearly erroneous in finding Redden failed to establish "good moral character." We will not overrule the Board's decision unless it is clearly erroneous. *In Re Petition for Reinstatement of Law License of Lee*, 305 Ark. 196, 806 S.W.2d 382 (1991). In its Findings of Fact and Conclusions of Law, the Board recounted the misconduct that led to disbarment and then stated as follows:

> At the time the Applicant submitted his application for readmission, he offered a letter dated October 16, 2005. In that letter he stated, "I reimbursed all the parties involved in my misconduct to the best of my knowledge" (Ex. 1). Two of the individuals financially damaged by the Applicant's misconduct were William J. Masenholder, and, Mary Ann Phillips. Both filed complaints with the Committee on Professional Conduct. According to the Supreme Court Committee on Professional Conduct, in 1996 the Applicant borrowed money from Mr. Maesenholder and failed to repay that loan, and, during that same year, the Applicant misappropriated

> funds due his client, Mary Ann Phillips (Ex. 2). Restitution payments were made to Mr. Maesenholder and Ms. Phillips in December, 2005 and January 2006, which was several months after the Applicant's assertion that reimbursement had been completed (Ex. 6). Further, such payments were made only after the Secretary raised the issue. When questioned concerning this discrepancy, the Applicant variously stated "they had been discharged in the bankruptcy;" and with regard to Mr. Maesenholder, "I overlooked that fact" (that he had failed to pay Mr. Maesenholder); or that he was basing his representation in his letter of October 16 on a review of his credit report; or, that this was a "mistake" (TR.p. 17-19).

The Board concluded that this misrepresentation in the October 16, 2005 letter was either "intentional or grossly negligent on his part." The Board further stated that "[i]n either case, this misrepresentation reflects adversely on the Applicant's honesty and trustworthiness. The Board concludes, by a preponderance of the evidence, that the Applicant has failed to establish 'good moral character' as contemplated by Rule XIII of the Rules."

We review the Board's decision de novo upon the record. Rule XIII(F). As already noted, we will not overrule the Board's decision unless we find it is clearly erroneous. *Lee, supra.* 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. *Stilley v. Supreme Court Comm. on Prof'l Conduct,* 370 Ark. 294, 259 S.W.3d 395 (2007).

As noted by the Board in its Findings of Fact and Conclusions, Mr. Masenholder filed a complaint with the Committee, and Redden's loan from this former client was noted in the Complaint for Disbarment. Mary Ann Phillips filed a complaint with the Committee, and she was listed in the Complaint for Disbarment. Redden's conduct in her case was discussed at length in the disbarment hearing. The Board found, and we are not left with a definite and firm conviction that the Board was mistaken, that Redden was aware of these complaints at the time he wrote the October 16, 2005 letter, and that Redden's representations about reimbursement were either intentional or grossly negligent.

Redden has become a credentialed secondary education teacher, a process that involved an examination of his character. While we applaud his achievements since disbarment, we cannot

ignore the similarity between the misrepresentations in his October 16, 2005 letter and the lapses in judgment that gave rise to disbarment. Redden's brief was comprised primarily of an attempt to convince this court that the circuit court erred in January 2000. Unfortunately, his reargument only reinforces the position that he took at the time, one of trying to avoid the consequences of his actions. Redden allowed his own interests to repeatedly prevail over those of his clients. Particularly distressing is his attempt to hide behind his bankruptcy and argue that while he still owed his clients money, that duty was discharged by his bankruptcy. He asserts that the Board discriminated against him as a bankruptcy debtor. He alleges there is an attempt to hold him responsible for the debts in violation of the United States Bankruptcy Code. He is mistaken. He is being asked to abide by the fiduciary obligations he made to his clients and the standards that he agreed to assume when he took the oath of an attorney and became an officer of the court. The Bankruptcy Code is not at issue. He has now apparently reimbursed his former clients; however, although he has done so in the face of financial difficulties, it still appears he has only done so haphazardly and grudgingly. This exhibits a disregard for his duties to his clients and the honor of the profession.

The protection of the public and the honor and integrity of the profession have long been the principal criteria in determining whether a person should be admitted or readmitted to the bar. *In re Petition of Anderson*, 312 Ark. 447, 851 S.W.2d 408 (1993); *Maloney v. State ex rel. Prosecuting Attorney*, 182 Ark. 510, 32 S.W.2d 423 (1930) (it is extremely desirable that the respectability of the bar should be maintained). There is a presumption against readmission. *Anderson, supra*; *Hurst v. Bar Rules Comm. of the State of Arkansas*, 202 Ark. 1101, 155 S.W.2d 697 (1941). Further, we give due consideration to rehabilitation by an applicant. *See Anderson, supra*. We have done so in this case. We find no clear error by the Board and affirm.

Carlos SOLIS *v.* STATE of Arkansas

07-701 269 S.W.3d 352

Supreme Court of Arkansas
Opinion delivered December 6, 2007

[redacted]

[redacted]

[redacted]

Swindle Law Firm, by: *Ken Swindle*, for appellant.

Dustin McDaniel, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., and *Vada Berger*, Ass't Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Carlos Alexander Solis appeals the grant of a default judgment in favor of appellee State of Arkansas. We affirm the circuit court's judgment.

On November 2, 2006, Solis was arrested for delivery of a controlled substance, a Class Y felony. At the time of his arrest, the Benton County Sheriff deputies seized his 1999 Ford F-350. The following day, the prosecuting attorney on behalf of the State instituted forfeiture proceedings against the Ford F-350 and served Solis with a summons and attached complaint. The caption of the complaint named the defendant as "1999 Ford F-350 Pickup VIN#1FTWW33F3XEC23723 (Carlos Alexander Solis)." The caption of the summons named the defendant as "1999 Ford F-350 Pickup VI[N]#1FTWW33F3XEC23723." Under this caption, the summons listed the defendant as "Carlos Alexander Solis." The text of the summons advised Solis that, in order to avoid a default judgment, he was required to file an answer in writing and in compliance "with the Arkansas Rules of Civil Procedure and/or the Arkansas Inferior Court Rules." The summons also stated that the answer had to be filed within twenty days of service unless Solis was not a resident of Arkansas, in which case the answer had to be filed within thirty days. The summons instructed Solis that if he wanted to be represented by an attorney, he should immediately contact that attorney to file an answer on his behalf.

On November 7, 2006, Solis, acting through his attorney, filed an answer to the State's complaint. Solis's answer was signed only by his attorney and did not contain a verification by Solis. On December 7, 2006, the State filed a motion for default judgment, arguing that it was entitled to a default judgment because Solis's answer was not verified by Solis's signature as required by Arkansas

Code Annotated § 5-64-505(g)(4) (Supp. 2005). On December 11, 2006, Solis filed a reply to the default-judgment motion. After holding two hearings on the matter, the circuit court granted a default judgment to the State.

I. Verification Requirement

Solis first claims on appeal that a verification is simply a signed document, and an attorney's signature constitutes the attorney's verification. No further verification, he argues, is required under § 5-64-505(g)(4) or under the Arkansas Rules of Civil Procedure.[1] The State, on the other hand, contends that verification has been defined by this court to require more than an attorney's signature. The State notes that Arkansas Rule of Civil Procedure 11 provides that, in general, pleadings can be signed by a party's attorney and do not have to be verified, but it makes an exception if verification is "otherwise specifically provided by rule or statute." Ark. R. Civ. P. 11(a) (2007). Section 5-64-505(g)(4), the State maintains, contains precisely such an additional verification requirement.

This court "reviews issues of statutory interpretation *de novo*, because it is for this court to determine the meaning of a statute." *McMickle v. Griffin*, 369 Ark. 318, 323, 254 S.W.3d 729, 736 (2007). Although this court is not bound by a circuit court's decision, "in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal." *Kelley v. USAA Cas. Ins. Co.*, 371 Ark. 344, 346, 266 S.W.3d 734, 737 (2007). This court has further explained that:

> The basic rule of statutory construction is to give effect to the intent of the legislature. Where the language of a statute is plain and unambiguous, we determine the legislative intent from the ordinary meaning of the language used. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. We construe the statute so that no word is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible.

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[1] The matter of the answer's lack of the certification, which is also raised by the State and required under § 5-64-505(g)(4)(B), will not be addressed because the circuit court did not rule on this issue. *Smith v. State*, 363 Ark. 456, 457, 215 S.W.3d 626, 627 (2005) ("We do not decide issues that were not decided by the lower court.").

McMickle, 369 Ark. at 323, 254 S.W.3d at 736 (quoting *Great Lakes Chem. Corp. v. Bruner*, 368 Ark. 74, 82, 243 S.W.3d 285, 291 (2006)) (citations omitted).

As already noted, § 5-64-505(g)(4), which is the civil forfeiture statute, requires that "the owner or interest holder of the seized property shall file with the circuit clerk a verified answer to the complaint." Thus, the instant case presents the question of what constitutes a verified answer for purposes of this statute. The definition of verification can be found in this court's case law, where it has been said that verification is "[a] formal declaration made in the presence of an authorized officer, such as a notary public, or . . . under oath but not in the presence of such an officer, whereby one swears to the truth of the statements in the document." *Shaw v. State*, 363 Ark. 156, 157, 211 S.W.3d 506, 507-08 (2005) (quoting *Black's Law Dictionary* 1593 (8th ed. 2004)).

That definition, however, does not answer the question of whether an attorney can verify a document on a client's behalf. This question, nevertheless, is answered by the Arkansas Rules of Civil Procedure. Rule 11 of those rules provides that "[e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record." Ark. R. Civ. P. 11(a) (2007). It also provides that "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified." *Id.* Thus, it is clear from the plain language of Rule 11 that verification means something more in certain instances than an attorney's signature on the pleading.

Rule 11 was adopted in its original form in 1978 as part of the Arkansas Rules of Civil Procedure. *Re: Rules of Civil Procedure*, 264 Ark. 964 (1978). Consulting the pre-Rule 11 requirement for pleadings, the Arkansas Code reveals that at one time "the complaint, answer and reply" were required to "be verified by the affidavit of the party to the effect that he believes the statements thereof to be true." Ark. Stat. Ann. § 27-1105 (Repl. 1962). When § 27-1105 was replaced by Rule 11 in 1978, the verification requirement was eliminated for most pleadings. Ark. R. Civ. P. 11 (2007), Reporter's Note 2. Under the original version of Rule 11, verification was required only if "specifically provided by these rules." Ark. Stat. Ann. Appx. – Rules of Court (Repl. 1979); Arkansas Rules of Civil Procedure, Rule 11. However, under the most recent amendment to the rules, which occurred in 1997, a verification can be required "by rule *or statute.*"

Ark. R. Civ. P. 11(a) (2007) (emphasis added). Section § 5-64-505(g)(4) unambiguously and clearly contains a requirement that the owner of the seized property verify the answer. It is, therefore, beyond dispute that Solis was required to swear personally to the truth of the statements contained in his answer. The trial court correctly found that Solis's answer was void and of no effect.

II. Deficiency of the Summons

Solis next argues that if personal verification of his answer was required by statute, then the summons was deficient, because it did not inform Solis of this requirement. The purpose of a summons, Solis asserts, is to give a defendant notice of what is required to avoid default, which it did not do because there were hidden requirements that were not apparent on the face of the summons. In addition, Solis argues that the summons was deficient in naming the 1999 Ford F-350 as the defendant rather than Solis himself.

A circuit court's interpretation of a court rule is reviewed de novo by this court. *See Sturdivant v. Sturdivant*, 367 Ark. 514, 517, 241 S.W.3d 740, 743 (2006) (discussing this court's review of a circuit court's interpretation of the rules of professional conduct). This court has further stated:

> We construe rules using the same means, including canons of construction, that are used to interpret statutes. The first rule in considering the meaning and effect of a statute or rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. When the language is plain and unambiguous, there is no need to resort to rules of statutory construction.

Aikens v. State, 368 Ark. 641, 643, 249 S.W.3d 788, 789-90 (2007) (quoting *Nat'l Front Page, LLC v. State ex rel. Pryor*, 350 Ark. 286, 291, 86 S.W.3d 848, 851 (2002)) (citations omitted). Stated differently, "[n]either rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a rule provision." *Sturdivant*, 367 Ark. at 517, 241 S.W.3d at 743.

Solis correctly notes that service requirements imposed by court rules "must be construed strictly and compliance with those requirements must be exact." *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 709, 120 S.W.3d 525, 530 (2003).

Solis, however, misses the mark in asserting that the summons in question failed to meet these strict requirements.

He first contends that the summons was defective by failing to mention the verification requirement contained in § 5-64-505(g)(4). This argument is without merit. Rule 4(b) of the Arkansas Rules of Civil Procedure gives the requirements for a valid summons:

> The summons shall be styled in the name of the court and shall be dated and signed by the clerk; be under the seal of the court; contain the names of the parties; be directed to the defendant; state the name and address of the plaintiff's attorney, if any, otherwise the address of the plaintiff; and the time within which these rules require the defendant to appear, file a pleading, and defend and shall notify him that in case of his failure to do so, judgment by default may be entered against him for the relief demanded in the complaint.

The rule lays out with great specificity the requirements for a proper summons. But nowhere does the rule require or even suggest that the summons must describe all of the requirements for a valid answer.

This court has noted that "[u]nder our rules, the summons is a process used to apprise a defendant that a suit is pending against him and afford him an opportunity to be heard." *Nucor Corp. v. Kilman*, 358 Ark. 107, 122-23, 186 S.W.3d 720, 729 (2004). Having been put on notice of a pending suit, it is the defendant's responsibility to research and comply with all relevant rules and statutes. In the case at hand, a perusal of § 5-64-505, which was specifically mentioned in the complaint as the statute under which forfeiture was to take place, would have informed Solis and his attorney of the verification requirement.

Solis next claims that the summons was defective in naming the 1999 Ford F-350 as the defendant in the caption of the case rather than Solis. This argument, too, must fail. The summons was not defective in naming the 1999 Ford F-350 as a party in the case, as this is the accepted procedure for in rem forfeiture actions. *See generally, $15,956 In U.S. Currency v. State*, 366 Ark. 70, 233 S.W.3d 598 (2006); *In re One 1994 Chevrolet Camaro*, 343 Ark. 751, 37 S.W.3d 613 (2001); *State v. One 1993 Toyota Camry, Vin. No. 4T1SK12EXPU283054*, 333 Ark. 503, 969 S.W.2d 663 (1998). Furthermore, Rule 4 does not purport to dictate who must be named as a party in an in rem action.

The summons, in addition, was not defective in later listing Carlos Alexander Solis as the "defendant" to whom the summons was directed. Although Solis was not the defendant listed in the caption, he was the person to whom notice of the forfeiture proceeding was being given. Listing him as the defendant to whom the summons was being issued was the best way to apprise him of the forfeiture proceeding, which was the purpose of the summons. We decline to interpret Rule 4(b) so as to preclude the State from using a summons in the form that is best calculated to give actual notice to a party in interest who is not the named defendant in an in rem proceeding. *See Nucor*, 358 Ark. 107, 122, 186 S.W.3d 720, 729 ("We are not unmindful of our decisions where we have held that the technical requirements set out in Rule 4(b) must be construed strictly and compliance with those requirements must be exact. However, we have also found that a literal application which leads to absurd consequences should be rejected where an alternative interpretation effects the statute's purpose.").

We hold that the summons was not deficient and that there was no defective process.

III. Substantial Compliance

Solis next contends that, even if his answer was not properly verified, the circuit court erred in granting a default judgment because his answer substantially complied with statutory requirements and was therefore sufficient to avoid a default judgment. Solis emphasizes that default judgments as well as an insistence of form over substance are disfavored by this court. Solis adds that the State was not prejudiced by his failure to verify his answer. The State, on the other hand, argues that Solis is not entitled to have the default judgment set aside because he has failed to demonstrate a meritorious defense to the underlying action. We agree.

This court has elected to follow the federal courts in considering "opposition to a motion for entry of a default judgment as a motion to set aside a default judgment." *B & F Eng'g, Inc. v. Cotroneo*, 309 Ark. 175, 178, 830 S.W.2d 835, 837 (1992). Therefore, Rule 55 of the Arkansas Rules of Civil Procedure applies to these cases. This court reviews a circuit court's decision not to set aside a default judgment under Rule 55 under an abuse-of-discretion standard. *Nucor*, 358 Ark. at 117, 186 S.W.3d at 726. The same standard applies to a circuit court's decision to grant or deny an opposed motion for default judgment. *See B & F Eng'g*, 309 Ark. at 178, 830 S.W.2d at 837.

Rule 55(c) provides that, unless a judgment is void, "[t]he party seeking to have the judgment set aside must demonstrate a meritorious defense to the action." Ark. R. Civ. P. 55(c) (2007); *see also Nationwide Ins. Enter. v. Ibanez*, 368 Ark. 432, 437, 246 S.W.3d 883, 887 (2007). In the case at hand, had the summons been defective, as is alleged by Solis, then the judgment would have been void. *See Nucor*, 358 Ark. at 119, 186 S.W.3d at 727 ("Default judgments are *void ab initio* due to defective process regardless of whether the defendant had actual knowledge of the pending lawsuit."). However, as has already been held in this opinion, the summons was not defective. The burden, therefore, is on Solis to demonstrate a valid defense to the State's forfeiture action. Apart from his answer's general denial that the vehicle in question was subject to forfeiture, Solis has raised no defense to forfeiture other than the purported defects of the summons, which this court has discounted. Hence, Solis has advanced no meritorious defense to the forfeiture action, and the circuit court did not abuse its discretion in granting the State's motion for a default judgment.

IV. Separation of Powers

Solis claims, as a final point, that the Arkansas Constitution clearly vests the power to prescribe the rules of pleading, practice, and procedure in the Arkansas Supreme Court. Because of this, Solis argues, to the extent that the statute regarding forfeiture proceedings prescribes additional procedural requirements, it unduly infringes upon the power of the judiciary, thereby violating the separation-of-powers doctrine.

We decline to reach Solis's constitutional argument on the basis that it is not essential to our decision. This court has said that if we can resolve a case "without reaching . . . constitutional arguments, it is our duty to do so." *Feland v. State*, 355 Ark. 573, 578, 142 S.W.3d 631, 634 (2004); *see, e.g., Landers v. Jameson*, 355 Ark. 163, 174, 132 S.W.3d 741, 748 (2003) ("This court has a well-settled principle that we will avoid a decision on the constitutionality of a state statute, when resolving the constitutional issue is not essential to deciding the case."); *Foreman v. State*, 321 Ark. 167, 170, 901 S.W.2d 802, 804 (1995) ("[W]e do not address appellant's constitutional argument because its resolution is not so necessary to the determination of this case that it cannot otherwise

be decided."); *Herman Wilson Lumber Co. v. Hughes*, 245 Ark. 168, 173, 431 S.W.2d 487, 490 (1968) ("Inasmuch as this case can be disposed of without determining the constitutional question, it is our duty to do so.").

As already discussed in the opinion, unless the judgment is void, a person who moves to have a default judgment set aside must demonstrate a meritorious defense to the action. Ark. R. Civ. P. 55(c). Regardless of the merits of Solis's constitutional argument, the circuit court did have jurisdiction over Solis, and its grant of a default judgment was not *void ab initio*. *See Nucor*, 358 Ark. at 119, 186 S.W.3d at 727. Solis has raised no meritorious defense to the forfeiture action. Hence, even if this court were to find that the verification requirement imposed by the legislature was unconstitutional, Solis would not be entitled to have the default judgment set aside under Rule 55(c) due to his failure to raise a meritorious defense.

Affirmed.

Eric Wayne KELLEY *v.* STATE of Arkansas

CR 07-353 269 S.W.3d 326

Supreme Court of Arkansas
Opinion delivered December 6, 2007

[Rehearing denied January 17, 2008.]

William R. Simpson, Jr., Public Defender, *Sharon Kiel*, Deputy Public Defender, by: *Erin Vinett*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Carolyn Boies Nitta*, Ass't Att'y Gen., for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellant Eric Wayne Kelley was convicted in the Pulaski County Circuit Court for the rape of M.M., a minor under fourteen years old. Kelley received a sentence of life imprisonment. Now he brings the instant appeal, arguing that the circuit court erred in denying his

motion to suppress certain evidence found during a nighttime search of his home because neither the affidavit nor the search warrant contained sufficient factual basis to justify a nighttime search. We agree, and we reverse and remand.

On November 7, 2005, the Sherwood Police Department received information from Texas authorities that Kelley had outstanding arrest warrants, from Dallas County, Texas, for sexual offenses against children. Sherwood police officers were also notified that Kelley was residing in the Audubon Cove apartments, number 101 C, in Sherwood, that he was using the alias Melvin Kelley, and that he had allegedly been having sexual relations with an eleven- or twelve-year-old boy of Middle Eastern descent.

On November 10 around 6:00 p.m., Officer Kevin Webb was patrolling in the area of Kelley's suspected residence, and he saw a man and a child, who matched the description of the child Kelley was allegedly having sexual relations with, leave apartment 101 C, get into a black Nissan Maxima, and drive away. Officer Webb performed a traffic stop and asked the driver, Kelley, to exit the vehicle. Kelley could not produce a driver's license, and instead presented an identification card bearing his alias. Kelley told Officer Web that the passenger was his "nephew." When Officer Webb talked to the child, M.M., alone, he advised the officer that he was Kelley's "friend." Officer Web placed Kelley under arrest, and Kelley and the child were taken to the police department.

At the police department, Sergeant Jeff Hagar, interviewed M.M. with his mother's permission, and M.M. stated that he and Kelley had been friends for about a year and a half. He told Sergeant Hagar that Kelley had performed oral sex on him approximately ten to twenty times during that period of time. M.M. also stated that Kelley had taken nude pictures of him and stored the pictures on the digital camera and computer in Kelley's apartment.

In the early morning hours of November 11, the officers obtained a nighttime search warrant for Kelley's apartment. The affidavit in support of the warrant contained the facts detailed above, and the officers allegedly gave testimony before the magistrate that Kelley had been adamant in asking the officers at the police department to allow him to call his sister so she could retrieve his medicine from his apartment. The officers told the magistrate that they were concerned that Kelley would ask his

sister to dispose of the camera and computer while she was in the apartment. However, the testimony was not recorded, and the affidavit did not contain any facts concerning Kelley's insistence on calling his sister. Additionally, with regard to the necessity for a nighttime search, the affidavit only stated that

> I also request that the warrant be executed anytime during the day or night due to the fact that the objects to be seized are in danger of imminent removal.

The officers then executed the warrant at Kelley's apartment and seized various electronic equipment, including a computer, digital camera, compact discs, and digital video discs.

The State filed a felony information charging Kelley with the rape of M.M. and later amended the information to include the offense of engaging children in sexually explicit conduct for use in visual or print medium. Kelley filed a motion to suppress the evidence seized during the search of his apartment, because, among other reasons, the search and seizure violated the Arkansas Rules of Criminal Procedure. After a hearing, the circuit court denied Kelley's motion. He was later convicted on the rape charge.[1] Kelley now appeals from his conviction.

For his sole point on appeal, Kelley argues that the circuit court erred in denying his motion to suppress because the affidavit and warrant did not contain any factual basis to support a nighttime search under our rules of criminal procedure. The State, however, argues that Kelley did not have standing to challenge the search. In the alternative, the State presents three arguments: (1) that the circuit court's denial of Kelley's motion was not clearly against the preponderance of the evidence, (2) the good-faith exception to the warrant requirement, under *United States v. Leon*, 468 U.S. 897 (1984), applies to the instant case, and (3) the circuit court's decision to deny Kelley's motion was harmless error. When reviewing a circuit court's decision to deny or grant a motion to suppress, this court conducts a *de novo* review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable

[1] Prior to trial, the State decided to *nolle prosequi* the charge of engaging children in sexually explicit conduct for use in visual or print medium.

suspicion or probable cause, giving due weight to the inferences drawn by the circuit court. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003).

I. Standing

First, we address the State's argument that Kelley did not have standing to challenge the search of his apartment because he was in police custody at the time of the search. When determining whether a defendant had standing to challenge a search, the pertinent inquiry is whether the defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize the expectation as reasonable. *See Mazenpink v. State*, 336 Ark. 171, 907 S.W.2d 648 (1999). Even though Kelley was not present in his home during the search, he clearly had a subjective expectation of privacy in the area searched because a search of his home was involved, and society would be prepared to recognize a person's subjective expectation of privacy in his own home. *See Mazenpink v. State, supra* (defendant who was not present in his home at the time of the search still had standing to challenge the searching officers' failure to use proper knock-and-announce procedures). Thus, Kelley did have standing to challenge the search of his apartment.

II. Motion to Suppress

We now turn to the issue of whether the circuit court erred in denying Kelley's motion to suppress the evidence found at his home because the nighttime search warrant was not supported by a sufficient affidavit. While Kelley argues that the warrant and affidavit in the instant case were wholly lacking in a factual basis to support a nighttime search, the State asserts that there was sufficient factual basis in the warrant and affidavit, and even if the affidavit and warrant were deficient, the *Leon* good-faith exception should apply. We conclude that the affidavit and warrant lacked any factual basis to support a nighttime search, and the *Leon* good-faith exception is not applicable to the facts of this case.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. U.S. CONST. amend. IV. This court, however, has recognized a heightened protection of our citizens' right to privacy in their homes. *See Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002). In particular, our

court has been in the vanguard of other jurisdictions in protecting our citizens against unreasonable searches and seizures in their homes at night. *See Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991); *Griffin v. State*, 347 Ark. 788, 67 S.W.3d 582 (2002) (Brown, J., concurring). In addition to the constitutional protections and general rules requiring probable cause to obtain a search warrant, Ark. R. Crim. P. 13.2(c), which was adopted by this court in 1976, expressly provides further protection against unjustified nighttime searches of our citizens' homes. Ark. R. Crim. P. 13.2 (c) (2007). *See also, In re Rules of Criminal Procedure*, 259 Ark. 863, 530 S.W.2d 672 (1975). Rule 13.2(c) mandates that a warrant for a nighttime search be supported by evidence that there is *reasonable cause* to believe that one of the following conditions exists:

> (i) the place to be searched is difficult of speedy access; or
>
> (ii) the objects to be seized are in danger of imminent removal; or
>
> (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy.

Ark. R. Crim. P. 13.2(c) (2007).

As early as two years after our adoption of the Criminal Rules of Procedure, in *Harris v. State*, 264 Ark. 391, 572 S.W.2d 389 (1978), this court was asked to determine the validity of a warrant served at night where the warrant lacked any indication that it could be served either day or night. *Id.* Finding that the warrant was invalid, we emphasized that good cause must exist to authorize entry into a citizen's privacy in the nighttime and remarked that "[t]his is a safeguard justified by centuries of abuse." *Id.* at 393, 572 S.W.2d at 390.

Two years later, we were asked to decide whether the issuance of a warrant based upon an affidavit that detailed the facts concerning a controlled buy of marijuana from the defendant's home but that contained a conclusory statement about "[h]aving found reasonable cause to believe that the substance described herein could be removed unless the search is conducted immediately," was in violation of the defendant's constitutional rights. *State v. Broadway*, 269 Ark. 215, 216, 599 S.W.2d 721, 721 (1980). This court expressed its shock that the magistrate issued a night-

time search warrant based upon the conclusory statement in the affidavit concerning the removal of evidence and clarified the purpose behind including a detailed factual basis in an affidavit to secure a nighttime warrant, by stating "[a]n affidavit should speak in factual and not mere conclusory language. It is the function of the judicial officer, before whom the proceedings are held, to make an independent and neutral determination based upon facts, not conclusions, justifying an intrusion into one's home." *Id.* at 218, 599 S.W.2d at 723. The *Broadway* court then concluded by holding that the magistrate's issuance of a nighttime warrant based upon the conclusory affidavit was a substantial violation of the legal requirements for a nighttime search of the defendant's home. *Id.*

After the United States Supreme Court's decision in *United States v. Leon, supra,* our court considered whether the *Leon* good-faith exception could be applied to save a deficient warrant in *Hall v. State,* 302 Ark. 341, 789 S.W.2d 456 (1990). In that case, the affidavit did not contain any facts supporting a nighttime search, and, although the affiant gave testimony that indicated the necessity of a nighttime search, the testimony was not recorded. *Id.* Recognizing our longstanding rule that testimony given before the issuing magistrate must be recorded in order to be considered upon review, this court concluded that nothing in the affidavit indicated reasonable cause to believe that a nighttime search was warranted under Rule 13.2(c). *Id. See also,* Ark. R. Crim. P. 13.1(c) (2007) (requiring recordation of oral testimony given before a magistrate). The *Hall* court concluded that the *Leon* good-faith exception did not apply because officers with reasonable knowledge of what our rules of criminal procedure prohibit would know that a nighttime search made pursuant to the deficient warrant was illegal. *Id.* For a similar result, see *State v. Martinez,* 306 Ark. 353, 811 S.W.2d 319 (1991).

In *Garner v. State, supra,* we were asked once again to consider whether the *Leon* good-faith exception would cure an invalid warrant for a nighttime search when, much like in *State v. Broadway, supra,* and the instant case, both the warrant and affidavit contained conclusory language that simply mirrored the language of our criminal rule. *Id.* While the court did acknowledge that the good-faith exception could apply in some nighttime search cases, we reiterated that the *Leon* court recognized four instances in which the good-faith belief of the executing officers would never save an invalid warrant:

> 1. Where the officers misled the issuing judge with information they knew was false or would have known as false, except for reckless disregard of the truth.
>
> 2. Where the issuing judge abandons the judicial role of neutrality and detachment and becomes an adjunct law enforcement officer.
>
> 3. *Where the officers' affidavit is so lacking in indicia of probable cause as to render official belief as to its existence unreasonable.*
>
> 4. Where the search warrant is facially deficient in failing to identify the places to be searched or things to be seized.

Id. at 359, 820 S.W.2d at 450 (emphasis added). The *Garner* court pointed out that even though the executing officers might have given oral statements to the municipal judge, which were unrecorded, and the officers may have subjectively believed that they were complying with the law, objectively the affidavit and warrant were lacking in any indicia of reasonable cause. *Id.* This court acknowledged that no oral statements to the magistrate were recorded and hence could not be considered on review. *Id.* Under such circumstances, going outside the affidavit and warrant to the subjective knowledge of the officers was impermissible. *Id.* In short, we concluded that the *Leon* good-faith exception could not be used to cure a warrant and affidavit that were so blatantly lacking in reasonable cause for a nighttime search. *Id.*

Likewise, our court reached a similar conclusion in *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993), a case involving the seizure of nude photographs of the appellant's young rape victims and other sexual objects, pursuant to a nighttime search warrant that contained only a conclusory basis for justifying the nighttime search. *Id.* Then, in *Moya v. State*, 335 Ark. 193, 981 S.W.2d 521 (1998), this court decided to follow the Eighth Circuit Court of Appeals' approach for applying the good-faith exception. *Id.* In doing so, we concluded that when determining whether the *Leon* good-faith exception applies in cases where the warrant lacks sufficient probable cause for a search, the appellate court is permitted to go outside the affidavit and consider information known to the officers, even if that information was not presented to the issuing magistrate. *Id.* However, the *Moya* opinion did not address the issue of whether an appellate court could look beyond the affidavit to determine if there was reasonable cause for a nighttime search. *See id.* In sum, the *Moya* opinion incorporated a

federal standard regarding application of the *Leon* good-faith exception to the question of whether there was probable cause to search, but the *Moya* court did not consider the additional requirement of reasonable cause for a nighttime search under our rule 13.2(c), an element not required under federal law. Additionally, in *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999), a case decided several months after *Moya*, this court again followed our past holdings and concluded that when an affidavit contains only conclusory statements to justify a nighttime search and only repeats the boilerplate language of Rule 13.2(c), the *Leon* good-faith exception does not apply. More recently, in *Davis v. State*, 367 Ark. 330, 240 S.W.3d 115 (2006), we reiterated that when there is no recorded testimony given in support of an affidavit, this court does not look to facts outside of the affidavit to determine probable cause for a nighttime search. *Id.* at 336, 240 S.W.3d at 120 (citing *Moya v. State, supra*).

In 2003, we considered the question of whether a nighttime search was justified when the defendant, like the appellant here, possessed child pornography and knew that investigating police officers suspected that he had pornographic pictures in his possession. *See Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003). In that case, this court found that there was evidence in the affidavit supporting a nighttime search because the officers explained in the affidavit that the defendant knew he was under suspicion, and, therefore, was likely to destroy the pictures before the officers could return the next day. *Id.* However, the *Cummings* case is factually distinguishable from the instant case. The affidavit in that case specifically stated that the evidence to be seized was in danger of imminent removal because officers had questioned the defendant about sexual pictures of his minor stepdaughter that were on a website, the defendant admitted to having racy pictures of his step-daughter on his computer, and, after the interview, the defendant was aware that he was under suspicion. *Id.* The defendant in *Cummings* was not only aware that he was under suspicion for sexual conduct with a child, but, more importantly, he was not detained and remained at home with his computer and the pictures after being made aware of the officers' suspicions. *See id.* Moreover, the affidavit explained that the defendant's knowledge about the officers' suspicions was the reason a nighttime search was necessary. In the instant case, Kelley knew he was under suspicion because he was arrested and placed in police custody, but nothing in the affidavit indicated that Kelley was capable of disposing of the evidence at his home before morning. Although Kelley's knowl-

edge of the officers' suspicions could give cause for concern that he might destroy the evidence, the fact that he had been arrested and was being detained would put that concern to rest.

Both dissenting Justices argue that the facts in the affidavit alone constitute sufficient factual basis for this court to determine that a nighttime search was justified. Although we certainly agree that the facts surrounding Kelley's arrest and M.M.'s statement that Kelley had nude pictures of M.M. on his computer and digital camera established sufficient probable cause for a search of Kelley's home in general, we cannot agree that the facts as presented in the affidavit could justify a nighttime search. The simple fact is that the affidavit did not contain any explanation why those facts justified a nighttime search, and the officer's testimony to the magistrate was unrecorded, and, thus, could not be used to save the warrant. *See Hall v. State, supra.* It is true that digital pictures on a computer and camera are both easy to remove and to destroy. But, if the dissenters' approach is taken to its logical end, facts in an affidavit supporting the existence of any easily removable or destroyable evidence, such as illegal drugs, would justify a nighttime search, and as a result, Rule 13.2(c) would be rendered a nullity.

In the instant case, the affidavit and warrant only contained the conclusory statement that the objects to be seized were in danger of imminent removal without providing any facts or explanation in support of such a statement. Thus, the affidavit lacked all indicia of reasonable cause to justify a nighttime search, and, under our objective standard, the officers should have known that an affidavit not stating facts that support a nighttime search was in violation of our rules. Accordingly, the *Leon* good-faith exception does not apply here, and we reverse and remand.[2]

III. Rule 4-3(h) Review

In compliance with Ark. Sup. Ct. R. 4-3(h), the record has been examined for all objections, motions and requests made by either party that were decided adversely to Kelley, and aside from the point of error upon which we reverse this case, no prejudicial error has been found. *See Doss v. State*, 351 Ark. 667, 97 S.W.3d 413 (2003).

BROWN and GUNTER, JJ., dissent.

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[2] In view of the imposition of a life sentence in the instant case, we cannot say that the circuit court's error was harmless.

ROBERT L. BROWN, Justice, dissenting. At 12:45 in the morning, Sergeant William Michaels gave sworn testimony to a district judge about why the child pornography in Kelley's home was in danger of imminent destruction. This testimony supplemented the Sergeant's affidavit and provided specific reasons why a nighttime search was warranted. The district judge then issued the search warrant.

These facts are undisputed by the parties and underscore why Sergeant Michaels's actions in executing the warrant were objectively reasonable and in good faith under the standard set out in *United States v. Leon*, 48 U.S. 897 (1984), and adopted and applied to nighttime searches by this court, *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993). Indeed, the circuit court found that Sergeant Michaels had given this sworn testimony and that was the reason the district judge issued the search warrant.

The majority also does not dispute these facts but contends that since Sergeant Michaels's statements to the district judge, though under oath, were not recorded, they cannot be considered in a good-faith analysis. In reaching this conclusion, the majority relies on cases that predate our decision in *Moya v. State*, 335 Ark. 193, 981 S.W.2d 521 (1998). The *Moya* decision specifically allowed unrecorded oral testimony to be considered in deciding whether a search warrant was executed in good faith for a daytime search. There is no legitimate reason to distinguish between daytime or nighttime searches on the issue of whether unrecorded, sworn testimony can be considered by this court in deciding the issue of good faith. This is particularly true when it is undisputed that the police officer swore under oath that the facts were true. To the extent cases prior to *Moya* required that all sworn statements for nighttime searches be recorded, I would overrule those cases on the basis of our *Moya* decision. Stated simply, *Moya* has changed the law.

What the majority holds is that Sergeant William Michaels operated in bad faith when he swore to the district judge the reasons why he believed a nighttime search was needed. The majority concludes, ironically, that this bad faith existed even while not contesting the sergeant's reasons for the search. The result is that law enforcement officers will now be hamstrung in their ability to move expeditiously at night, even when the protection is in place against an unreasonable search because the police officer has made his case before a judge under oath and believes he is operating in good faith. The fact that the majority

concludes that all sworn facts must either be in the affidavit or recorded unnecessarily restricts law enforcement and completely undercuts the notion that a search will pass muster if the law enforcement officer operates in objective, good faith. *See United States v. Leon*, 48 U.S. 897 (1984).

What follows is the information that the district judge had at his disposal to justify a nighttime search warrant:

- A sworn affidavit which contained these facts:

  – Kelley was a fugitive from Texas who had been previously charged with a sex offense against children and who was currently suspected of having sexual relations with an eleven- or twelve-year-old boy.

  – Kelley had a minor boy, age twelve, in his car at the time of arrest who told the detective that Kelley had performed oral sex on him ten to twenty times and taken nude pictures of him. Kelley also showed the boy pornographic tapes. The boy matched the description of the boy with whom Kelley was alleged to be having sexual relations.

  – Kelley lied about the identity of his passenger and said he was his "nephew."

  – Kelley kept these photographs in his home and the boy believed he stored the photographs on his computer.

  – Kelley had been arrested.

  – The information at the home was in danger of imminent removal.

- Sergeant Michaels's sworn testimony that Kelley was "very, very adamant" about telephoning his sister from jail following his arrest, and Sergeant Michaels feared that the sister would remove or destroy the pornographic evidence.

Following a suppression hearing after Kelley was charged with rape of the twelve-year-old boy and incarcerated, the circuit judge denied suppression and made the following ruling.

> So, you have a judge in the middle of the night who has been given information that there are photographs that, in this residence

> that could be imminently destroyed or removed. He listens, he reads that, and then at 12:45 a.m. says that he, he authorizes them to go day or night due to the fact that they could be imminently removed. And, I think that lends credence to the judge signed this warrant thinking that those items would be imminently removed. And, I also think it leads to the, to a good faith basis by the officers. If they have a judge at 12:45 in the morning who reads this information and says these things are to be seized because of the danger of imminent removal to go get them, I think the officers can rely on that officer.
>
> So, I'm going to deny the motion to suppress.

The information that the sergeant possessed made his actions entirely reasonable. Moreover, this court has recognized that law enforcement must act quickly at night in certain circumstances. *See, e.g.*, *Cummings v. State*, 353 Ark. 618, 635-36, 110 S.W.3d 272, 282-83 (2003) (holding that an affidavit stating that the officer feared that the suspect would destroy child pornography because he knew he was under investigation was sufficient to support a nighttime warrant, where the child pornography was kept in electronic form and could easily be destroyed); *Langford v. State*, 332 Ark. 54, 64, 962 S.W.2d 358, 364 (1998) (upholding a nighttime warrant based partly on a statement in the affidavit that drugs were "packaged and maintained in a manner that their destruction or removal can be easily accomplished"); *Owens v. State*, 325 Ark. 110, 117, 926 S.W.2d 650, 654 (1996) (upholding a nighttime search based in part on a statement in the affidavit that the drugs to be seized could be easily flushed down the toilet).

Using an objective standard, Sergeant Michaels was executing a search warrant issued by a district judge to whom he had submitted a sworn affidavit and sworn testimony. As a well-informed police officer, he undoubtedly was aware of the *Cummings* case, in which this court emphasized that when an accused knows he is under suspicion for possession of child pornography, the danger of imminent removal is sufficient to justify a nighttime search under Arkansas Rule of Criminal Procedure 13.2(c). 353 Ark. at 635-36, 110 S.W.3d at 283.

The majority hinges its decision on the fact that Sergeant Michaels's sworn testimony was unrecorded and, therefore, could not be considered in determining objective good faith. In 1990 and again in 1991, this court declined to look further than the affidavit in deciding whether the good-faith exception applied to

nighttime searches. *See Garner v. State*, 307 Ark. 353, 359-60, 820 S.W.2d 446, 450 (1991); *Hall*, 302 Ark. at 343-45, 789 S.W.2d at 458-59. These cases, however, were decided before this court decided *Sims v. State*, in which we said that "[a]lthough we may not look to facts outside of an affidavit to determine probable cause, when assessing good faith, we can and must look to the totality of the circumstances, including what the affiant knew, but did not include in his affidavit." 333 Ark. 405, 410, 969 S.W.2d 657, 660 (1998).

The same year as our *Sims* decision, this court specifically held that unrecorded oral testimony is to be considered when determining whether the good-faith exception applies:

> Where . . . there is a written affidavit in support of a search warrant that is later ruled deficient, this court will go beyond the four corners of the affidavit and consider unrecorded oral testimony to determine whether the officers executing the search warrant did so in objective good faith reliance on the judge's having found probable cause to issue the search warrant. Moreover, this court may also consider information known to the executing officers that may or may not have been communicated to the issuing judge.

Moya v. State, 335 Ark. 193, 202, 981 S.W.2d 521, 525-26 (1998). In so holding, this court applied the standard for determining good faith announced by the Eighth Circuit Court of Appeals in *U.S. v. Martin*, in which that court said that "when assessing good faith we can and must look to the totality of the circumstances including what [the affiant officer] knew but did not include in his affidavit." 833 F.2d 752, 756 (8th Cir. 1987). The Eighth Circuit was, in turn, relying on a United States Supreme Court decision, which found that "the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

Nor does Rule 13.1(c) of the Rules of Criminal Procedure dictate a different result. Rule 13.1(c) states that a judge hearing an application for a search warrant is to "keep a fair written summary of the proceedings and the testimony taken before him, except that if sworn testimony *alone* is offered in support of the application, such testimony shall be recorded." Ark. R. Crim. Pro. 13.1(c) (2007) (emphasis added). In the situation at hand, there was an

affidavit supporting the warrant application. Therefore, it was not only sworn testimony that was offered in support of the search warrant.

Because this court specifically held that unrecorded, oral testimony is acceptable in a good-faith analysis by this court for daytime searches in *Moya v. State*, *supra*, in 1998, it is illogical not to apply the same standard to nighttime searches. I would, accordingly, overrule *Garner* and *Richardson* to the extent those cases require sworn testimony before a judge at night to be recorded if it is to be considered in determining whether an officer relied in objective good faith on a defective nighttime search warrant.

To determine objective reasonableness under *Leon*, the first thing to be examined is the affidavit in support of the warrant. If the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," then the good-faith exception does not apply. *Leon*, 468 U.S. 897, 923 (1984). The affidavit in the instant case provided some basis for a nighttime search, although, admittedly, more was needed. The affidavit stated that Kelley was a fugitive from justice, had pending sex charges against children against him, was living under an assumed name, and had been arrested earlier the same evening traveling in a car with a minor who stated that Kelley had performed oral sex on him on multiple occasions. The affidavit also stated that the child traveling with Kelley told police officers that nude pictures of him were stored in Kelley's apartment in various electronic forms. The affidavit, as a final point, contained the statement that "the objects to be seized are in danger of imminent removal."

Hence, the fault of the affidavit was not that it failed to contain facts that could support a nighttime search or that it failed to allege that the objects were in danger of removal but that it failed to explicitly link the facts to the opportunity for imminent removal. While this failure is enough to make the affidavit, standing alone, insufficient, it is not so great as to "render official belief in [the existence of probable cause] entirely unreasonable." *Leon*, 468 U.S. at 923 (1984).

Having concluded that the affidavit was not so deficient as to make good-faith reliance on it unreasonable, the next issue to be examined are facts known to the affiant but not included in the affidavit. Here, the sergeant testified under oath before the district judge that Kelley had been extremely insistent that he be allowed

to call his sister, who he said would go to his apartment and pick up medication for him. Because of this, police officers were rightly concerned that his sister would remove the computer, camera, or other readily portable evidence. These facts relayed to the district judge by Sergeant Michaels, when considered in conjunction with the facts contained in the affidavit and the fact that the warrant itself purported to authorize a nighttime search, were more than sufficient to support the police's good-faith reliance on the defective nighttime warrant.

This case is readily distinguishable from the cases cited by the majority. In *Garner v. State, State v. Martinez,* and *Hall v. State,* the affidavits supporting the nighttime warrants stated only that illegal drugs were being kept at and sold from the premises. *Garner,* 307 Ark. 353, 354-55, 820 S.W.2d 446, 447-48 (1991)[1]; *Martinez,* 306 Ark. 353, 357, 811 S.W.2d 319, 321 (1991); *Hall,* 302 Ark. at 344, 789 S.W.2d at 458. Likewise, in *Fouse v. State,* the only fact listed in the affidavit was that the smell of ether was coming from the home. 337 Ark. 13, 21-22, 989 S.W.2d 146, 149-50 (1999). In *Fouse,* the only other portions of the affidavit that could be relevant in justifying a nighttime search were statements regarding the amount of time it takes to manufacture methamphetamine, the danger of explosion, and a bare conclusion that the items to be seized might be imminently removed. *Id.* Unlike the case at hand, in none of these cases did the affidavit mention the fact that the suspect knew he was under suspicion, which this court considered all important in *Cummings.* In *Richardson v. State,* which is also cited by the majority, the affidavit, like the one in the case at hand, contained conclusory language that the items to be seized were in danger of being removed or destroyed, but, unlike the case at hand, there was no indication of additional sworn statements by the police officer to supplement the affidavit. 314 Ark. 512, 518-19, 863 S.W.2d 572, 576 (1993). Finally, the case of *Davis v. State* is inapposite to the instant case because in that case no good-faith analysis was performed by this court. 369 Ark. 330, 254 S.W.3d. 729 (2006).[2]

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[1] In *Garner,* it is also not clear that additional oral statements made to the judge were under oath.

[2] *State v. Broadway,* which is also cited by the majority, was decided before the United States Supreme Court announced the good-faith exception in *Leon* and is, therefore, inapplicable to whether the good-faith exception applies to the present case. 269 Ark. 215, 599 S.W.2d 721 (1980).

To summarize, in the case at bar: (1) there were assertions in the affidavit that supported the need for a nighttime search; (2) extrinsic facts known to the police sergeant and imparted to the issuing judge under oath supported the need for a nighttime search due to Kelley's sister and the potential for imminent destruction; and (3) the affidavit requested, and the warrant granted, permission to conduct the search at night. Taken together, these facts manifestly support the objective reasonableness of Sergeant Michaels's actions in executing the search warrant. I would not decide this case merely on the basis that the detective's sworn statements to the district judge were unrecorded, especially where, under *Moya*, we do not require this for daytime search warrants. My fear is that the majority's narrow interpretation of the law virtually eliminates the application of the good-faith exception to nighttime searches.

I would not suppress the evidence found in Kelley's apartment for the reasons set out in this opinion. For those reasons, I respectfully dissent.

GUNTER, J., joins this dissent.

JIM GUNTER, Justice, dissenting. I write separately to emphasize that the good-faith exception to the exclusionary rule is applicable to the present case and supports the circuit court's denial of Appellant's motion to suppress. Therefore, I respectfully dissent.

The Fourth Amendment to the United States Constitution declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

The Fourth Amendment does not define unreasonableness, but it is well settled that a warrantless search is presumptively unreasonable unless it falls under a narrow exception to the warrant requirement. One such exception was articulated in the landmark case of *United States v. Leon*, 468 U.S. 897 (1984), in which the United States Supreme Court stated that when an officer relies in good faith on a search warrant that is later determined to be unsupported by probable cause, any evidence

discovered by reason of that search will not be suppressed. In *Leon*, the Court announced that the good-faith exception applies when the executing officers' good-faith reliance on an invalid search warrant is objectively reasonable. *Id.* at 919. The good-faith exception cannot cure certain errors, namely: (1) when the magistrate is misled by information the affiant knew was false; (2) if the magistrate wholly abandons his detached and neutral judicial role; (3) *when the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable*; and (4) when a warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid. *Leon,* 468 U.S. at 914-15 (emphasis added).

Further, in *Leon*, the Court stated that, "depending on the circumstances of the particular case, a warrant may be so facially deficient — i.e., in failing to particularize the place to be searched or the things to be seized — that the executing officers cannot reasonably presume it to be valid." *Id.* at 923. Thus, the Court reasoned, "the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. . . . In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 924-926.

The United States Court of Appeals for the Eighth Circuit provides guidance for our understanding of the objective standard of good faith articulated by the *Leon* court in determining what a reasonable, "well-trained police officer" would have believed constitutes probable cause. In *United States v. Martin*, 833 F.2d 752 (8th Cir. 1987), the Eighth Circuit reasoned:

> Although a police officer may not rely entirely on the magistrate's finding of probable cause, in cases where, as here, the courts cannot agree on whether the affidavit is sufficient, it would be unfair to characterize the conduct of the executing officers as bad faith, particularly where there has been no material false statements or misrepresentations in the affidavit and where the officer is acting in good faith.
>
> . . . .
>
> When judges can look at the same affidavit and come to differing conclusions, a police officer's reliance on that affidavit must, therefore, be reasonable. . . .

Id. at 755-56.

Similar to the Fourth Amendment in the United States Constitution, article 2, § 15 of the Arkansas Constitution provides:

> The right of the people of this State to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Id.

In consideration of nighttime searches, we are guided by Rule 13.2(c) of the Arkansas Rules of Criminal Procedure (2007), which provides:

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

Id. Pursuant to the rule, if any one of the exceptions is present, the issuing magistrate may, by appropriate provision in the warrant, authorize its execution at any time of day or night. *See id.*

Thus, the question in this case is whether the good-faith exception, as articulated in *Leon*, *supra*, should be extended to nighttime searches. In Arkansas, we have consistently held that a

factual basis supporting a nighttime search is required as a prerequisite to the issuance of a warrant authorizing a nighttime search. *Davis v. State*, 367 Ark 330, 240 S.W.3d 115 (2006); *Cummings v. State*, 353 Ark. 618, 110 S.W.3d 272 (2003); *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999).

The majority's rigid adherence to establishing, by way of an affidavit, a separate probable cause to search at night is not supported in either the U.S. or Arkansas Constitution. Here, the majority is misguided in concluding that a heightened probable-cause requirement exists for a good-faith-exception in a nighttime-search context. The majority mistakenly concludes that there should be: (1) the probable-cause determination in the affidavit for the execution of the search warrant and (2) a second probable-cause requirement for the justification of a nighttime search. In our most recent case of *Fouse v. State,* 337 Ark. 13, 989 S.W.2d 146 (1999), we established the precedent that even if we determine that a search warrant is deficient under Ark. R. Crim. P. 13.2(c) to justify a nighttime search, we shall turn to the issue of whether the police officers acted in good faith in executing the search warrant under *Leon, supra.* That same logic should apply to the present case.

Under a *Leon* analysis, there has been no allegation that judge "abandoned his detached and neutral role," nor has there been any allegation that the officers were "dishonest or reckless." *Id.* at 926. Further, on the night that Appellant was taken into custody, I would hold that the officers "harbored an objectively reasonable belief in the existence of probable cause" for the nighttime search. *Id.* The officer appeared before the judge at 2 a.m., gave the information under oath, and Appellant was in custody at the time. Based on the officer's actions, I see no unreasonableness in the officer's obtaining a warrant and in his good-faith belief that he had probable cause to search Appellant's residence.

Additionally, I would hold that the good-faith exception applies for the following reasons. First, the affidavit, which was written by Sergeant Michaels, was *not* "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon,* 468 U.S. at 914-15. Based upon M.M.'s statement, the officers knew that Appellant kept nude photographs of M.M. at his residence; that the child had seen the nude photographs on Appellant's digital camera; that the child believed those images were stored on Appellant's computer; and that the

child believed the photographs were still in Appellant's possession and stored on his computer in his room.

Second, these officers were confronted with the likelihood that this evidence of child pornography was in danger of imminent removal. At the suppression hearing, Detective Ben Skeel testified that there was "the potential for destruction of property." Further, Sergeant Michaels testified that Appellant was "very, very adamant about making phone calls" to his sister, and that "a digital camera and a computer is something that could be [grabbed]." This information was communicated by the officer to the magistrate upon the issuing of the search warrant. At the suppression hearing, the following colloquy occurred:

> Q: Did you request for this to be a nighttime search?
>
> A: Yes, ma'am, I did.
>
> Q: Okay. First of all, were you sworn by the judge when you went with the affidavit?
>
> A: Yes, ma'am.
>
> Q: Okay. Were you still sworn, well, did you request a nighttime search?
>
> A: Yes, ma'am, I did request.
>
> Q: Okay. Did you put in that affidavit why you wanted a nighttime search?
>
> A: The reason I had in the affidavit is that items are to be seized are in imminent, or in danger of imminent removal.
>
> Q: Okay. Did you, was the magistrate or the judge ever given a reason for that nighttime search?
>
> A: He, every time I go before the judge with a no not clause or, or a nighttime clause, he has me elaborate on it —
>
> Q: Okay.
>
> A: — on it, so, he, he did ask me as to why is it imminent, in imminent danger of removal.

Q: Okay. Were you sworn during that time?

A: Yes, ma'am.

Q: And, what did you tell him?

A: I explained to him that we were in fear that items were going to be removed from the residence because Mr. Kelley was adamant about making phone calls to contact his, I believe it was his sister, and, and his reasoning for wanting to call her was to obtain his medications. But, he was very, very adamant about making phone calls. And, due to the fact that they were talking about a digital camera and a computer is something that could easily be, you know, he could easily ask her to, hey, can you grab my computer and camera, take it out of the residence.

Q: While she was grabbing the medication?

A: While she was grabbing the medication. It's not like, it's not like it's a huge safe or anything that could be, that you need a dolly or anything to get out of there.

Q: Did, did he [the judge] sign your warrant after that?

A: Yes, ma'am.

When assessing a good-faith reliance on the magistrate's determination of probable cause, we must determine whether the officers' reliance upon the search warrant was objectively reasonable. *Fouse*, 337 Ark. at 21, 989 S.W.2d at 149 (citing *Leon*, *supra*). Sergeant Michaels testified that he believed that Appellant attempted to get his sister to dispose of the equipment and the images on the computer and digital camera. Given the portability of the items to be seized and the fact that the photographs could be easily deleted, Sergeant Michaels believed that the items were in danger of imminent removal and that a nighttime search was warranted. *See, e.g.*, *U.S. v. Rugh*, 968 F.2d 750 (8th Cir. 1992) (holding that, under the totality of the circumstances, there were sufficient facts to establish the officer's objectively reasonable belief that probable cause existed to justify a nighttime search in which child pornography, including photographs and videotapes, was confiscated). Therefore, I would conclude that the circuit court properly relied

upon Sergeant Michaels's testimony that he held an objectively reasonable belief that a nighttime search of Appellant's home was justified under Rule 13.2(c)(iii). Based upon our standard of review in light of the totality of the circumstances, I would hold that the good-faith exception to the exclusionary rule is applicable to the case *sub judice* and supports the circuit court's denial of Appellant's motion to suppress.

I would affirm.

BROWN, J., joins in this dissent.

Kenny TRAVIS, Jr. *v.* STATE of Arkansas

CR 07-238 269 S.W.3d 341

Supreme Court of Arkansas
Opinion delivered December 6, 2007

Stanley & Thyer, P.A., by: *Bill Stanley*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Farhan Khan*, Ass't Att'y Gen., and *Jake H. Jones*, Ass't Att'y Gen., for appellee.

JIM GUNTER, Justice. This appeal arises from an order of the Mississippi County Circuit Court convicting Appellant Kenny Travis, Jr. of the capital murder of J. W. Hall, a Class Y felony and a violation of Ark. Code Ann. § 5-10-101 (Supp. 2003), and aggravated robbery, a Class Y felony and a violation of Ark. Code Ann. § 5-12-103 (Repl. 1997), and sentencing him to life imprisonment without the possibility of parole and ten years' imprisonment, respectively. On appeal, Appellant raises five allegations of error. We affirm.

On June 24, 2005, Appellant, Kevin Ransom, and Acquilla Ramsey went to J. W. Hall's auto dealership under the pretense of showing Hall a VCR tape of his mistress and another man having

sex. The victim told Appellant that he would pay three or four hundred dollars for the tape. However, once the three individuals got there, Ransom (a.k.a. Punch) and Appellant went into the victim's office and asked "where the money was at." Appellant shot the victim in the leg, asked where the safe was, started "tusslin' " with the victim, and shot the victim again in the upper body. Appellant then stated that he shot the victim again in the head. During a car ride to Memphis, Andre Love (a.k.a. Coco) took his cell phone and started recording Appellant's confession to Love. Love testified that he made the recording because "I just knew it was gonna come down to a day like this when we was gonna be in court, and like for some reason now, like he try to put me in it, and this was my way out of it." On the night of the incident, there was a fire that was started outside Appellant's mobile home. Osceola Police Department recovered some of the burned items.

On August 3, 2005, the State filed a felony information in Osceola, charging Appellant with one count of capital murder. An amended felony information was filed on August 5, 2005, in which Appellant was charged with one count of capital murder and one count of aggravated robbery.

On February 7, 2006, Appellant filed a motion for change of venue, claiming that the case was highly publicized in Mississippi County and that Appellant could not receive a fair and impartial trial in Mississippi County. On July 11, 2006, the circuit court granted the motion, transferring the matter to Blytheville for Appellant's trial.

Appellant filed a motion *in limine* on July 31, 2006, moving to prohibit the introduction, reference, or playing of an alleged digital phone recording made by Love of his discussion with Appellant. On August 7, 2006, Appellant also filed a motion *in limine* to exclude a video tape from surveillance cameras at Wal-Mart, as well as video tapes of the statements given by Ramsey and Love, two of the State's primary witnesses in the matter.

The case was submitted to a Mississippi County jury, and the jury found Appellant guilty of capital murder and aggravated robbery and sentenced him to life imprisonment without the possibility of parole, as well as 120 months, in the Arkansas Department of Correction. On August 11, 2006, a judgment and commitment order was entered by the circuit court. From his conviction and sentence, Appellant brings his appeal.

For his first point on appeal, Appellant argues that the circuit court erred in denying his motion for a continuance or for a mistrial. Specifically, Appellant contends that, during Ransom's testimony, Ransom indicated that there was a different copy of a voice recording made by Love, that the prosecution did not make that recording available to him, and that the circuit court abused its discretion by denying Appellant's motions for mistrial or a continuance to allow him to investigate. Appellant asserts that Rules 17.1 and 19.2 of the Arkansas Rules of Criminal Procedure placed an obligation upon the prosecuting attorney to disclose the information of a different recording, and the prosecutor's failure to disclose that information amounted to a discovery violation.

In response, the State argues that the circuit court did not abuse its discretion by denying Appellant's motions for mistrial and continuance, nor did prejudice result from the ruling. Specifically, the State contends that the State complied with the rules of discovery, and even if the State failed to comply with the rules of discovery, Appellant failed to meet his burden of demonstrating how he was prejudiced by the circuit court's denial of his motions for a mistrial and a continuance.

The standard of review for alleged error resulting from denial of a continuance is abuse of discretion. *Navarro v. State*, 371 Ark. 179, 264 S.W.3d 530 (2007). Absent a showing of prejudice by the defendant, we will not reverse the decision of a trial court. *Id.* Further, we have made it clear that a mistrial is a drastic remedy and should be declared when there has been an error so prejudicial that justice cannot be served by continuing the trial, or when it cannot be cured by an instruction. *Smith v. State*, 354 Ark. 226, 243, 118 S.W.3d 542, 552 (2003). The trial court has wide discretion in granting or denying a motion for mistrial, and, absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal. *Id.*

We discussed the rules dealing with discovery and the prosecutor's obligation to disclose certain statements to defense counsel in *Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000), where we stated:

> Rule 17.1(a)(ii) of the Arkansas Rules of Criminal Procedure mandates that the prosecutor disclose, upon timely request, "any written or recorded statements and the substance of any oral statements made by the defendant." Rule 19.2 imposes a continuing duty on the prosecutor to disclose this information. In the

> event of noncompliance, Rule 19.7 allows the trial judge to order the undisclosed evidence excluded, grant a continuance, or enter such an order as he or she deems proper under the circumstances. The key in determining whether a reversible discovery violation exists is whether the appellant was prejudiced by the prosecutor's failure to disclose. *Bray v. State*, 322 Ark. 178, 908 S.W.2d 88 (1995).

Tester, 342 Ark. at 557, 30 S.W.3d at 104-05. Absent a showing of prejudice, we will not reverse. *Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991).

The circuit court has four options under Rule 19.7 to remedy a violation of the rules: (1) permit discovery, (2) exclude the undisclosed evidence, (3) grant a continuance, or (4) enter an order as the court deems appropriate under the circumstances. *Reed v. State*, 312 Ark. 82, 847 S.W.2d 34 (1993). Under certain circumstances, a continuance to deal with the surprise caused by the State's failure to comply with pretrial discovery requirements may be sufficient to cure any such errors. *See Reed, supra*; *Hughes v. State*, 264 Ark. 723, 574 S.W.2d 888 (1978). It is within the trial court's discretion to employ any one of the listed sanctions under Rule 19.7(a) or one of its own choosing where there is a failure to disclose. *Renton v. State*, 274 Ark. 87, 622 S.W.2d 171 (1981).

With this precedent in mind, we turn to the present case. At issue are Love's recordings played at trial for the jury. Both Ransom and Officer Mike Grimes testified about those recordings at trial. First, Ransom testified that Officer Grimes and another officer played a microcassette copy of Love's cell-phone recording in which Ransom heard Appellant say that "he was gonna have to knock my [Ransom's] ass off too." Ransom admitted during his testimony that he did not know who made the tape that he heard while in custody. During a bench conference, Appellant questioned the existence of the microcassette.[1] After the bench conference, Appellant's attorney continued to question Ransom about the recording on the microcassette.

Second, Officer Grimes testified that he was able to download Love's recording off his cell phone onto a digital recorder and then onto his laptop computer. The digital recording was played again for the jury, and Officer Grimes testified that the microcas-

[1] During this bench conference, the court reporter's primary and back-up recording equipment failed, and as a result, there is no record of the bench conference.

sette copy was played for Ransom during his interview with police. Appellant called a second bench conference during which he argued that the microcassette was not made available to him and he could have sent "it off to an expert to determine if it had been tampered with." Appellant then moved for a mistrial, which the circuit court denied. Officer Grimes later testified that he made a microcassette copy before recording a digital copy. The digital copy was made available to Appellant before trial, but he declined it. The Arkansas State Crime Lab was unable to improve the quality of the recording. Officer Grimes testified that the microcassette contained the exact voice recording that was heard by the jury via the digital copy.

Under the circumstances in the present case, the prosecutor disclosed the statement. Officer Grimes testified:

> Yes, the record I have here that is downloaded on my laptop is the same as what you hear on the phone. I recorded it on my laptop just actually by playing it just not in a data cable, just playing it in open air. Just using the digital recorder and just record off of — I think you seen a device yesterday where you use to play it with a speaker phone. Basically with using that type of device just recorded it digitally on my recorder. Yes, you just take a recorder [with a microcassette] and hold it up there to the speaker. Then with the digital recording device I was able to plug it into my laptop and download it to that. Also, I was able to burn a CD after that point. I also have a recording stored on my hard drive. That's actually put into a wave file, to do that. However, the dictation module software that comes directly from the digital recorder has a clearer version of that. Once it goes to a wave file it loses a little bit of quality.

Based upon this testimony, it is clear that the microcassette copy, while it was not played for the jury, contained the same recording on both the cell phone and the digital recording on the laptop. Thus, there was only one recording, and it was simply in three different copies: cell phone, microcassette, and digital. Ultimately, Appellant declined the digital copy, which contained the same voice recording that was on the microcassette, and as a result, Appellant is not prejudiced by any alleged failure to disclose. *See Tester, supra.* Therefore, the circuit court's denial of his motions for mistrial and continuance is affirmed.

For his second point on appeal, Appellant argues that the circuit court erred in denying his *Batson* challenge to the State's

exclusion of jurors. Specifically, Appellant contends that out of thirty-two potential jurors, six were African-American, and the State struck five of them. The State, however, argues that the circuit court did not abuse its discretion by denying Appellant's *Batson* challenges. Specifically, the State contends that Appellant's *Batson* challenges have no merit, and the circuit court's rulings should be upheld.

This court has previously stated our standard of review for *Batson* challenges: "This court will reverse a circuit court's ruling on a *Batson* challenge only when its findings are clearly against the preponderance of the evidence. We further accord some measure of deference to the circuit court, because it is in a superior position to make determinations of juror credibility." *Owens v. State*, 363 Ark. 413, 416, 214 S.W.3d 849, 850-51 (2005).

Under *Batson v. Kentucky*, 476 U.S. 79 (1986), a prosecutor in a criminal case may not use his peremptory strikes to exclude jurors solely on the basis of race. *Ratliff v. State*, 359 Ark. 479, 199 S.W.3d 79 (2004). In determining whether such a violation has occurred, a three-step analysis is applied. *Stokes v. State*, 359 Ark. 94, 194 S.W.3d 762 (2004). The first step requires the opponent of the peremptory strike to present facts that show a prima facie case of purposeful discrimination. *Id.* This first step is accomplished by showing the following: (a) the opponent of the strike shows he is a member of an identifiable racial group; (b) the strike is part of a jury-selection process or pattern designed to discriminate; and (c) the strike was used to exclude jurors because of their race. *Id.* (citing *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998)).

Once a prima-facie case of discrimination has been shown, the process moves to the second step, wherein the burden of producing a racially neutral explanation shifts to the proponent of the strike. *Id.* This explanation, according to *Batson*, must be more than a mere denial of discrimination or an assertion that a shared race would render the challenged juror partial to the one opposing the challenge. *Weston v. State*, 366 Ark. 265, 234 S.W.3d 838 (2006). Under *Purkett v. Elem,* 514 U.S. 765 (1995) (per curiam), this explanation need not be persuasive or even plausible. Indeed, it may be silly or superstitious. The reason will be deemed race neutral "[u]nless a discriminatory intent is inherent in the prosecutor's explanation." *Purkett,* 514 U.S. at 768. But, according to *Purkett,* a trial court must not end the *Batson* inquiry at this stage, and, indeed, it is error to do so.

If a race-neutral explanation is given, the inquiry proceeds to the third step, in which the trial court must decide whether the opponent of the strike has proven purposeful discrimination. *Stokes, supra.* We will reverse a trial court's findings on a *Batson* objection when the trial court's decision was clearly against the preponderance of the evidence. *Ratliff, supra.*

Appellant made *Batson* challenges to five out of the six African-American jurors during voir dire, but on appeal, he only raises a challenge to the circuit court's ruling on four jurors, namely Gillespie, Williams, Hopkins, and Langel. First, Juror Gillespie stated that she knew Appellant's daughter and that she knew a guilty verdict would be difficult for the daughter. She further stated that she would not want to be on the jury. She was excused by the State, and Appellant raised a *Batson* challenge. The State offered a race-neutral explanation of excluding Juror Gillespie because of her ties with Appellant's daughter. Based upon Juror Williams's answers, the circuit court upheld the strike. For those race-neutral reasons, we affirm the circuit court's ruling.

Second, Juror Williams indicated that her son had recently been tried for murder and that she would get quite emotional during Appellant's trial if selected as a venireperson. She claimed that she would try to be fair, but that the State would "have to really show it to me." Further, she testified that she would "[c]ry like a baby" because her "son didn't do it," and she did not "want to say guilty to one's son, you know?" Responding to the *Batson* objection, the State argued that her son had recently been a defendant in a murder trial and that she believed he was not guilty. The circuit court ruled that the explanation was race-neutral, and for those reasons, we agree and will not disturb the circuit court's ruling.

Third, Juror Hopkins indicated that she knew Rev. Moses Black, one of Appellant's witnesses. She stated that she would rather not determine who was telling the truth and that she should not judge anybody. She further stated during voir dire that she "would probably say to the rest of the jury, whatever y'all want to do." The State excused her, and Appellant raised a *Batson* challenge. The State argued that she and Rev. Black "worship[ped] together" and that cross-examining a minister with the presence of Juror Hopkins is "not something you look forward to," particularly when the State believed that Rev. Black "knew

exactly what had taken place." Based upon the fact that Juror Williams and Rev. Black worshipped together, the circuit court upheld the strike. For those reasons, we affirm the circuit court's ruling. *See Stenhouse v. State*, 362 Ark. 480, 209 S.W.3d 352 (2005) (upholding a *Batson* challenge when the pastor was to be a witness and the State offered that reason as a race-neutral explanation in response to the *Batson* challenge).

Lastly, Juror Langel also indicated that she knew Rev. Black from her church and that he visited her elderly mother. The State excused Juror Langel, and in response to Appellant's *Batson* challenge, the State cited the same reasons as it had given for Juror Hopkins. Additionally, the State was concerned that Juror Langel would give Rev. Black more credibility because of the close ties that he had to her mother. The circuit court found that the State gave a sufficient race-neutral explanation, and for those reasons, we affirm. *See Stenhouse, supra.*

For his third point on appeal, Appellant argues that the circuit court erred in refusing to allow the admission of three taped phone conversations between Acquilla Ramsey, Appellant's girlfriend and co-defendant, and Ann Travis, Appellant's aunt. Specifically, Appellant contends that the circuit court's ruling was in violation of the Arkansas Rules of Evidence 607 and 613 (2007) because Ramsey's statements contained prior inconsistent statements. According to Appellant, the circuit court denied the admission of these taped conversations during an in-chambers discussion because "[w]hen Acquilla Ramsey testified, she admitted she had made the statements to Ann Travis during telephone conversations."

The State responds by arguing that we should decline to address this argument because the in-chambers discussion, in which the circuit court ruled upon this issue, is not contained in the record on appeal. Further, the State asserts that "there is no indication that Appellant has attempted to settle or correct the record to include the unrecorded segments upon which he predicates error." In the alternative, the State contends that the circuit court did not abuse its discretion because Appellant cannot demonstrate prejudice.

With regard to the standard of review for evidentiary rulings, we have said that trial courts have broad discretion and that a trial court's ruling on the admissibility of evidence will not be reversed absent an abuse of that discretion. *See Navarro, supra.* In

Fountain v. State, 269 Ark. 454, 601 S.W.2d 862 (1980), we stated that all bench conferences and in- chambers conferences should be on the record unless they involve matters unrelated to the current trial, in which case, a note to that effect may be made.

In the present case, Appellant's Exhibits 16, 17, and 18 were proffered into evidence. Counsel for Appellant stated:

> Your Honor, based on our conversation in chambers Defendant proffers tapes which have been identified as proffer 16, 17, and 18 which would have been conversations with Acquilla Ramsey that were played. These tapes contain conversation [sic] with Acquilla Ramsey which the court ruled in chambers they were inadmissible because we didn't offer them for impeachment purposes. She had admitted that she had these conversations.

While it may be possible to glean the circuit court's ruling from counsel's statement, we cannot hazard a guess as to the rationale behind the ruling, nor do we have a record that may contain any objection to it. Additionally, we cannot discern whether Appellant raised the arguments concerning Ark. R. Evid. 605 or 613 before the circuit court. Without such proof in the record, we refuse to reach arguments raised for the first time on appeal. Any such argument is precluded on appeal. *See, e.g.*, *White v. State*, 370 Ark. 284, 259 S.W.3d 410 (2007) (holding that an argument may not be raised for the first time on appeal). For these reasons, we decline to reach the merits of this argument.

For the fourth point on appeal, Appellant argues that the circuit court erred in not allowing him to demonstrate a voice-record recording with Love's cell phone. Specifically, Appellant contends that the circuit court should not have sustained the State's objection to the demonstration. Appellant asserts that the demonstration would show that Love could not have recorded the conversation on any Motorola cell phone because such a recording "would not be identical to the recording made by Mr. Love since the persons were not in the same environment, that being in an automobile." In response, the State argues that Appellant's argument is barred because there was no ruling upon which he predicated error. In the alternative, the State asserts that the circuit court did not abuse its discretion, and if it did, then any alleged error was harmless.

At issue was Appellant's attempt to reenact Love recording on his cell phone Appellant's confession to killing Hall. We have held that the admissibility of demonstrative evidence is a

matter falling within the wide discretion of the trial court. *See Hamilton v. State*, 348 Ark. 532, 74 S.W.3d 615 (2002). Here, a bench conference was conducted to determine whether the demonstrative evidence would be admitted. However, after hearing arguments on the matter, the circuit court stated, "I'll tell you what, Mr. Love is not going anywhere. Let's go on to something else right now, and we'll look at these phones and discuss the variables a little later on." Toward the end of the bench conference, the circuit court further stated, "Well, I still think you need to ask him something else right now, and we'll get to this issue a little later on." Based upon these statements, we hold that Appellant did not obtain a clear ruling from the circuit court on this issue, and as a result, the issue is precluded from appellate view. *See Small v. State*, 371 Ark. 244, 264 S.W.3d 512 (2007).

For his fifth point on appeal, Appellant argues that the circuit court erred in denying his motion *in limine* concerning introduction and reference to the cell phone and voice record of Andre Love. Specifically, Appellant contends that the circuit court "allowed the cell phone to be introduced into evidence even though the State took no steps to establish the integrity of the recording or to establish that the same had not been altered or impaired." The State responds by arguing that Appellant's failure to obtain a ruling precluded appellate review. In the alternative, the State asserts that there was no abuse of discretion, and if there were, then the error was harmless.

In discussing our standard of review for evidentiary rulings, we have said that the trial courts have broad discretion and that a trial court's ruling on the admissibility of evidence will not be reversed absent an abuse of that discretion. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006).

Appellant makes a chain-of-custody argument. On July 31, 2006, Appellant filed a motion *in limine* in which he stated:

> On July 18, 2006, Defendant and undersigned counsel were allowed to hear what purported to be an audio recording of Defendant discussing the crime in this matter, which recording had allegedly been preserved on phone owned by Andre Love. After discussions with the prosecutor and Mike Grimes of the Arkansas State Police, it was discovered that the audio recording could not be copied for Defendant, although it had been requested. It was further discovered that the recording had allegedly remained on the

> phone, which phone had apparently remained in the possession of Andre Love until some two weeks, or so, prior to July 18, 2006, at which time the State of Arkansas purchased a different phone for Mr. Love and took possession of the phone in question.
>
> To date, undersigned counsel and Defendant have been told by the State that it has been unable to download or transfer the recording from the telephone to any other form of media or recording. Defendant objects to the introduction of said evidence inasmuch as the State has not preserved the same so as to establish a proper chain of custody. Mr. Love has a multitude of reasons to alter, modify or change the recording to enure to the determent [sic] of Defendant, Kenny Appellant, inasmuch as he knows that Defendant, Kenny Appellant, has always maintained that Andre Love was involved in the shooting of J.W. Hall and in fact was the shooter. The State, for whatever reason, chose to allow this phone to remain in the hands of non-law enforcement and to be used repeatedly for the course of the better part of a year while not taking proper steps to preserve the integrity of the evidence. There is no way for this court to make a determination as to whether there is a reasonable probability that the integrity of the evidence has not been impaired.

Prior to trial, Appellant raised his motion *in limine*, but the circuit court stated, "I have a good idea. We'll cross that bridge when and if we get to it." Appellant's attorney replied, "I agree." However, the cell phone was admitted without objection at trial, and the recording on it was played without objection. We have repeatedly said that failure to obtain a ruling on an issue at the trial court level precludes review on appeal. *See Small, supra.* Here, the trial court provided no ruling on the issue. Thus, we are precluded from reaching the issue on appellate review.

Pursuant to Ark. Sup. Ct. R. 4-3(h) (2007), the record in this case has been reviewed for all objections, motions, and requests made by either party, which were decided adversely to Appellant, and no prejudicial error has been found. *See, e.g., Bell v. State*, 371 Ark. 375, 266 S.W.3d 696 (2007).

Affirmed.

EL PASO PRODUCTION COMPANY and
Swift Energy Company *v.* James H. BLANCHARD, Jr.

06-1107 269 S.W.3d 362

Supreme Court of Arkansas
Opinion delivered December 6, 2007

[Rehearing denied January 17, 2008.]

Kinard, Crane & Butler, P.A., by: *David F. Butler*; *Lemle & Kelleher, LLP*, by: *Joseph L. Shea, Jr.*, for appellants.

Bell Law Firm, by: *Ronny J. Bell* and *Karen Talbot Gean*, for appellee.

JIM GUNTER, Justice. Appellants, El Paso Production ("El Paso") and Swift Energy Company ("Swift") appeal an order of the Columbia County Circuit Court awarding damages to Appellee James H. Blanchard, Jr. ("Blanchard") resulting from Appellants' seismic operations conducted upon surface lands owned by Blanchard. We affirm in part, reverse in part, and remand for a recalculation of actual damages.

I. Facts

Blanchard, along with his mother, Audrey Palmer Blanchard, and others ("Blanchard family"), owned eighty acres of land in Columbia and Lafayette Counties, including an undivided

one-half interest in the mineral estate underlying the surface property. Blanchard subsequently acquired the surface interest of his family in the property. North Central Oil Corporation ("North Central") owned the other one-half interest in the mineral estate underlying the Blanchard property.

On February 21, 1997, the Blanchard family entered into an oil-and-gas lease with Swift ("Swift lease") in which they leased their mineral interest in the Blanchard property. The lease contained the following provision:

> This lease may not be assigned or subleased, in whole or in part, without the express written consent of James H. Blanchard, Jr. which consent shall not be unreasonably withheld. Any assignment or sublease granted by Lessee without the express written consent of James H. Blanchard, shall be null and void.

Further, the lease allowed for timber damages to be "appraised by a licensed forester of Lessor's choice with Lessee being responsible for said appraised damages plus a reasonable forester's fee associated therewith."

On August 20, 1997, North Central granted to Sonat Production Company ("Sonat"), El Paso Production Company's predecessor in interest, an oil-and-gas lease ("El Paso lease") covering its one-half interest in the mineral estate that granted Sonat the exclusive right to explore the minerals on the Blanchard property.[1] This lease includes seismic testing. Both Swift and El Paso were companies engaged in the exploration and development of oil and gas. Swift's focus was to the west of the Blanchard property, and El Paso's focus was toward the east of the property. For years, El Paso actively developed the Springhill/North Shangaloo-Red Rock Field located to the east of the Blanchard property.

In the summer of 1997, El Paso undertook a seismic shoot several miles to the east of the property. El Paso evaluated the seismic information acquired from the shoot and proposed well locations. El Paso also approved another seismic shoot designated as the Springhill West project, which was to the east of the Blanchard property. Additionally, El Paso pursued a seismic shoot to the west of the Blanchard property called the Teague Branch Prospect.

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[1] For the sake of clarity, all references to Sonat will be to El Paso.

On October 10, 1997, El Paso and Swift entered into the Seismic Acquisition Agreement whereby Swift received permission from El Paso for Swift's seismic shoot over acreage leased by El Paso in the Teague Branch Prospect. In return, Swift agreed to license data acquired by Swift to El Paso for the price of $1,750 per mile, and Swift authorized El Paso to shoot seismically over leases held by Swift in Springhill West. These leases included the Blanchard lease.

El Paso then contracted with Boone Geophysical, Inc. ("Boone") to undertake the Springhill West seismic shoot, and Boone filed an application with the Arkansas Oil and Gas Commission ("Commission"). On February 13, 1998, the Commission issued a permit to El Paso and Boone to conduct the seismic operations contemplated under the application. In a memo dated March 3, 1998, Mike Hamlin, an independent contractor working for Boone, advised Allan Schlosser, an El Paso geophysicist, of Blanchard's involvement. Hamlin offered Blanchard $400 for surface damages relating to the four seismic shoots. Blanchard advised Hamlin that his lessee, Swift, had the exclusive right to permit the seismic operations, and he could not give such permission. Blanchard told Hamlin that he would not do business with El Paso as long as David Hamilton was employed by El Paso. When Blanchard refused to grant El Paso permission to conduct the seismic exploration, El Paso requested permission from Swift.

On April 14, 1998, Swift and El Paso entered into a letter agreement in which El Paso was granted permission by Swift to conduct seismograph data acquisition upon Blanchard's property. On April 15, 1998, El Paso forwarded to Blanchard the required notice of intention to engage in seismic operations upon the Blanchard property. The letter makes no assertion that the notice was given on behalf of Swift. The notice was forwarded by certified mail, return receipt requested, as required by the lease. The Blanchards refused Boone Geophysical and El Paso access to the Blanchard property to conduct the seismic operations.

On May 21, 1998, El Paso filed a complaint for injunctive relief against Blanchard and others to conduct seismic operations pursuant to the terms of the North Central lease agreement. The circuit court granted the temporary restraining order on May 21, 1998, and it was served upon Blanchard on May 22, 1998.

El Paso undertook a seismic shoot over the Blanchard property in June of 1998. In a letter dated June 16, 1998, Blanchard provided to Swift an appraisal of the amount owed by

Swift to Blanchard for damages pursuant to the Swift lease. According to Blanchard, he sustained $173.72 in actual damages in connection with the seismic exploration. He also made a claim of $1,705 for his "disturbance." He further alleged that Swift failed to give notice of the operations and violated the terms of the lease agreement. He sought $3,757.44 in addition to the $1,878.72 for the invoice of the appraisal.

On July 21, 1998, Blanchard's attorney sent a letter to Swift seeking $5,000 in settlement. In a letter dated July 22, 1998, Swift offered to pay the total lease amount claim of $1,878.72 plus any attorneys' fees. Further, Swift disputed the claims regarding its undertaking the seismic shoot or failing to send notice. Swift also notified Blanchard that El Paso had paid the appraisal fee. Swift requested a release in return for payment. El Paso spent approximately $240,000 conducting the seismic shoot that yielded poor seismic information.

On March 4, 1999, Blanchard complained to the Arkansas Oil and Gas Commission that El Paso and Boone had violated its Rule B-42. The Commission opted not to act on Blanchard's complaint because the Commission's jurisdiction had been preempted by the circuit court's involvement.

Three cases concerning the matter were consolidated, and prior to trial, by orders dated July 12, 2000, and July 1, 2001, the circuit court granted motions for partial summary judgment in favor of Blanchard. Additionally, prior to trial, Blanchard withdrew a claim for punitive damages arising out of a trespass claim in order to recover damages based upon unjust enrichment.

The matter was presented for trial on December 8, 2004. On May 19, 2006, the circuit court entered its findings of fact and conclusions of law, making the following rulings: (1) affirming its prior order of July 9, 2001, granting partial summary judgment in favor of Blanchard on the issue of Swift violating the terms and conditions of its lease agreement with Blanchard when it assigned to El Paso the right to conduct seismic exploration on the Blanchard property; (2) that Blanchard did not unreasonably withhold his consent to an assignment from Swift to El Paso; (3) affirming the prior July 12, 2000 order that El Paso was required to obtain consent prior to undertaking any seismic operations on the Blanchard property; (4) awarding Blanchard the liquidated damages due to him under the lease agreement in the amount of

$3,757.44; (5) that Blanchard established a valid claim for damages against El Paso for tortious interference of a valid contractual relationship; and (6) that Blanchard was not entitled to punitive damages. On June 30, 2006, the circuit court entered an order awarding judgment to Blanchard in the amount of $3,757.44 as compensatory damages for breach of contract, $3,757.44 as compensatory damages for tortious interference, and $260,000 as compensatory damages "for the amount by which El Paso was unjustly enriched by its unlawful trespass upon [the] Blanchard land[.]" On July 14, 2006, El Paso filed its notice of appeal.

On September 4, 2007, we granted Blanchard's motion to reschedule oral argument, and oral argument was set for November 8, 2007. From the circuit court's June 30, 2006 order, which references the May 19, 2006 order, El Paso now brings its appeal.

II. Standard of review

In bench trials, the standard of review on appeal is not whether there is substantial evidence to support the finding of the circuit court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Omni Holding and Development Corp. v. C.A.G. Investments, Inc.*, 370 Ark. 220, 258 S.W.3d 374 (2007). 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 an error has been committed. *Id.* Facts in dispute and determinations of credibility are within the province of the fact-finder. *Id.*

III. Blanchard's trespass claim

For its first point on appeal, El Paso argues that the circuit court erred in finding that it trespassed on the Blanchard property. In so doing, El Paso makes three specific arguments. First, El Paso contends that the circuit court erroneously interpreted the Commission's Rule B-42 to require permission of all surface owners prior to the undertaking of a seismic shoot. Second, El Paso asserts that Rule B-42 is unconstitutional as applied. Third, El Paso claims that the circuit court erroneously found that the Swift permit, which authorized El Paso to undertake the seismic shoot, was "null and void" because it, in effect, was an assignment without Blanchard's written consent. El Paso maintains that this permit was not in breach of the Swift lease.

In response, Blanchard argues that the circuit court properly ruled that El Paso trespassed when it conducted seismic operations on his property. Blanchard maintains that El Paso's actions constituted a trespass because it did not have his permission to enter his surface estate as required by Rule B-42 of the Commission.

A. Rule B-42

The crux of El Paso's first argument is that, because it is the owner of a mineral leasehold estate, which is situated under Blanchard's surface estate, it may reasonably use the surface for the purpose of developing the minerals. It is well settled in Arkansas that a mineral owner is properly considered a "landowner." *Schnitt v. McKellar*, 244 Ark. 377, 386, 427 S.W.2d 202, 208 (1968). The owner of a mineral estate has the right to reasonable use of the surface for developing minerals, and the mineral estate is described as the "dominant" estate while the surface estate is depicted as the "subservient estate." *See, e.g., Diamond Shamrock Corp. v. Phillips*, 256 Ark. 886, 511 S.W.2d 160 (1974) (holding that the owner of a mineral estate has the right to go upon the surface estate to drill wells and occupy the surface to the extent that it is reasonably necessary). In other words, the mineral owner or his lessee has a right of reasonably necessary surface usage to explore and develop the mineral estate. *See, e.g., Arkansas Louisiana Gas Co. v. Wood*, 240 Ark. 948, 403 S.W.2d 54 (1966). In *Wood*, we stated:

> [A]n oil and gas lease gives with it the right to possession of the surface to the extent *reasonably necessary* to enable a lessee to perform the obligations imposed upon him by the lease. This includes the right to enter upon the premises and use so much of it, and in such manner, as may be reasonably necessary to carry out the terms of the lease and [to] effectuate its purpose.

Id. at 950, 403 S.W.2d at 55-56 (emphasis added). In *Wood*, we held that, in addition to sustaining $1500 damages to his property, the lessee's use of the landowner's stock pond was not reasonably necessary. *Id.*

Notwithstanding this well-established precedent, Blanchard relies upon Rule B-42 of the Arkansas Oil and Gas Commission, which provides:

> No entry shall be made by the permittee upon the lands upon which such seismic operations are to be conducted without the permittee having first secured a permit from the landowner authorizing such operations to be conducted.

Id.[2] The Commission's statutory authority for implementing such a rule is found at Ark. Code Ann. § 15-71-110 (Supp. 2007).

In light of this regulation, we note the two paragraphs from El Paso's application with the Arkansas Oil and Gas Commission to conduct seismic operations read as follows:

> The undersigned Applicant acknowledges by the execution hereof that this Application is filed for purposes of conforming with the requirements of Act 1991, No. 5, and that any operation which Applicant herein is granted a permit to perform shall be subject to and in conformity with the provisions of said Act and all rules, regulations, and orders of the Arkansas Oil and Gas Commission applicable thereto.
>
> Applicant further agrees that it shall neither enter nor permit the entry upon any lands for the purpose of conducting such seismic operations without having first secured a valid permit or permits from the owner or owners thereof granting Applicant herein the right of entry.

With these principles in mind, we turn to the present case. Here, the circuit court, in its May 22, 2006 order, referenced its July 31, 2000 order in which the court ruled that the Blanchards owned the entire surface estate of the land at issue, as well as an undivided portion of the mineral estate lying under their surface estate. The court also ruled that El Paso was an owner of a mineral leasehold estate under the Blanchard property. The court further ruled that Rule B-42 "specifically sets out the procedures which those desiring to perform seismic operations must follow."

In construing the language of Rule B-42, which was the regulation at the time of the filing of the lawsuit, the "permittee" must gain permission from the "landowner" before seismic operations are conducted on the land. Given a plain reading of the Commission's Rule B-42, the "landowner" equals the surface owner. Here, the surface owner is Blanchard. Thus, we hold that, notwithstanding El Paso's right to explore as a result of its one-half mineral rights, which flow directly from North Central to El Paso as authorized by the El Paso lease, El Paso nevertheless violated Rule B-42 by failing to obtain Blanchard's consent, as required by Rule B-42.

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[2] This rule has since been amended.

Further, we hold that El Paso's conducting seismic activity was "reasonably necessary" under *Wood*, *supra*, because of its authorization to conduct its operations as a one-half mineral-rights owner. *See also Musser Davis Land Co. v. Union Pacific Resources*, 201 F.3d 561 (5th Cir. 2000) (holding that seismic exploration is a generally accepted practice that was encompassed in the right to explore).

B. Constitutionality of Rule B-42

We now consider El Paso's arguments concerning the constitutionality of Rule B-42. The United States Supreme Court explained in *Agins v. Tiburon*, 447 U.S. 255 (1980), that a zoning regulation amounts to a constitutional taking only if "the ordinance does not substantially advance a legitimate state interest," or it "denies an owner economically viable use of his land." Similarly, in *National By-Products, Inc. v. City of Little Rock*, 323 Ark. 619, 916 S.W.2d 745 (1996), we held that a municipality "takes" a person's land only when the regulation "substantially diminishes the value of the land." In *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005), the United States Supreme Court later set forth a consideration of the following factors, which include the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" and " 'the character of the governmental action' — for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good' . . . [.]" *Id.* at 538-39 (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

At the outset, we note that El Paso filed its notice of appeal on July 14, 2006, in which El Paso gave notice of appealing the June 30, 2006 judgment, as well as "all rulings preceding the judgment which were adverse to the Defendants/Appellants including but not limited to the court's 'Order Denying Motion to Dismiss,' filed on March 12, 2004, which raises questions as to the constitutionality of Rule B-42 of the Arkansas Oil and Gas Commission as applied[.]" In the March 12, 2004 order denying El Paso's motion to dismiss, the court states that the motion is denied "for the reasons set forth and cited in Defendant/Counterclaimant's Response and supporting brief and oral arguments to this [circuit] court." According to Blanchard's

brief in response to El Paso's motion to dismiss, Rule B-42 is not an unconstitutional taking without just compensation. Thus, we consider the arguments.

We first note that when considering the validity of a regulation, we must give the regulation the same presumption of validity as a statute. *Arkansas Residential Assisted Living Ass'n, Inc. v. Arkansas Health Services Permit Comm'n*, 364 Ark. 372, 377, 220 S.W.3d 665, 668 (2005). With the *Agins* test in mind, we turn to the present case. First, we have noted that the United States Supreme Court has set aside the first prong of the *Agins* test. *See Craft v. City of Fort Smith*, 335 Ark. 417, 984 S.W.2d 22 (1998); hence, we will not address the "substantially advances" prong in *Agins*. Second, under the viable-use prong, we must determine whether Rule B-42 denies an owner an economically viable use of his interest in the land. Here, only seismic activity was prohibited without the express permission of the landowner. Similarly, under a *Lingle* analysis, Rule B-42 does not impact El Paso economically, as it is not prohibited from exploring the mineral estate in other capacities, such as drilling. For these reasons, we agree with the circuit court's rulings that Rule B-42 is constitutional as applied.

C. Assignment vs. license

Next, we must determine whether El Paso's entrance upon Blanchard's property, pursuant to the April 1998 permit, was a license or an assignment, which the Swift lease prohibited. El Paso argues that Swift did not grant an assignment or sublease, but rather Swift's seismic permit was a license. In response, Blanchard argues that licenses are not assignable, and therefore, Swift did not have a license. Further, Blanchard maintains that under the lease agreement, Swift did not have the authority to grant a right without Blanchard's consent.

We explained the difference between a license and a lease in *Harbottle v. Central Coal & Coke Co.*, 134 Ark. 254, 203 S.W. 1044 (1918), where we stated:

> There is a marked difference between a license and a lease. Under the lease, the right of possession against the world is given to the tenant, while a license creates no interest in the land, but is simply an authority or power to use in some specific way.
>
> . . . .

> A license in respect to real estate is an authority to do a particular thing upon the land of another without possessing an estate therein. The test to determine whether an agreement for the use of real estate is a license or a lease is whether the contract gives exclusive possession as against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license.

Id. at 1046 (citations omitted). However, "[a] license not being assignable, an attempted assignment by the licensee of his rights thereunder has been regarded as bringing the license to an end[.]" Tiffany Real Property, Sec. 837 (2004).

Here, the Swift lease between Blanchard and Swift specifically provided that the rights granted to Swift were not subject to assignment or sublease, in whole or in part, without the express written consent of Blanchard. In paragraph ten of Exhibit A of the Blanchard-Swift lease, the following language is:

> This lease may not be assigned or subleased, in whole or in part, without the expressed written consent of James H. Blanchard, Jr. which consent shall not be unreasonably withheld. Any assignment or sub-lease granted by lessee without the expressed written consent of James H. Blanchard, Jr. shall be null and void.

However, we agree with El Paso's argument that no assignment occurred. El Paso had the right to license seismic tests by way of its own lease of an undivided one-half interest in minerals under Blanchard's surface. El Paso had the right to explore, including seismic operations independent of Blanchard, who owned the other one-half mineral interest. Further, under *Bonds, supra,* El Paso did not breach the non-assignability clause of the Swift lease, particularly considering that El Paso was not a party to the Swift lease.

As to the one-half mineral interest owned by Blanchard, Swift did not assign any right that was barred by the non-assignment clause in the lease. Under its right to explore given in the lease, Swift could license another party to conduct seismic operations without violating the agreement. El Paso acquired no interest in Blanchard's land through Swift's license, but only acquired the privilege to occupy the Blanchard property for the specific purpose of conducting seismic tests. Therefore, we hold that the permission to conduct seismic operations held by El

Paso by way of Swift was a license and was not an assignment. *Harbottle, supra.* Accordingly, we reverse the circuit court's rulings on this point.

IV. Unjust-enrichment damages

For the second point on appeal, El Paso argues that the circuit court erred in awarding damages for unjust enrichment solely on the basis of a showing of trespass. Specifically, El Paso asserts that Blanchard expressly waived his trespass action prior to trial and elected to sue in assumpsit. El Paso asserts that Blanchard is not entitled to the award based upon unjust enrichment because Blanchard did not satisfy the requirements of an unjust-enrichment claim for the following reasons: (1) El Paso was not enriched, and (2) Blanchard did not suffer a compensable loss.

Blanchard responds by arguing that the circuit court's award of damages for unjust enrichment was proper. Specifically, Blanchard contends that El Paso was unjustly enriched by its wrongful act of trespassing on the Blanchard property to conduct seismic exploration without the required permission.

To find unjust enrichment, a party must have received something of value, to which he or she is not entitled and which he or she must restore. *Hatchell v. Wren*, 363 Ark. 107, 117, 211 S.W.3d 516, 522 (2005). There must also be some operative act, intent, or situation to make the enrichment unjust and compensable. *Id.*; *Dews v. Halliburton Indus., Inc.*, 288 Ark. 532, 708 S.W.2d 67 (1986). One who is free from fault cannot be held to be unjustly enriched merely because he or she has chosen to exercise a legal or contractual right. *Rigsby v. Rigsby*, 356 Ark. 311, 149 S.W.3d 318 (2004); *Guaranty Nat'l Ins. Co. v. Denver Roller, Inc.*, 313 Ark. 128, 854 S.W.2d 312 (1993). In short, an action based on unjust enrichment is maintainable where a person has received money or its equivalent under such circumstances that, in equity and good conscience, he or she ought not to retain. *Merchants & Planters Bank & Trust Co. v. Massey*, 302 Ark. 421, 790 S.W.2d 889 (1990); *Frigillana v. Frigillana*, 266 Ark. 296, 584 S.W.2d 30 (1979).

Further, in *Pro-Comp Management, Inc. v. R.K. Enterprises*, 366 Ark. 463, 237 S.W.3d 20 (2006), we stated:

> Unjust enrichment is an equitable doctrine. It is the principle that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution

> of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.

Id. (citations omitted).

With these principles in mind, we turn to the present case. Here, there was testimony at trial that drilling a well would have cost El Paso $500,000, and by El Paso's own calculation, it spent $240,000 in conducting seismic operations. Thus, the circuit court awarded Blanchard $260,000 in assumpsit damages by subtracting $240,000 from $500,000. However, we conclude that El Paso's paying Blanchard $260,000 in unjust-enrichment damages was too speculative, particularly in light of the fact that the $500,000 was not substantiated and neither El Paso nor Swift had the intent to drill. Thus, for these reasons, we reverse the circuit court's award of $260,000 to Blanchard.

V. Tortious interference

For its third point on appeal, El Paso argues that it did not tortiously interfere with the Swift lease. Specifically, El Paso claims that it could not and did not intend for Swift to breach the Swift lease, that El Paso did not induce Swift to do anything, there were no additional resultant damages, and El Paso's conduct was not improper.

Blanchard contends that the circuit court correctly determined that El Paso tortiously interfered with Swift's lease from Blanchard. Blanchard asserts that Swift had intent to grant El Paso permission to conduct the seismic operations on the Blanchard property and to refuse to pay Blanchard damages unless he agreed to release El Paso from further liability. Further, Blanchard maintains that El Paso induced Swift to breach its lease from Blanchard, and as a result, Blanchard was damaged by El Paso's tortious interference with his lease to Swift.

We have stated that to establish a claim of tortious interference with business expectancy, a plaintiff must prove: (1) the existence of a valid contractual relationship or a business expectancy; (2) knowledge of the relationship or expectancy on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or

expectancy has been disrupted. *Stewart Title Guaranty Co. v. American Abstract & Title Co.*, 363 Ark. 530, 215 S.W.3d 596 (2005). In addition to the above requirements, we have also stated that, for an interference to be actionable, it must be improper. *Id.*

Guided by these legal principles, we turn to the present case. Here, the circuit court made the following rulings:

> (1) That a valid contractual relationship existed between Blanchard and Swift; (2) that El Paso had knowledge of the contractual relationship between Blanchard and Swift; (3) that El Paso intentionally interfered with the Blanchard-Swift contractual relationship by inducing Swift to breach its contractual relationship with Blanchard; (4) that Blanchard was damaged directly as a result of El Paso's interference with a valid contractual relationship between Blanchard and Swift; (5) that El Paso's action was improper for the following reasons: (a) El Paso's conduct was egregious in it knew that Blanchard would not consent to an agreement for Sonat to conduct seismic operations on his property, and it knew that Blanchard's position was that he had granted that right to Swift but that Swift could not assign it to Sonat or anyone else; in order to defeat the clear language of Blanchard's lease with Swift, Sonat induced Swift, for valuable consideration, to grant Sonat a permit to conduct said seismic operations; (b) El Paso's motives were purely pecuniary and selfish; (c) El Paso clearly interfered with the right of Blanchard to control, as he had the right to do, the development of his property for oil and gas; (d) See (b) above; (e) there are no social interests which should be protected by the manner in which El Paso conducted its operation in this case; (f) El Paso's interference with the Blanchard-Swift lease was direct and not remote; (g) the relations between Blanchard and El Paso were estranged and unfriendly.

We disagree with the circuit court's rulings for the following reasons. At the outset, we note that because there was no breach of contract, there can be no tortious interference. For these reasons, we reverse the circuit court's ruling with respect to El Paso's alleged tortious interference with the Swift lease.

VI. Damages

For its fourth point on appeal, El Paso argues that if Blanchard is allowed to recover, then his award should be reduced. Specifically, El Paso contends that the circuit court was required to reduce Blanchard's recovery to reflect his percentage interest in the Blanchard property.

Blanchard argues that there is no basis for any reduction of his damage award. In response to El Paso's contention that Blanchard should receive a percentage according to his interest in the property, Blanchard claims that he should receive one-hundred percent of the damages because he is the surface owner.

Here, the circuit court awarded Blanchard the following damages: (1) $3,757.44 in compensatory damages for Swift's breach of contract; (2) $3,757.44 for El Paso's tortious interference with contractual relations; and (3) $260,000 as compensatory damages for El Paso's unjust enrichment. Based upon the above analyses and holdings, we reverse the following circuit court's rulings with respect to damages. First, we hold that Swift did not breach its contract with Blanchard because of its right to grant a license, and we reverse the award of $3,757.44 in compensatory damages for breach of contract. Second, because we hold that El Paso did not tortiously interfere with Swift's lease, we reverse the award of $3,757.44. Third, as we stated earlier, we reverse the circuit court's award of $260,000 in unjust-enrichment damages. Lastly, we remand for a determination of actual damages to Blanchard's property.

VII. Cross-appeal

For his first point on cross-appeal, Blanchard argues that the circuit court erred in finding that Blanchard failed to prove a portion of his damages with respect to his claim for tortious interference with contractual relations. El Paso responds, arguing that Blanchard is not entitled to further recovery for his unjust-enrichment claim.

In civil cases where the trial judge, rather than a jury, sits as the trier of fact, the correct standard of review on appeal is not whether there is any substantial evidence to support the finding of the court, but whether the judge's findings are clearly erroneous or clearly against the preponderance of the evidence. *McGraw v. Jones*, 367 Ark. 138, 238 S.W.3d 15 (2006).

Here, the circuit court ruled that Blanchard failed to produce evidence as to the proper amount of damages. At trial, Blanchard testified that he would have agreed to less than the cost of drilling a well. The cost of drilling a well is approximately $500,000. Thus, the damages would have been too speculative. We have said that although recovery will not be denied merely

because the amount of damages is hard to determine, damages must not be left to speculation and conjecture. *Vowell v. Fairfield Bay Community Club, Inc.*, 346 Ark. 270, 58 S.W.3d 324 (2001). For these reasons, we cannot say that the circuit court erred.

In his second point on cross appeal, Blanchard argues that the circuit court erroneously failed to award punitive-damage awards. We must determine whether the judge's findings are clearly erroneous or clearly against the preponderance of the evidence. *McGraw, supra.*

The circuit court set forth in its findings its rationale for its refusal to award punitive damages. First, it stated that El Paso obtained legal advice from its own legal counsel that it could conduct the seismic operations under the permit. Second, it obtained a temporary restraining order before moving onto Blanchard's property. Based upon these reasons, the circuit court concluded that El Paso was acting in its own fair interest based upon reasonable economic and business considerations. *See, e.g., Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993). Based upon these rulings, as well as our well established standard of review, we do not disturb the circuit court's rulings on this point.

Affirmed in part; reversed and remanded in part; affirmed on cross-appeal.

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

PAUL E. DANIELSON, Justice, concurring in part; dissenting in part. While I concur with a large part of the majority opinion and the holding to reverse the order of the circuit court, I do not believe that El Paso violated Rule B-42. Furthermore, while the majority remands "for a determination of actual damages to Blanchard's property," it is my opinion that Blanchard chose to waive damages for the tort of trespass when he instead sought damages below based on unjust enrichment, as noted by the circuit court in its findings of fact and conclusions of law. Therefore, I would dismiss the case as to any damages claimed against El Paso for trespass.

For clarification purposes, I begin with a review of the most basic facts. El Paso and Swift were both companies engaged in the exploration and development of oil and gas. Blanchard was the surface owner and owner of a one-half undivided mineral interest in the land relevant to this lawsuit. North Central was the owner

of the other one-half interest in the mineral rights on Blanchard's property. Swift had entered into an oil and gas lease with Blanchard on February 21, 1997, that granted it the right to develop the property for oil and gas, including the right to use seismic exploration. By virtue of an oil and gas lease from North Central, dated August 20, 1997, El Paso also held a leasehold interest in one-half of the mineral estate.

After some prior dealings with Swift on Blanchard's property, El Paso learned, around February of 1998, that one of its projects would involve some of Blanchard's property and approached Blanchard to request a permit for these seismic shoots. Blanchard denied that permit, advising El Paso that his lessee, Swift, had the exclusive right to permit seismic operations, and he could not give such permission. Therefore, El Paso sought a permit from Swift, which Swift agreed to. However, Blanchard denied El Paso access to the property. Under advisement of their in-house counsel, El Paso obtained a temporary injunction against Blanchard for access to the land, which was served upon Blanchard on May 22, 1998. El Paso proceeded and conducted the seismic explorations on the property. Thereafter, Blanchard asserted that Swift had breached its lease by granting the permit to El Paso and that El Paso had wrongfully trespassed by conducting the seismic exploration. It should be noted that the court order obtained by El Paso was never appealed.

It is my opinion that El Paso did everything reasonable to attempt to comply with Rule B-42. First, El Paso approached Blanchard, the surface owner, to get a permit. Blanchard informed El Paso that he could not give such permission because his lessee, Swift, had the exclusive right to permit the seismic operations. The only choice that El Paso, or any other third party seeking a seismic permit, had was to approach Swift. Blanchard effectively sent El Paso to Swift himself. Swift then granted permission for El Paso to conduct the seismic operations, yet Blanchard still denied El Paso access to the property. El Paso went so far as to get a court order to gain legal access to the land. All of these facts are consistent with a finding that El Paso complied with Rule B-42. The right of exploration was not Blanchard's, therefore he had no right to keep El Paso from exploring for minerals.

This was a situation in which the surface owner attempted to hold up the owner of the mineral rights from exploration and used Rule B-42 to do so. Rule B-42 has since been changed by the

Arkansas Oil and Gas Commission, now requiring only notice to a surface owner before certain mineral exploration takes place. Rule B-42 of the Arkansas Oil and Gas Commission now provides in pertinent part:

> No entry shall be made by any person or entity upon the lands upon which such seismic operations are to be conducted without the person or entity having first given *notice* as provided in Ark. Code Ann. (1987) § 15-72-203 to the surface owner of the lands upon which such operations are to be conducted.

(Emphasis added.)

For the above reasons, I would hold that El Paso did not violate Rule B-42 and, because Blanchard waived his option to sue based on the tort of trespass, I would dismiss any claims for damages against El Paso for trespass.

Kenneth HARRISON *v.* STATE of Arkansas

CR 07-357 269 S.W.3d 321

Supreme Court of Arkansas
Opinion delivered December 6, 2007

Bill Luppen, for appellant.

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

PAUL E. DANIELSON, Justice. Appellant Kenneth Harrison appeals from his capital-murder conviction and his sentence to life imprisonment without parole. He asserts two points on appeal: (1) that the circuit court erred in denying his motion for mistrial, the premise of which was alleged juror misconduct, and (2) that the circuit court erred in denying his motion for new trial, which was based upon newly discovered evidence of a witness's prior juvenile conviction for capital murder. We affirm.

Because Harrison does not challenge the sufficiency of the evidence, only a brief recitation of the facts with respect to the crime is required. Suffice it to say, Harrison was accused and convicted of capital murder after he shot and killed Fulton Watson at Roy's Service Center on West 12th Street in Little Rock on November 11, 2005. Two witnesses, Shuntae Ingram and Jacque Snider, were at the scene at the time of the shooting, and both testified against Harrison at his trial. As already stated, the jury

convicted Harrison of capital murder, and he was sentenced to life imprisonment without parole. He now appeals.

Harrison first argues that the circuit court erred in denying his mistrial motion, which was based on one juror's comments to two other jurors. He alleges that jurors Hall and Westbrook received improper information from juror Wright, which was not in evidence. He contends that the circuit court's denial of his mistrial motion, which left Hall and Westbrook on the jury, had the effect of tainting the jury's verdict by the outside information given to the two. Harrison avers that because there was a reasonable possibility of resulting prejudice to him by the circuit court's decision, this court should reverse the circuit court's denial of his motion for mistrial. The State urges that juror Wright's limited knowledge of Harrison and her vague statements caused no prejudice to him, especially due to the fact that both jurors who remained on the jury affirmed their ability to be impartial.

In the instant case, a review of the record reveals the following events. On the morning of the second day of trial, the bailiff alerted the circuit court to a problem regarding certain jurors, stating:

> BAILIFF: Before we get started, I have not mentioned this to anyone. I just had two jurors, Ms. Westbrook and Ms. Hall, come to me this morning and said that yesterday afternoon when the Court recessed and they went back to the back, juror number one, Ms. Wright, made a comment before the rest of the jurors, that she knew Mr. Harrison, and that she knew he was a mechanic. And Ms. Westbrook questioned Ms. Wright and asked her why did she not make that statement to the Court, when we — the Court, first asked her that. And she said it didn't matter. Ms. Hall also said that she concurred with that, that she could not sleep last night, because they knew that Ms. Wright knew Mr. Harrison, and that they had some problems with that this morning.
>
> They did not want it divulged, but I told them ethically, we didn't have a choice, but to notify the Court. But, they do have some problems with Ms. Wright, and she made the statement in front of the other jurors.

At that time, the circuit court called juror Wright and inquired of her. She stated that she "just" knew Harrison from when he worked "at

the shop on 12th Street," denying that she knew him personally. The circuit court then inquired of her further:

> CIRCUIT COURT: Then, how did you come to know that he worked there on 12th Street?
>
> Ms. WRIGHT: Because, over the years, I have stopped by there once, and he just looked at my car for something. I asked a question about my car. That was all.
>
> CIRCUIT COURT: And he had dealt with your car?
>
> Ms. WRIGHT: No, he just gave me an opinion.

The circuit court then asked whether either of the attorneys had any questions for Ms. Wright, and defense counsel stated that he had none. After Ms. Wright was permitted to return to the jury room and the State suggested excusing her, defense counsel made the following objection and requested a mistrial:

> DEFENSE COUNSEL: Your Honor, I think the jury is tainted now, not just Ms. Wright, but the other two jurors who heard that; obviously the one was troubled by it. I think the whole jury pool is tainted, and I'd ask for a mistrial.

Upon defense counsel's motion for mistrial, the circuit court called Ms. Hall and Ms. Westbrook. Ms. Hall acknowledged Ms. Wright's statement that she knew Harrison, and defense counsel then inquired of Ms. Hall:

> DEFENSE COUNSEL: Is that going to have any affect [sic] on you as a juror today? Do you think you can be a fair and impartial juror, knowing that?
>
> Ms. HALL: Oh, yeah.
>
> DEFENSE COUNSEL: No problems?
>
> Ms. HALL: Definitely no problem. And she didn't sway me, one way or the other.
>
> DEFENSE COUNSEL: Okay. That's all.

The circuit court then called Ms. Westbrook. When asked by the circuit court, she relayed the following account:

> Ms. WESTBROOK: Well, she — I mean, she made the statement that she knew something, a little bit about, you know, what had happened, the day that it had happened. And I questioned her. I asked her why she didn't say anything when you all asked us if anyone knew anything about the case. And then she said, "Well, I don't really know him." But, you know, so —
>
> . . . .
>
> She just didn't believe that he would do something like that. And, I mean, that's when — I don't know if everybody else caught on it, because everybody was kind of talking, but I'm the one who actually questioned her and asked her, "Well, why didn't you say anything when we were asked if you knew anything concerning the case?" And Ms. Hall, she looked at me, because she — she heard it, too, evidently.

The prosecutor then asked Ms. Westbrook whether she would still be able to fairly weigh the evidence, to which she responded that she could. Defense counsel had no questions for her. Following some discussion between the circuit court and defense counsel, the circuit court excused Ms. Wright, but permitted Ms. Hall and Ms. Westbrook to remain on the jury, and denied Harrison's motion for mistrial.

We have held that a mistrial is an extreme and drastic remedy that will be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing with the trial or when the fundamental fairness of the trial has been manifestly affected. *See Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006). A circuit court has wide discretion in granting or denying a mistrial motion, and, absent an abuse of that discretion, the circuit court's decision will not be disturbed on appeal. *See id.*

We cannot say that the circuit court abused its discretion in denying Harrison's mistrial motion. A review of the events reveals no evidence of prejudice to Harrison. Indeed, as the State points out in its brief, it could be said that Ms. Wright's statements were actually in favor of Harrison. Here, the circuit court removed Ms. Wright and questioned Ms. Westbrook and Ms. Hall, both of whom stated that they would be impartial. Accordingly, the circuit court did not abuse its discretion in denying Harrison's motion for mistrial.

Harrison's second point on appeal relates to his motion for new trial. A review of the record reveals that on September 8, 2006, Harrison filed his motion for new trial. In it, he asserted that the State failed to provide him with information that Shuntae Ingram had been convicted of capital murder when he was a juvenile. Harrison asserted that because it was a juvenile adjudication, it could not have been obtained by his due diligence. He claimed that he was prejudiced by the State's failure to disclose in that he was prevented from using that information to attack Ingram's credibility, prevented from questioning potential jurors on the matter during voir dire, and prevented from "developing a strategy of implicating Mr. Ingram in the murder." Harrison further requested a hearing on his motion. Four days later, on September 12, 2006, the circuit court denied the motion "[b]ased upon a review of Defendant's motion, applicable case law, and all other matters and things pertaining thereto[.]"

With respect to the denial of his new-trial motion, Harrison initially argues, without citing to any authority, that the circuit court's denial of his motion for new trial, without hearing any evidence or receiving a response to the motion by the State, violated his due-process rights under the federal and state constitutions and that this court should remand the matter for a full hearing on the motion. He further contends that he could have used Ingram's juvenile conviction for impeachment purposes, had he known about it prior to trial. The State responds that a hearing was not necessary on Harrison's new-trial motion, as one is not required when it would be superfluous. In addition, the State points to the fact that when Ingram testified, he was in prison clothes, due to his incarceration at the time of Harrison's trial, and that defense counsel had the opportunity to, and did, impeach Ingram. For these reasons, the State concludes, Harrison cannot demonstrate any reasonable probability that the result of his trial would have differed had he received the information and been able to use it.

We first hold that we are precluded from addressing Harrison's claim that the circuit court's failure to conduct a hearing on his new-trial motion violated his due-process rights, due to his failure to cite to any legal authority in support of that proposition. We have held time and time again that we will not reach the merits of an argument on appeal, even a constitutional argument, 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. *See Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005). Therefore, we decline to address his argument that the circuit court's failure to hold a hearing violated his due-process rights.

Turning to the merits of the circuit court's denial of the motion, we have held that the decision on whether to grant or deny a motion for new trial lies within the sound discretion of the circuit court. *See Henderson v. State*, 349 Ark. 701, 80 S.W.3d 374 (2002). We will reverse a circuit court's order granting or denying a motion for a new trial only if there is a manifest abuse of discretion. *See id.* In addition, we have emphasized that, in matters dealing with the prosecution's failure to disclose prior convictions, the crucial issue is whether the appellant was prejudiced by the failure to disclose. *See, e.g.*, *Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000).

We cannot say that the circuit court manifestly abused its discretion in denying Harrison's motion, as our review reveals that Harrison was not prejudiced by the alleged lack of disclosure of Ingram's alleged juvenile conviction. First, during direct examination, Ingram acknowledged that he was dressed in blue and was currently incarcerated in the Arkansas Department of Correction. In addition, he acknowledged having several felony convictions:

> PROSECUTOR: And you've got some felony convictions, I think, for breaking or entering, back in 2000, is that correct?
>
> INGRAM: Yes.
>
> PROSECUTOR: And a couple of theft by receiving's [sic] in 2002?
>
> INGRAM: Yes.
>
> PROSECUTOR: And then a couple more theft by receiving's [sic] in 2005, and a failure to appear. Is that right?
>
> INGRAM: Yes.

Then, on cross-examination, defense counsel also pointed out that Ingram was currently serving time in prison and that he was out on bond at the time of the shooting:

DEFENSE COUNSEL: So, you're serving 15 years in the penitentiary for theft of property, is that right?

INGRAM: Theft by receiving.

DEFENSE COUNSEL: Cars — stealing cars?

INGRAM: Yeah.

DEFENSE COUNSEL: And was that during this time?

INGRAM: During the time, what?

DEFENSE COUNSEL: When this shooting happened, were you stealing cars then, or were you waiting to get to go to Court then, or —

INGRAM: I was out on bond.

It is clear to this court that Ingram's criminal record was made known to the jury and was used by the defense in an attempt to impeach him. We cannot say that a juvenile capital-murder conviction, if there indeed was one,[1] would have affected the jury's assessment of Ingram's credibility. For that reason, we cannot say that any lack of disclosure of Ingram's alleged juvenile conviction undermined confidence in the outcome of Harrison's trial. *See, e.g., Lee v. State, supra.* Accordingly, we affirm the circuit court's denial of Harrison's motion for new trial.[2]

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[1] It is not evident from Harrison's motion for new trial that a juvenile conviction, in fact, existed.

[2] While we find no prejudice in the instant case, we do take this opportunity to remind the bench and bar that prior convictions *shall* be disclosed by the prosecution to the defense, upon request. Rule 17.1 of the Arkansas Rules of Criminal Procedure provides, in pertinent part:

> (a) Subject to the provisions of Rules 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:
>
> . . . .

Pursuant to 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. *See White v. State*, 370 Ark. 284, 259 S.W.3d 410 (2007).

Affirmed.

BROWN and IMBER, JJ., concur.

ANNABELLE CLINTON IMBER, Justice, concurring. The circuit court's denial of Harrison's motion for new trial should be summarily affirmed. This point on appeal is not preserved for appellate review because Harrison failed to prove the existence of Ingram's alleged juvenile conviction by means of a proffer under seal. Without such a proffer, any opinion on the merits is merely advisory. For this reason, I respectfully concur.

BROWN, J., joins this concurrence.

(vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial, if the prosecuting attorney has such information.

Ark. R. Crim. P. 17.1(a)(vi) (2007).

Johnny Paul DODSON *v.* Larry NORRIS, Director, Arkansas Department of Correction

07-1179 269 S.W.3d 350

Supreme Court of Arkansas
Opinion delivered December 6, 2007

PER CURIAM. In accordance with section 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 William R. Wilson, Jr., of the United States District Court for the Eastern District of Arkansas filed a motion and certifying order with our clerk on November 13, 2007. The certifying court requests that we answer one question of Arkansas law that may be determinative of a cause now pending in the certifying court, and it appears to the certifying court that there is no controlling precedent in the decisions of the Arkansas Supreme Court. The law in question involves whether a motion for belated appeal is a properly filed application for postconviction relief or other collateral review, and whether such motion is sufficient to toll the running of the one-year limitations period for filing federal habeas corpus petitions under 28 U.S.C. § 2254, even if it is eventually denied.

After a review of the certifying court's analysis and explanation of the need for this court to answer the question of law presently pending in that court, we accept certification of the following question: Whether a motion for belated appeal, as provided for in Arkansas Criminal Appellate Rule 2(e), of a state circuit court's order denying relief under Rule 37 of the Arkansas

Rules of Criminal Procedure is a part of the ordinary appellate review procedure under Arkansas law.

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

A. Time limits under Rule 4-4 will be calculated from the date of this *per curiam* order accepting certification. The plaintiff in the underlying action, Johnny Paul Dodson, is designated the moving party and will be denoted as the "Petitioner," and his brief is due thirty days from the date of this *per curiam;* the defendant, Larry Norris, Director of the Arkansas Department of Correction, shall be denoted as the "Respondent," and his brief shall be due thirty days after the filing of Petitioner's brief. Petitioner may file a reply brief within fifteen days after Respondent's brief is filed.

B. The briefs shall comply with this court's rules as in other cases except for the brief's content. Only the following items required in Rule 4-2(a) shall be included:

(3) Point on appeal which shall correspond to the certified question of law to be answered in the federal district court's certification order.

(4) Table of authorities.

(6) Statement of the case which shall correspond to the facts relevant to the certified question of law as stated in the federal district court's certification order.

(7) Argument.

(8) Addendum, if necessary and appropriate.

(9) Cover for briefs.

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

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 Petitioner and Respondent.

Accepted.

Michael David KOSTER *v.* STATE of Arkansas

07-1160 269 S.W.3d 376

Supreme Court of Arkansas
Opinion delivered December 6, 2007

Cindy Baker, for appellant.

No response.

PER CURIAM. Appellant Michael David Koster, by and through his attorney, has filed a motion for rule on the clerk. His attorney, Cindy M. Baker, states in the motion that our clerk has refused to accept her untimely tender of the record.

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 stated 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." *Id.* 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*, Ms. Baker has candidly admitted fault in connection with the untimely filing of an order granting an extension of time to file the record. The motion for rule on the clerk is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion granted.

John David TERRY *v.* John A. WHITE, in His Capacity as Chancellor of the University of Arkansas at Fayetteville; and Alan B. Sugg, in His Capacity as President of the University of Arkansas System

07-1143 269 S.W.3d 377

Supreme Court of Arkansas
Opinion delivered December 6, 2007

PER CURIAM. On November 1, 2007, Appellant John David Terry filed a motion for suspension or stay of order. Appellees, John A. White, Chancellor of the University of Arkansas, Fayetteville, and B. Alan Sugg, President of the University of Arkansas System, timely filed a response to the motion. On November 8, 2007, this court issued a summary order granting Appellant's motion for suspension or stay of order. Now before the court is Appellees' motion for clarification or reconsideration of the court's November 8, 2007 order.

Upon consideration of Appellees' motion for clarification and Appellant's response thereto, and for good cause shown, we hereby clarify that all proceedings in the circuit court are stayed pending resolution of the matters on appeal. In other words, all parties are admonished to maintain the *status quo*.

H. G. FOSTER, Special Prosecutor; Jack McQuary, Special Prosecutor *v.* Hon. Victor L. HILL, Circuit Judge

07-1235 269 S.W.3d 791

Supreme Court of Arkansas
Opinion delivered December 10, 2007

PER CURIAM. Special prosecuting attorneys H. G. Foster and Jack McQuary petition this court for a writ of prohibition or in the alternative a writ of certiorari to halt the empaneling of a special grand jury by Circuit Court Judge Victor L. Hill. On July 12, 2007, Judge David Burnett entered an order[1] appointing Foster and McQuary as special prosecutors to investigate possible criminal conduct of West Memphis police officer Erik Stammis in the death of DeAunta Farrow. On November 26, 2007, Judge Hill entered an order directing the circuit clerk to summon jurors to serve on a special grand jury to carry out the same task. The issue brought to this court is the question of who may investigate Farrow's death.

Farrow's death occurred in Crittenden County. Both Judge Hill and Judge Burnett serve in the Second Judicial District, which includes Crittenden County. Judge Hill serves in Division 6, and

[1] The July 12, 2007 order is captioned "IN THE MATTER OF THE APPOINTMENT OF A SPECIAL PROSECUTOR IN RE: THE DEATH OF DEAUNTA FARROW." The order bears no case number. On December 3, 2007, Judge David Burnett entered an order concerning redaction of confidential information in the event investigative files are released under a Freedom of Information Act request. That order bears the same caption and again bears no case number.

Judge Burnett serves in Division 3. Under the current Plan of the Second Judicial District Pursuant to Administrative Order 14, Crittenden County criminal cases are assigned to Divisions 3, 5, and 8. Division 6 is assigned Crittenden County civil cases.[2] The special prosecutors allege that Judge Hill, who serves in Division 6, may not empanel a special grand jury to investigate Farrow's death, and Judge Hill asserts that he may.

This petition will be treated as a case. We direct that the following issues be briefed:

1. Whether an assignment under Administrative Order No. 14 that a division of the circuit court hear only civil cases arising in a given county precludes the circuit court judge serving in that division from exercising jurisdiction in criminal cases arising in that county;

2. Whether Ark. Code Ann. § 16-32-201(a)(2)(A) (Supp. 2007) which limits circuit courts that may empanel grand juries to those assigned criminal cases also limits the authority granted circuit courts in Ark. Code Ann. § 16-85-517 (Repl. 2005) to empanel a special grand jury to circuit courts assigned criminal cases;

3. Whether a division of the circuit court in a judicial district may empanel a grand jury to investigate an incident for criminal conduct when another division of the circuit court in the same judicial district has already appointed a special prosecutor to perform the same task;

4. Whether a judge in a division of a judicial district has the authority to terminate the appointment of special prosecutors appointed by the judge in another division of the same judicial district; and

5. Whether this court's general superintending control of circuit courts granted under amendment 80 may be exercised under its original jurisdiction to direct that only one of two circuit courts possessing subject-matter jurisdiction may exercise that jurisdiction.

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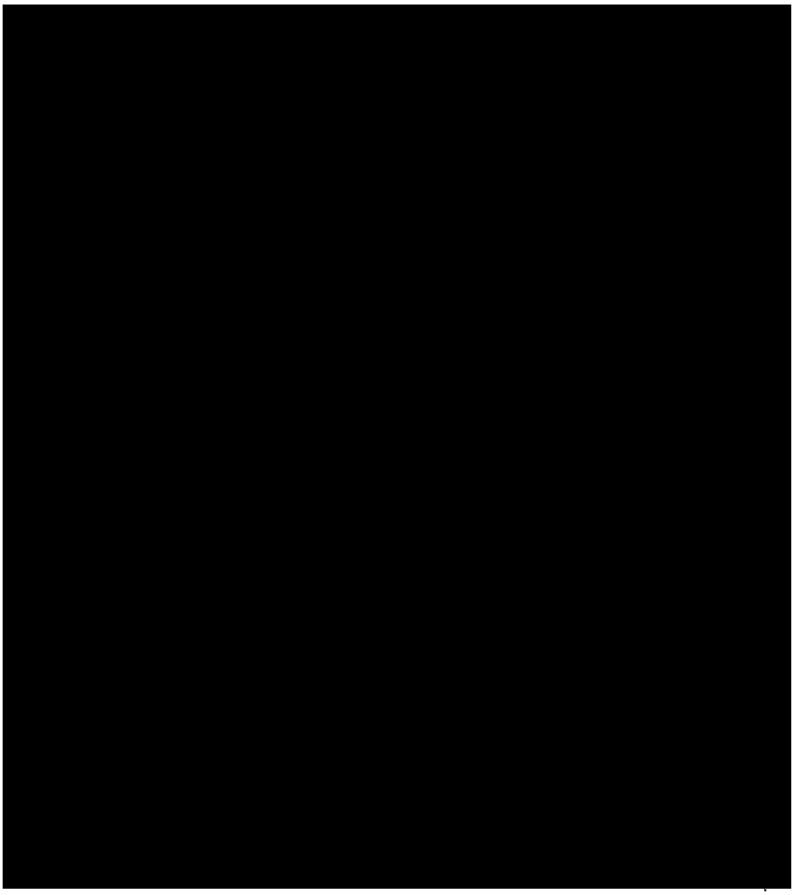
[2] Under the Plan of the Second Judicial District Pursuant to Administrative Order 14, Judge Victor L. Hill is assigned criminal cases arising in Craighead County, Poinsett County, and the Osceola District of Mississippi County.

We request that the parties in this matter and the Attorney General's office, file simultaneous briefs on the above issues, and on any other issues the parties deem relevant, with the clerk of this court within thirty days of the date of this opinion. Any party wishing to respond may file a reply brief within five days thereafter.

[redacted]



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