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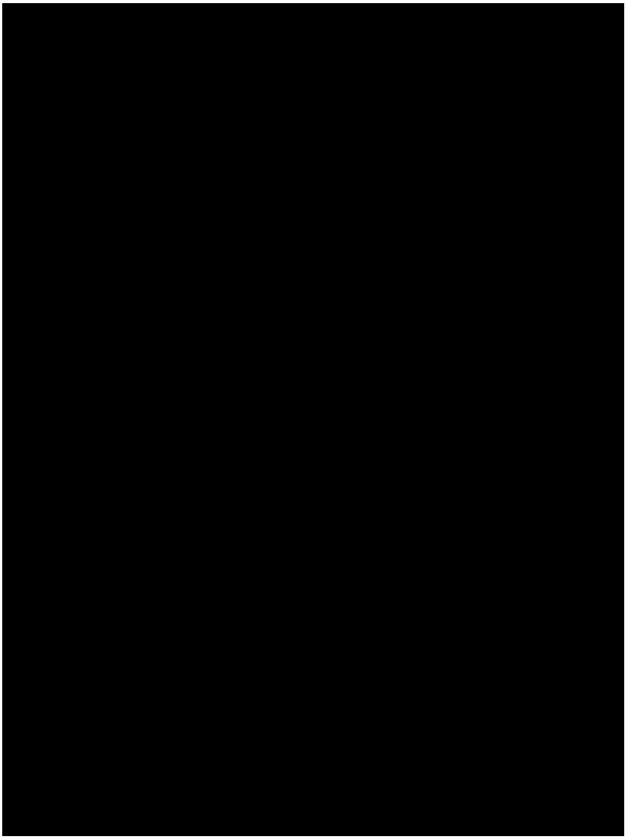

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R.M.W. *v.* STATE of Arkansas

CR 08-505 289 S.W.3d 46

Supreme Court of Arkansas
Opinion delivered November 6, 2008

Julia B. Jackson, Public Defender Conflicts Office, for appellant.

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

JIM HANNAH, Chief Justice. R.M.W. appeals an order of the Pulaski County Circuit Court, Criminal Division, deny-

ing his motion to transfer his case to the circuit court, juvenile division, pursuant to Arkansas Code Annotated § 9-27-318 (Supp. 2005). He argues that the circuit court's decision to try him as an adult is clearly erroneous in that the decision is not supported by clear and convincing evidence. We hold that the trial court was not clearly erroneous and that the decision is supported by clear and convincing evidence. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(b)(4).

Facts

On July 17, 2007, Tom & Jean's Grocery was robbed. Store owner Ghazi Hammad suffered multiple gunshot wounds and later died. His wife Khadijah Awwad suffered a gunshot wound and survived. R.M.W. and M. B. were charged as adults with capital murder, attempted capital murder, and aggravated robbery. At the time of the robbery, R.M.W. was fifteen years old, and M.B. was seventeen years old.

R.M.W. moved to transfer the criminal action against him to the juvenile division. At the hearing on the motion, evidence was presented to show that while he was fifteen, he functioned at the level of a twelve- to thirteen-year-old. Family, teachers, and a psychologist testified that R.M.W. was childlike and immature. They noted that he prefers the company of children who are younger than he is because he enjoys their interests. Evidence was presented to show that R.M.W. still plays cars with younger boys and that he plays juvenile games that others his age long ago abandoned. Evidence was also presented to show that R.M.W. had never been violent or showed any tendencies toward aggressiveness or violence. There was additional evidence that R.M.W. was always respectful and mannerly in his dealings with teachers and others and that he was helpful and kind. A deputy sheriff who works with R.M.W. in detention testified that he is very obedient and respectful, and does not seem to understand why he is being held. She further noted that he is easily intimidated by the other inmates. Several witnesses testified that R.M.W. is a follower. They stated further that he does not plan in life, and that he acts impulsively without foreseeing consequences.

R.M.W.'s account of what happened was introduced through his testimony and the testimony of his mother. R.M.W. was permitted to return to his old neighborhood and stay overnight on July 17 with his friend M.B. M.B. asked R.M.W. if he wanted to go buy candy, and R.M.W. agreed. On the way to the

store, M.B. stated, "I'm tired of this shit." R.M.W. asked, "Tired of what?" M.B. responded, "I'm tired of being broke. I am fixing to rob a store. Are you down?" R.M.W. testified that he told M.B. "No." R.M.W. states that at this point, M.B. pulled out a gun and put it to R.M.W.'s head saying if he "didn't do it, he was going to kill me." R.M.W. further stated:

> He told me to go in there and act like I was getting some candy and stuff like that. . . . I went in the store and acted like I was getting some candy. I was walking around. And I didn't know what to do. I was just walking around. I went on the other side of the rack, and he came behind me and said if I didn't do it he was going to kill me.

R.M.W. stated that he then pulled out his gun and pointed it at Hammad and Awwad, telling them to raise their hands. R.M.W. further stated that he kept his gun on Hammad and Awwad for a while, and in trying to get out of the robbery, he handed his gun to M.B., who took it, but handed it back to R.M.W. requiring him to go on. Hammad then began to walk toward him and M.B., and R.M.W. stated that he dropped his pistol because he did not want to go through with the robbery. Hammad attacked them, and M.B. shot Hammad. They escaped to the woods, and when M.B. fell asleep, R.M.W. fled. He called his mother the next morning and turned himself into the police.

M.B. testified that he and R.M.W. planned the robbery together. He also testified that R.M.W. wanted to be armed so they stole a pistol for R.M.W. to use in the robbery. M.B. testified that R.M.W. was a willing participant in the robbery.

A video surveillance tape in the store recorded the robbery. The video quality is sufficient to easily identify the people and see the events. There is audio, but the quality is low. The gunshots can be heard, and voices can be heard, but the voices cannot be understood. The robbery occurred shortly after 10:00 p.m. after the store had been closed for the day. The videotape shows Hammad step out of view where he apparently unlocks the door to let R.M.W. enter the store. R.M.W. goes to an aisle of merchandise to look around and Hammad leans on a nearby rack while he talks with him. M.B. did not enter with R.M.W. After speaking with R.M.W. for a few moments, Hammad returns to the front of the store and M.B. enters. M.B. walks around one aisle to encounter R.M.W. from behind in what appears to be an attempt

to conceal communication with R.M.W. M.B. walks close to R.M.W. and does appear to communicate with R.M.W. in some way. They then proceed together toward Hammad and Awwad who are near the door.

They approach Hammad and Awwad with drawn pistols. R.M.W. has a black pistol, and M.B. has a silver pistol. R.M.W. confronts Hammad with his pistol. There is physical contact between the two, and Hammad brushes R.M.W. aside. R.M.W. backs off while still holding his pistol on Hammad. Gunshots are heard and Hammad touches his mouth, apparently indicating an injury. M.B. is not visible at this point. M.B. steps out in front of Hammad holding a silver pistol on Hammad. R.M.W. is off to the right and in one camera view can be seen holding his gun on Hammad. R.M.W. then hands his pistol to M.B. Nothing on the tapes makes clear why this transfer of the gun occurred; however, the gun is soon handed back to R.M.W. R.M.W. is then seen again holding his pistol on Hammad and Awwad. M.B. makes two trips behind the counter. Hammad then approaches R.M.W. and M.B. They both back away. A scuffle between the three occurs, and R.M.W.'s black pistol falls to the floor. R.M.W. escapes and moves out of the scene toward the front of the store. A few moments later, he returns to the fight in an apparent attempt to free M.B. from Hammad by striking Hammad at least twice. As R.M.W. strikes Hammad, he is drawn back into the fray. M.B. escapes the fight and grabs the black pistol off the floor. Awwad comes to Hammad's aid and holds R.M.W. down. Hammad leaves to pursue M.B. M.B. shoots multiple times and returns to free R.M.W. from Awwad. R.M.W. moves toward the front of the store where he remains while M.B. threatens Awwad. The boys then leave the store.

At some point during the robbery, Awwad suffers a gunshot wound to the hip; however, the videotape does not reveal when that occurred. Awwad was unable to say when she was injured. The parties agreed that all shots were fired by M.B.

Motion to Transfer to Juvenile Division

R.M.W. moved under Arkansas Code Annotated § 9-27-318(e) to transfer his case to the juvenile division. He argued that he was intimidated and manipulated into participating in the robbery. In deciding the motion, the circuit court is to consider the following factors:

(1) The seriousness of the alleged offense and whether the protection of society requires prosecution in the criminal division of circuit court;

(2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;

(3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;

(4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;

(5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;

(6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;

(7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court that are likely to rehabilitate the juvenile before the expiration of the juvenile's twenty-first birthday;

(8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;

(9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and

(10) Any other factors deemed relevant by the judge.

Ark. Code Ann. § 9-27-318(g). R.M.W. appeals from the denial of a motion to transfer his case to juvenile court. *See Otis v. State*, 355 Ark. 590, 142 S.W.3d 615 (2004); *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991). Section 9-27-318(e) permits any party to move to transfer, and an order on a motion to transfer may be appealed by any party. *See* Ark. Code Ann. § 9-27-318(*l*).

On August 29, 2007, the State filed criminal charges against R.M.W. in the criminal division of the circuit court. Pursuant to Arkansas Code Annotated § 9-27-318(c)(2), the State could charge R.M.W. in either the criminal division of the circuit court or the juvenile division of the circuit court because at the time of the crime R.M.W. was fifteen and charged with capital murder and aggravated robbery. Upon a finding by clear and convincing evidence that a case should be transferred to another division of the circuit court, the circuit court may do so. *See* Ark. Code Ann. § 9-27-318(h)(2); *Otis, supra.*

Clear and convincing evidence is that degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to be established. *Otis, supra.* This court will not reverse the circuit court's decision unless it was clearly erroneous. *Id.* 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. *See Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

[redacted] The critical question in this case was whether, as R.M.W. alleged, he was forced or manipulated into participating in the robbery, or whether he willingly participated. The circuit court found that R.M.W. "has not matured, given his age." The circuit court also went on to find, as R.M.W.'s expert psychologist Dr. Nicholaus Paul testified, that it is unlikely a person would behave as an innocent child for fifteen years and then commit such a robbery at gunpoint. However, in weighing all the evidence, the circuit court concluded that R.M.W. was lying about the nature of his involvement in the robbery, and that regardless of his background, he was a willing participant in the robbery.

The circuit court found that several facts in this case and several events shown on the videotape contradicted R.M.W.'s story. We agree. R.M.W. entered the store first, while M.B. remained outside. That is inconsistent with a desire to avoid participating. Once inside, R.M.W. had an opportunity to warn Hammad and Awwad and provide for his safety had he wished to do so. He did not do so.

Further, R.M.W. walked in calmly and looked at goods on the shelves. Nothing on the videotape shows that R.M.W. was nervous or cowering in the moments before M.B. entered the store. Rather, he seems to be waiting for M.B.

Additionally, R.M.W. was the first to confront Hammad, and he did so by pointing a pistol at him. In this first confrontation, R.M.W. came in physical contact with Hammad. That is not consistent with a desire to withdraw or not participate. After M.B. shot Hammad in the face, R.M.W. continued to hold his pistol on Hammad.

Soon afterward, R.M.W. handed his pistol to M.B., however, why that was done is not revealed by the videotape. It is only a few more moments until R.M.W. is again pointing his pistol at both Hammad and Awwad. Shortly after this, we see Hammad approach R.M.W. and M.B. They back away. Hammad presses forward and a fight ensues. As this fight begins, R.M.W.'s black pistol falls to the floor. R.M.W. states that he threw down the pistol because he wished to stop participating in the robbery; however, the videotape shows that he dropped it during the fight. Hammad then pursued and grabbed M.B. R.M.W., who by this point is several feet away, returns to strike Hammad at least twice in an attempt to free M.B. from Hammad's attack. Coming to the robber's assistance hardly serves as evidence R.M.W. did not want the robbery to take place. Finally, once M.B. freed R.M.W. from Awwad, R.M.W. waited for M.B. and only left the store with him.

We note that R.M.W. argues that he should be tried as a juvenile because he turned himself in, because he was developmentally delayed, because he was in special education for some subjects, and because he was diagnosed with attention deficit hyperactivity disorder. We note that he produced credible witnesses who testified to his quiet, kind, and respectful demeanor. He was by most accounts a gentle boy who would have been thought incapable of such an act as armed robbery; however, the videotape and Awwad's testimony tell a different story.

We also note that contrary to R.M.W.'s assertion in his brief, the circuit court did not find that he was guilty of the charged crimes. Rather, the circuit court concluded that it "did not believe that a gun was put to his head before he went in the store." To decide whether transfer to the juvenile court was appropriate, the circuit court had to decide whether the clear and convincing evidence supported R.M.W.'s story that he was a manipulated or an unwilling participant in the robbery. At the close of evidence in the hearing, the circuit court told R.M.W. that the court would take a break and upon its return he would be asked if "his story really happened or not." That question was asked, and the circuit court could not find his answer, his prior testimony, or his story credible. In this hearing, the circuit judge

sat as the finder of fact. Credibility of witnesses is an issue for the finder of fact. *Polk v. State*, 348 Ark. 446, 73 S.W.3d 609 (2002). On appeal, we have no means to assess witness credibility and may not act as the finder of fact. *Ridling v. State*, 360 Ark. 424, 203 S.W.3d 63 (2005). R.M.W. has not borne his burden of proving that the circuit court was clearly erroneous. We are not left with the definite and firm conviction that a mistake has been committed.

Affirmed.

CITY of CENTERTON, a Municipal Corporation *v.* CITY of BENTONVILLE, a Municipal Corporation, and George and Nancy Huber, Daniel and Ruby Davies, Sandra and Gary Townsend, and Lois Peters Revocable Trust

08-380 289 S.W.3d 53

Supreme Court of Arkansas
Opinion delivered November 6, 2008

[Rehearing granted November 18, 2008.*]

* IMBER, J., would deny rehearing.

Slinkard Law Firm, by: *Andrew R. Huntsinger*, for appellant.

Clark, & Spence, by: *George R. Spence*, Bentonville City Attorney, for appellee City of Bentonville.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *L. Kyle Heffley*, for appellees George and Nancy Huber, Daniel and Ruby Davies, and Lois Peters Revocable Trust.

JIM HANNAH, Chief Justice. The City of Centerton appeals an October 11, 2007 order declaring the City's annexation ordinance invalid. We lack jurisdiction to hear this appeal.

The order appealed from was entered on October 11, 2007. Centerton filed a posttrial motion to amend the judgment on October 14, 2007. A posttrial motion extends the time within which to file the notice of appeal to thirty days from the date the posttrial motion is decided. *See* Ark. R. App. P.–Civ. 4(b)(1). However, if the circuit court fails to decide the motion within thirty days, the motion is deemed denied as of the thirtieth day. *Id.*

The thirty days within which the circuit court had to decide the motion ran November 23, 2007, and the court did not decide the motion until November 30, 2007. Thus, the motion was deemed denied on November 23, 2007. Centerton had thirty days from November 23, 2007, or until December 26, 2007, to file the notice of appeal. It was filed on December 28, 2007. Pursuant to Ark. R. App. P.–Civ. 4(a), the notice of appeal had to be filed within thirty days of entry of the judgment appealed from. *See Murchison v. Safeco*, 367 Ark. 166, 238 S.W.3d 11 (2006). This court may not hear the appeal. It is dismissed.

SUPPLEMENTAL OPINION ON GRANT OF REHEARING
DECEMBER 11, 2008

No briefs filed.

PER CURIAM. The City of Centerton petitions this court for rehearing. This court dismissed Centerton's appeal on November 5, 2008, based on a lack of jurisdiction due to a failure to file the notice of appeal within thirty days as required under Ark. R. App. P.–Civ. 4(a). Our decision was based on a file stamp that appeared to indicate filing on December 28, 2007, and this conclusion was affirmed by the signature date of December 27, 2007, on the notice of appeal. We have now received an affidavit from the Benton County Circuit Clerk clarifying that the notice of appeal was filed on December 26, 2007, and not on December 28, 2007. The signature date of December 27, 2006, was apparently a scrivener's error. This makes the notice of appeal timely. We grant the petition for rehearing, and the appeal in this case will be heard and decided.

We also take this opportunity to address the subject of file marks more generally. The rights of litigants, including criminal appellants, turn on accurate file marks. Clerks should assure that file stamps produce clear and legible file marks. They should assure that stamps are always sufficiently inked to provide a clearly legible mark. Those placing the file marks should check to see that the file mark produced is clear and legible and that it is dark enough to be

legible on copies. Further, while not present in the case at issue, all too often a file mark is placed over the top of other printing on the page. This frequently makes the file mark unreadable or nearly unreadable. File marks should never be stamped on top of other printing. We also ask counsel to assure that documents have legible file marks. They should take particular care in assuring that all records and addenda contain copies of documents with legible file marks.

IMBER, J., would deny.

Harvie ANGLIN *v.*
JOHNSON REGIONAL MEDICAL CENTER

08-453 289 S.W.3d 28

Supreme Court of Arkansas
Opinion delivered November 6, 2008

[redacted]

Law Offices of Charles Karr, P.A., by: *Charles Karr*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Stuart P. Miller*, for appellee.

JIM HANNAH, Chief Justice. Appellant Harvie Anglin appeals the order of the Johnson County Circuit Court granting summary judgment in favor of appellee Johnson Regional Medical Center (JRMC). On appeal, he asserts that the circuit court erred in determining that JRMC was entitled to charitable immunity and in determining that it was not necessary to address the issue of governmental immunity. Mr. Anglin also contends that the circuit court erred in concluding that his amended complaint could not relate back to the date of the original complaint pursuant to Rule 15(c) of the Arkansas Rules of Civil Procedure. Finally, Mr. Anglin contends that the circuit court erred in declaring that Rule 56 of the Arkansas Rules of Civil Procedure is constitutional. We affirm the circuit court.

Harvie and Margie Anglin filed a lawsuit on February 6, 2003, as husband and wife, against JRMC and AIG Insurance Company (AIG), based upon allegations of medical injuries sustained by Mrs. Anglin as a result of the alleged negligence of JRMC that occurred on January 24, 2003. Mrs. Anglin later died, and Mr. Anglin filed a motion to revive the original action after being appointed special administrator of his wife's estate. On April 14, 2003, the circuit court ordered the substitution of Mr. Anglin as the party of interest and granted the motion for revival. Mr. Anglin then pursued a wrongful death claim on behalf of his deceased wife. On April 22, 2003, Mr. Anglin nonsuited AIG, and an order dismissing AIG without prejudice was entered.

On December 5, 2003, Mr. Anglin filed a First Amended Complaint against JRMC and TIG Insurance Company (TIG). Mr. Anglin voluntarily nonsuited the action, dismissing it without prejudice, on August 1, 2005.[1] On August 1, 2006, Mr. Anglin filed a complaint based on the same allegations, but he named only JRMC as a defendant.

On November 19, 2007, JRMC filed a motion for summary judgment, contending that JRMC was entitled to both governmental and charitable immunity. In addition, JRMC asserted that Mr. Anglin's complaint, filed on August 1, 2006, in accordance

[1] While the order of dismissal does not specifically mention TIG, the order dismissed the entire action without prejudice, and there is nothing in the record indicating that TIG was dismissed prior to August 1, 2005.

with the savings statute, was a nullity because he failed to name the proper defendant, TIG, JRMC's liability insurer.

Mr. Anglin responded to the motion for summary judgment and asserted that Rule 56 was unconstitutional and that JRMC was not entitled to either governmental or charitable immunity. After a hearing on the motion, the circuit court entered an order granting JRMC's motion for summary judgment and dismissing with prejudice Mr. Anglin's complaint against JRMC. The circuit court concluded that JRMC was entitled to charitable immunity and that because Mr. Anglin did not sue the liability insurer directly, his complaint was a nullity. Further, the circuit court determined that Rule 56 was constitutional. Mr. Anglin now brings this appeal.

Mr. Anglin asserts that the circuit court erred in granting summary judgment on the basis that JRMC was entitled to charitable immunity. 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 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.*

"The essence of the [charitable-immunity] doctrine is that agencies, trusts, etc., created and maintained exclusively for charity may not have their assets diminished by execution in favor of one injured by acts of persons charged with duties under the agency or trust." *George v. Jefferson Hosp. Ass'n*, 337 Ark. 206, 211, 987 S.W.2d 710, 712 (1999) (citing *Crossett Health Ctr. v. Croswell*, 221 Ark. 874, 256 S.W.2d 548 (1953)). The doctrine favors charities and results in a limitation of potentially responsible persons whom an injured party may sue. *Id.* Therefore, we give the doctrine a very narrow construction. *Id.* (citing *Williams v. Jefferson Hosp. Ass'n*, 246 Ark. 1231, 442 S.W.2d 243 (1969)). To deter-

mine whether an organization is entitled to charitable immunity, courts consider the following factors:

> (1) whether the organization's charter limits it to charitable or eleemosynary purposes; (2) whether the organization's charter contains a "not-for-profit" limitation; (3) whether the organization's goal is to break even; (4) whether the organization earned a profit; (5) whether any profit or surplus must be used for charitable or eleemosynary purposes; (6) whether the organization depends on contributions and donations for its existence; (7) whether the organization provides its services free of charge to those unable to pay; and (8) whether the directors and officers receive compensation.

Id. at 212, 987 S.W.2d at 713. These factors are illustrative, not exhaustive, and no single factor is dispositive of charitable status. *Id.*

In support of its motion for summary judgment, JRMC presented the affidavit of its administrator, Larry Morse. Mr. Morse stated that JRMC treats patients and provides medical services free of charge, without regard for the patients' ability to pay. He also stated that JRMC's charter limits it to charitable purposes and establishes it as a not-for-profit entity. Mr. Morse further explained that JRMC is exempt from the payments of federal and state income taxes because it is a 501(c)(3) corporation existing, organized, and operated for charitable purposes. Mr. Morse also stated that JRMC derives its funds primarily from Medicare, Medicaid, and individual patients or their private insurers.

Mr. Morse stated that, as of September 30, 2007, JRMC had provided approximately $849,043 in free medical services for the year. He also stated that JRMC currently experiences an operating margin of (9.78%), indicating a loss from operations.

Along with Mr. Morse's affidavit, JRMC submitted its articles of incorporation, which state that JRMC shall provide health services on a charitable basis and not for profit, but that nothing shall be deemed to require JRMC to furnish services without charge to those able to pay the charges either directly or through third parties. In addition, the articles of incorporation state that no part of the net earnings of JRMC shall inure to the benefit of or be distributable to its members, trustees, officers, or other private persons, except that JRMC shall be authorized and empowered to pay reasonable compensation for services rendered.

In response to JRMC's pleadings accompanying the motion for summary judgment, Mr. Anglin presented the deposition of

Mr. Morse. Citing Mr. Morse's deposition, Mr. Anglin claims that JRMC is not entitled to charitable immunity because it is not maintained exclusively for charity. He states that JRMC is a "big business," and that, while the hospital did not make a profit in 2006, it made profits in excess of $1 million in years prior to 2006. Mr. Anglin also asserts that JRMC is not a charity because it sues patients to collect unpaid hospital bills. Finally, Mr. Anglin contends that, by virtue of the fact that JRMC carries liability insurance, it is a business and not a charity.

Of the eight factors listed in *George*, three are clearly established based upon evidence in the record. Those are: (1) whether the organization's charter limits it to charitable or eleemosynary purposes; (2) whether the organization's charter contains a "not-for-profit" limitation; and (7) whether the organization provides its services free of charge to those unable to pay. The first and second are demonstrated by JRMC's articles of incorporation, which state that the hospital provides health services on a charitable, not-for-profit basis. The seventh factor is established by Mr. Morse's affidavit, wherein he stated that the hospital provides health services free of charge to those who cannot pay. As noted, in the first nine months of 2007, JRMC provided $849,043 in free medical services.

As to the fourth factor, whether the organization earned a profit, the record shows that in some years, JRMC did earn a profit, and in others, it did not. Mr. Morse's affidavit established that JRMC is currently operating at a loss. JRMC satisfies the fifth factor, whether any profit or surplus must be used for charitable or eleemosynary purposes, because Mr. Morse stated any surplus shall be used to fund the hospital to fully perpetuate its charitable community benefit of providing medical assistance to the public.

As for the third factor, whether the hospital's goal is to break even, it appears from the record that JRMC's goal is to not operate at a loss and to use any surplus to fund improvements for the hospital. As for the sixth factor, whether the organization depends on contributions and donations for its existence, it does not appear that JRMC depends on these types of funding for its existence, as the hospital services are paid for by insurance companies, whether governmental or private. As for the eighth factor, whether the directors and officers receive compensation, the

articles of incorporation state that the directors and officers can receive reasonable compensation, but that they shall receive no part of the net earnings.

The circuit court found that Mr. Anglin's response to JRMC's motion for summary judgment did not refute JRMC's overwhelming evidence supporting its contention that JRMC meets the standard governing charitable immunity under Arkansas law. We agree.

Mr. Anglin appears to suggest that JRMC is not a charity hospital because it has in some years earned a profit. Indeed, it is evident that JRMC anticipated that it might make a profit, as demonstrated by Mr. Morse's statement that the hospital intended to use any surplus to perpetuate its purpose of providing healthcare for the benefit of the community. In *George*, we explained:

> [T]rying to break even is only one factor and certainly not a dispositive one when applied to a hospital. Modern hospitals are complex and expensive, technological, economic and medical enterprises that can ill afford to come short of even in their financial integrity. Running a small surplus should not be seen as totally incompatible with charitable status in such cases. . . . The existence of profit is not determinative of charitable status.

337 Ark. at 213, 987 S.W.2d at 713.

Further, the fact that JRMC sued patients to collect unpaid medical bills is not determinative of its charitable status. Mr. Anglin failed to show that in filing suit to collect unpaid bills, JRMC was attempting to collect from patients unable to pay. This leaves only the evidence from JRMC that suit is instituted only against those able to pay but who refuse to do so. Based upon a review of the totality of the relevant facts and circumstances, we hold that the circuit court did not err in concluding that JRMC meets the requirements of a charitable entity for purposes of asserting the defense of the charitable-immunity doctrine. Because we affirm the circuit court's determination that JRMC is charitably immune from suit, we need not address Mr. Anglin's argument regarding governmental immunity.

Mr. Anglin asserts that even if JRMC is immune from tort liability, he may still sue JRMC's liability insurer. He contends that the circuit court erred in concluding that his first amended

complaint, which named TIG Insurance Company as a defendant, could not relate back to the date of the original complaint.[2] The record reveals that Mr. Anglin filed his complaint against JRMC on August 1, 2006, exactly one year after he had nonsuited his first amended complaint, which he had filed on December 5, 2003.[3] At the time Mr. Anglin refiled suit, on August 1, 2006, *Low v. Insurance Co. of North America*, 364 Ark. 427, 220 S.W.3d 670 (2005), was the law regarding the issue of charitable immunity, and the *Low* decision specifically required Mr. Anglin to file a direct cause of action against the insurer of an institution entitled to charitable immunity. Nevertheless, Mr. Anglin did not name the liability insurance carrier of JRMC in his complaint filed August 1, 2006, despite the fact that the *Low* decision was delivered on December 15, 2005, prior to the expiration of Mr. Anglin's savings limitations period, which ran on August 1, 2006. In other words, Mr. Anglin had more than eight months in which to refile his claim against the liability insurance carrier, TIG, in accord with the law as stated in *Low*.

We have previously rejected an appellant's argument that we apply our decision in *Low* prospectively in a case where the appellant had more than two months in which to refile a claim against a charitable defendant's insurance company in accordance with the law in *Low*. *See Felton v. Rebsamen Med. Ctr.*, 373 Ark. 472, 284 S.W.3d 486 (2008). Mr. Anglin acknowledges the *Felton* decision; however, he claims his case is distinguishable from *Felton*, because in his case, the one-year savings statute expired before this court decided *Low*. Mr. Anglin is mistaken. As noted above, the one-year savings statute expired on August 1, 2006, some eight months after our decision in *Low*.

Mr. Anglin's first amended complaint, filed on December 18, 2007, in an attempt to name the hospital's liability insurance carrier as a defendant, is time-barred, and despite his suggestion to the contrary, the relation-back doctrine is inapplicable. Pursuant to our holding in *Low*, Mr. Anglin was required to file a direct cause of action against the insurer of an institution entitled to charitable immunity. The complaint filed on August 1,

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[2] Mr. Anglin filed a first amended complaint naming TIG as a defendant on December 18, 2007.

[3] The December 5, 2003 complaint named both JRMC and TIG as defendants.

2006, the day the savings statute expired, failed to include the insurer. Therefore, that complaint was a nullity. Where the complaint is a nullity, the relation-back doctrine is inapplicable because there is no pleading to amend and nothing to relate back. *See Brewer v. Poole*, 362 Ark. 1, 207 S.W.3d 458 (2005). Accordingly, the circuit court did not err in concluding that the relation-back doctrine was inapplicable.

Finally, Mr. Anglin contends that Arkansas Rule of Civil Procedure 56 is unconstitutional because it denies him his right of trial by jury as guaranteed by the Arkansas Constitution. In this case, the circuit court determined that JRMC was entitled to summary judgment as matter of law because it was immune from suit due to its charitable immunity. Mr. Anglin asserts that Rule 56 "encroaches on the right to trial by jury because it requires a party to demonstrate that there are genuine issues of material fact, or the case will be decided by the trial judge without a jury trial." He states that nothing in the Arkansas Constitution states that the right to a trial by jury extends only to those cases in which there are factual disputes. Further, Mr. Anglin contends that the issue of whether a hospital is entitled to a defense of governmental or charitable immunity is a question of fact for the jury to decide. Accordingly, Mr. Anglin asserts that the circuit court's final judgment granting JRMC's motion for summary judgment pursuant to Rule 56 was unconstitutional because he was not afforded the right to have these fact questions heard by a jury. Article 2, section 7 of the Arkansas Constitution provides in relevant part:

> The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law; and in all jury trials in civil cases, where as many as nine of the jurors agree upon a verdict, the verdict so agreed upon shall be returned as the verdict of such jury, provided, however, that where a verdict is returned by less than twelve jurors all the jurors consenting to such verdict shall sign the same.

The right to a jury trial under this provision is a fundamental right. *Craven v. Fulton Sanitation Serv., Inc.*, 361 Ark. 390, 206 S.W.3d 842 (2005); *Walker v. First Commercial Bank, N.A.*, 317 Ark. 617, 880 S.W.2d 316 (1994). This right extends to all cases that were triable at common law. *Craven, supra*; *Hopper v. Garner*,

328 Ark. 516, 944 S.W.2d 540 (1997). That is, the constitutional right to trial by jury extends only to the trial of issues of fact in civil and criminal causes. *Craven, supra*; *Jones v. Reed*, 267 Ark. 237, 590 S.W.2d 6 (1979). Thus, where there is no factual dispute, there is no constitutional right to a trial by jury.

Mr. Anglin maintains that the question of whether JRMC is entitled to charitable immunity is a question of material fact that entitles him to a jury trial. In support of this argument, he cites *Crossett Health Center v. Croswell*, 221 Ark. 874, 256 S.W.2d 548 (1953). *Croswell* is distinguishable from the instant case because there were disputed facts concerning whether the hospital was a charity. In that case, there was evidence that the hospital had been given land, funds, and furnishings by a lumber company that had an interest in the hospital. Moreover, the articles of incorporation provided that, upon liquidation of the hospital, the assets could be distributed by the board of governors in any manner consistent with state laws. Here, Mr. Anglin claims that because JRMC earned a profit in some years and because JRMC sues to collect unpaid medical bills, he has the right to present to the jury the question of whether JRMC is a charity that is immune from suit.

Where there are disputed facts concerning an organization's charitable status, those facts should be presented to the jury. *See Croswell, supra*. On the other hand, where there are no disputed facts regarding a defendant's charitable status, the determination of charitable status is a question of law for the court. In *George*, the appellant argued that there were factual issues with respect to the fourth, fifth, and eighth factors — whether the organization earned a profit, whether any profit or surplus must be used for charitable or eleemosynary purposes, and whether the directors and officers receive compensation. We disagreed, stating:

> As to the fourth, fifth, and eighth, appellant contends that these are all questions of fact and must therefore be tried rather than resolved on summary judgment. We disagree. While there may be fact issues involved, they are not matters of disputed fact. Rather, they are differing legal interpretations of undisputed facts. In such cases, an appellate court should grant summary judgment where reasonable persons would not reach different conclusions based upon those undisputed facts. *Leigh Winham, Inc. v. Reynolds Ins. Agency*, 279 Ark. 317, 651 S.W.2d 74 (1983). When each of the remaining

> *Masterson*[4] factors are analyzed with the relevant undisputed facts, JRMC's charitable status is established.

George, 337 Ark. at 212-13, 987 S.W.2d at 713.

Here, the issues regarding JRMC's profit and its practice of filing suit to collect unpaid medical bills are not matters of disputed fact, but rather they are differing legal interpretations of undisputed facts. *See George, supra.* There are no disputed facts, as was the case in *Croswell.* Therefore, in this case, because no disputed facts existed, the circuit court correctly determined, as a matter of law, that JRMC was a charity entitled to immunity. Because there were no genuine issues of material fact, the circuit court did not err in granting summary judgment. We hold that, because a person is entitled to a jury trial only in the event that there are factual issues, and none exist in this case, Mr. Anglin was not unconstitutionally denied his right to a jury trial.

Affirmed.

BROWN, J., dissents.

ROBERT L. BROWN, Justice, dissenting. I would reverse the grant of summary judgment in this case because the issue of whether Johnson Regional Medical Center ("JRMC") is a charitable organization entitled to charitable immunity is contested by the parties and presents a genuine issue of material fact for the jury to resolve. The trap that the majority, and the trial court before it, fell into was to decide these issues of fact as a "legal interpretation of undisputed facts," all of which runs counter to the foundational principle in our jurisprudence that juries are fact-finders — not the judges.

As an additional matter, I disagree that all of the eight *George* factors are undisputed by the parties. *See George v. Jefferson Hospital Ass'n*, 337 Ark. 206, 987 S.W.2d 710 (1999). Harvie Anglin, as the plaintiff in this case, presented proof in deposition form that JRMC makes a net profit in most years; that it has over six million dollars in reserve funds; that it is the fourth largest employer in Clarksville; that government or private insurance accounts for the

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[4] In *Masterson v. Stambuck*, 321 Ark. 391, 902 S.W.2d 803 (1995), the court adopted the eight-factor test to determine whether an organization is entitled to charitable immunity.

majority of its income and it receives an insignificant portion from donations; that charity care accounts for a very small part of the services it provides; that it carries liability insurance; and that its administrative employees are well paid. That evidence, at the very least, calls into question whether JRMC's profit and reserves are used for charitable care and the extent of free care it offers.

But the main fallacy in the majority opinion is that it seems to claim that, if the parties agree on the profit amounts and amount of charitable care, there is no genuine issue of material fact for purposes of deciding charitable immunity. But that misses the point entirely. Even assuming that no one disputes the accuracy of the amount of profit made by JRMC or the total amount of its reserve funds or the amount of charitable care it gives, the ultimate question is whether, based on all the factors, JRMC is, in fact, a charity. That is the issue to be resolved and that is a factual inquiry. Based on the majority's reasoning, however, no matter how much profit a hospital makes and no matter how little it offers in charitable care, as long as the parties do not contest those amounts, the hospital will never be entitled to a jury trial with respect to the hospital's status. That cannot be the law.

In *Crossett Health Center v. Croswell*, 221 Ark. 874, 883, 256 S.W.2d 548, 552 (1953), this court made the point clearly and undisputedly that it was up to the jury to consider the factors militating for and against charitable status and to determine whether "the Medical Center was a trust involving dedication of its property to the public." Moreover, this court has made it clear that we give the doctrine of charitable immunity "a very narrow construction." *Williams v. Jefferson Hosp. Ass'n*, 246 Ark. 1231, 442 S.W.2d 243 (1969). And yet in analyzing the eight *George* factors, the majority tilts in favor of JRMC and gives a broad construction for charitable immunity. For example, for factor three, which is whether the hospital's goal is to break even, JRMC admits that breaking even is not its goal and that any profit is used to fund hospital improvements. Presumably, "improvements" would also include compensation for directors and officers. The point is that there is no suggestion that profit goes solely to charitable care. The majority also announces that JRMC provides $849,043 in free medical services, which is at odds with Anglin's deposition proof. But, in addition, does Medicare and Medicaid pay for some of this free care? That question is unanswered in the majority's opinion.

After today's decision, it is difficult for me to imagine how any of the *George* factors or the issue of charitable immunity itself

would ever present an issue for the jury to decide. The majority seems to accept JRMC's figures and to close the door on that ever happening. As a result, deciding whether the *George* factors are met, and immunity itself, becomes solely for judges to resolve as a matter of law. Again, that is at odds with all of our summary-judgment jurisprudence when a genuine issue of fact remains to be resolved. In short, whether an entity is a charity is the material factual inquiry in summary judgment, not a "legal interpretation," as the majority would have it. It also bears mentioning that Arkansas is one of only four states that still provides absolute charitable immunity for its hospitals. *See* Janet Fairchild, Annotation,, *Tort Immunity of Nongovernmental Charities - Modern Status*, 25 A.L.R. 4th 517 (1983 & Supp. 2007).

I would deny the hospital's motion for summary judgment and remand for a jury trial on the question of whether JRMC is entitled to charitable immunity. For these reasons, I respectfully dissent.

ADVANCE AMERICA SERVICING of ARKANSAS, INC., d/b/a Advance America Cash Advance; Advance America, Cash Advance Centers of Arkansas, Inc.; and Advance America, Cash Advance Centers, Inc. *v.* Brenda McGINNIS, Individually and on Behalf of a Class of Similarly Situated Persons

08-492 289 S.W.3d 37

Supreme Court of Arkansas
Opinion delivered November 6, 2008

[Rehearing denied December 11, 2008.]

Wright, Lindsey & Jennings, by: *Claire Shows Hancock* and *Gary D. Marts, Jr.*; *Sutherland Asbill & Brennan*, by: *Lewis S. Wiener, Phillip E. Stano*, and *Brendan Ballard*, for appellants.

Arnold, Batson Turner & Turner, by: *Todd Turner* and *Dan Turner*; *Scholtens & Averitt*, by: *Chris Averitt* and *Jay Scholtens*, for appellee.

DONALD L. CORBIN, Justice. Appellants, Advance America Servicing of Arkansas, Inc., d/b/a Advance America Cash Advance; Advance America, Cash Advance Centers of Arkansas, Inc.; and Advance America, Cash Advance Centers, Inc., appeal from the order of the Clark County Circuit Court denying their motion to compel arbitration of a putative class-action complaint for alleged violations of Arkansas's Constitution and laws prohibiting usurious interest and deceptive trade practices. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(a)(1) as an appeal involving the interpretation or construction of the Arkansas Constitution. On appeal, Appellants argue the circuit court erred in concluding the arbitration provision in question was invalid for lack of mutuality, in looking outside the arbitration provision to other parts of the underlying contract, and in failing to strike the invalid portion of the contract and to enforce the arbitration provision. We find no error and affirm the circuit court's denial of the motion to compel arbitration.

Appellee, Brenda McGinnis, filed a putative class-action complaint against Appellants in circuit court on February 27, 2007, alleging Appellants had charged her and other potential class members usurious interest, engaged in deceptive trade practices, and violated a prior court-approved settlement agreement. According to the complaint, Appellee engaged in a transaction with Appellants at their Jonesboro, Arkansas, branch office on Novem-

ber 3, 2006, whereby she wrote a check for $278.83 and Appellants gave her $250.00 in cash and agreed to hold her check until her next payday. The complaint alleged this transaction was typical of the transactions between Appellants and its customers in Arkansas and amounted to a loan resulting in an effective annual percentage rate of over 150% in violation of the prohibition of usurious interest contained in article 19, section 13 of the Arkansas Constitution. As such, the complaint alleged entitlement to twice the amount of interest paid plus costs and attorney's fees. *See* Ark. Const. art. 19, § 13; Ark. Code Ann. §§ 4-57-101 et seq. (Repl. 2001 & Supp. 2005). In addition to being a usurious loan, the complaint also alleged this transaction was a violation of the Arkansas Deceptive Trade Practices Act, Arkansas Code Annotated sections 4-88-101 et seq. (Repl. 2001 & Supp. 2003), entitling Appellee to her actual damages plus costs and attorney's fees. The complaint alleged further that the transaction demonstrated that Appellants were operating under the Check-Cashers Act, Arkansas Code Annotated sections 23-52-101 et seq. (Repl. 2000 & Supp. 2005), and charging fees under that act in violation of a settlement agreement to cease conducting check-cashing transactions in Arkansas approved by the circuit court in *Garrett v. Advance America, Cash Centers of Arkansas, Inc.*, Clark County Circuit Court, Case No. CIV-99-152.

Appellants moved to compel arbitration of the matters alleged in the complaint.[1] They argued that Appellee's claims arose from six transactions between her and Appellants conducted from September 1, 2006 to February 2, 2007, pursuant to a Deferred Presentment Option Agreement (Customer Agreement) she executed with Appellants. Appellants contended that, pursuant to the express terms of the Customer Agreement she signed, Appellee was required to submit to arbitration the claims alleged in her complaint. Appellants argued that Appellee did not challenge the arbitration provision of the Customer Agreement; rather, she asserted a challenge to the Customer Agreement as a whole and therefore *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440

[1] We observe that while the motion to compel arbitration was pending in state circuit court, Appellants also filed an action in federal district court to compel arbitration and stay the state-court proceedings. The Court of Appeals for the Eighth Circuit ultimately dismissed that action, determining that the amount in controversy did not satisfy the requirements for diversity jurisdiction. *Advance Am. Servicing of Ark., Inc. v. McGinnis*, 526 F.3d 1170 (2008).

(2006), required the circuit court to send the case to arbitration. Appellants attached to their motion to compel arbitration a copy of the Customer Agreement. The portions of that Customer Agreement that are at issue in this appeal are as follows:

Deferred Presentment Option Agreement

. . . .

Default, Returned Check Fee, Court Costs, and Attorney's Fee. You will be in default under this Customer Agreement if you do not pay us any amount you owe us under this Customer Agreement or you cause your Check not to be honored on or after the Presentment Date. If the Check is returned to us from your bank or other financial institution due to insufficient funds, closed account, or a stop-payment order, we shall have the right to all civil remedies allowed by law to collect the check and shall be entitled to recover a returned check fee of $25.00 as authorized by applicable Arkansas law, court costs, and reasonable attorney's fee paid to an attorney who is not our salaried employee. Neither we nor any other person on our behalf will institute or initiate any criminal prosecution against you.

. . . .

Acknowledgments. Please note that this Customer Agreement contains a binding Waiver of Jury Trial and Arbitration Provision. You acknowledge that we issued a copy of this Customer Agreement to you. You acknowledge that we paid the proceeds of the transaction to you, in cash. . . . You further acknowledge that you have read, understand, and agree to all of the terms on both sides of this Customer Agreement, including the provision on the other side of this Customer Agreement entitled "Waiver Jury Trial and Arbitration Provision."

. . . .

WAIVER OF JURY TRIAL AND ARBITRATION PROVISION. Arbitration is a process in which persons with a dispute: (a) waive their rights to file a lawsuit and proceed in court and to have a jury trial to resolve their disputes; and (b) agree, instead, to submit their disputes to a neutral third person (an "arbitrator") for a decision. Each party to the dispute has an opportunity to present

some evidence to the arbitrator. Pre-arbitration discovery may be limited. Arbitration proceedings are private and less formal than court trials. The arbitrator will issue a final and binding decision resolving the dispute, which may be enforced as a court judgment. A court rarely overturns an arbitrator's decision. Nothing contained in this Waiver of Jury Trial and Arbitration Provision (hereinafter the "Arbitration Provision") shall prevent or limit the authority of the Arkansas State Board of Collection Agencies from fully exercising its administrative remedies as set forth in Act 1216 of 1999 nor preclude you from any administrative remedies available to you under the Act. *THEREFORE, YOU ACKNOWLEDGE AND AGREE AS FOLLOWS:*

1. For purposes of this Arbitration Provision, the words "dispute" and "disputes" are given the broadest possible meaning and include, without limitation (a) all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision, the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision; (b) all federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to this Customer Agreement (including the Arbitration Provision), the information you gave us before entering into this Customer Agreement, including the Application, and/or any past agreement or agreements between you and us; (c) all counterclaims, cross-claims and third-party claims; (d) all common law claims, based upon contract, tort, fraud, or other intentional torts; (e) all claims based upon a violation of any state or federal constitution, statute or regulation; (f) all claims asserted by us against you, including claims for money damages to collect any sum we claim you owe us; (g) all claims asserted by you individually against us and/or any of our employees, agents, directors, officers, shareholders, governors, managers, members, parent company or affiliated entities (hereinafter collectively referred to as "related third parties"), including claims for money damages and/or equitable or injunctive relief; (h) all claims asserted on your behalf by another person; (i) all claims asserted by you as a private attorney general, as a representative and member of a class of persons, or in any other representative capacity, against us and/or related third parties (hereinafter referred to as "Representative Claims"); and/or (j) all claims from or relating directly or indirectly to the disclosure by or related third parties of any non-public personal information about you.

2. You acknowledge and agree that by entering into this arbitration Provision:

(a) *YOU ARE WAIVING YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES;*

(b) *YOU ARE WAIVING YOUR RIGHT TO HAVE A COURT, OTHER THAN A SMALL CLAIMS TRIBUNAL, RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; and*

(c) *YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.*

3. Except as provided in *Paragraph 6* below, all disputes including any Representative Claims against us and/or related third parties *shall* be resolved by binding arbitration *only* on an individual basis with you. *THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION.*

. . . .

6. All parties, including related third parties, shall retain the right to seek adjudication in a small claims tribunal for disputes within the scope of such tribunal's jurisdiction. Any dispute, which cannot be adjudicated within the jurisdiction of a small claims tribunal, *shall* be resolved by binding arbitration. Any appeal of a judgment from a small claims tribunal *shall* be resolved by binding arbitration.

In her response to Appellants' motion to compel arbitration, Appellee for the first time asserted a challenge to the arbitration provision of the Customer Agreement as being unenforceable for lack of mutuality. Appellee relied on former case law from this court holding similar arbitration provisions unenforceable as lack-

ing the element of mutuality of obligation. *See, e.g.*, *Nat'l Cash, Inc. v. Loveless*, 361 Ark. 112, 205 S.W.3d 127 (2005). Appellee also claimed that the lack of mutuality rendered the Customer Agreement one-sided and therefore unconscionable. According to Appellee's response, *Buckeye* was not applicable to her case since she now included a challenge to the arbitration provision of the Customer Agreement.

The circuit court held a hearing on November 20, 2007, on the motion to compel arbitration and ruled from the bench that

> the language, reserving the right to all civil remedies, when considered with the language in the arbitration agreement section of the contract, that the arbitration agreement is invalid because the remedies lacked mutuality of the parties, not that the whole contract lacks mutuality. . . .
>
> I'm not making any ruling with regard to the validity or non-validity of the contract. I'm making my ruling only with regard to the language which I think has to be considered in conjunction with the arbitration language to determine whether or not the arbitration clause is invalid.

The circuit court then entered an order on January 16, 2008, denying the motion to compel arbitration for the reasons stated from the bench. This appeal followed.

An order denying a motion to compel arbitration is an immediately appealable order. Ark. R. App. P.–Civ. 2(a)(12). We review the circuit court's order denying Appellants' motion to compel arbitration de novo on the record. *Nat'l Cash*, 361 Ark. 112, 205 S.W.3d 127.

The first point Appellants assign as error to the trial court is the ruling that the "all civil remedies" language in the Customer Agreement renders the arbitration provision unenforceable for lack of mutuality of obligation. Implicit in the circuit court's ruling was a finding, based upon this court's case law, that the "all civil remedies" language gives Appellants access to the circuit court while limiting Appellee to arbitration. Appellants assert this was an incorrect interpretation of the arbitration provision, which provides that all disputes arising under the Customer Agreement must be resolved in either small claims court or binding arbitration. Appellants point out that the "all civil remedies" language is located separately and independently from the arbitration provi-

sion and that the circuit court erroneously grafted the language into the arbitration provision to find that it lacks mutuality. Appellants assert the circuit court erred in fundamentally equating and thereby blurring the distinction between "all civil remedies" available to a party and the "forum" in which a party may seek such remedies. Appellants maintain, for the first time on appeal, that the "all civil remedies" language is an independent-damages provision of the Customer Agreement giving Appellants the right to pursue "all civil remedies" in the event a customer's check is dishonored, but does not give them the right to pursue those remedies in judicial forums.

Appellants assert five subpoints under this first assignment of error. We address all five subpoints, but first point out that many of these subpoints raised under this first assignment of error were not raised below. At the hearing on the motion to compel arbitration, Appellants' primary argument was that *Buckeye Check Cashing*, 546 U.S. 440, required Appellee's complaint to be heard by an arbitrator. Their focus at the hearing was on the fact that Appellee could not be in court because, according to *Buckeye*, her complaint only challenged the validity of the contract as a whole and not the arbitration provision. In addition, they argued that it was only in response to the motion to compel that Appellee raised a challenge to the arbitration provision; and then the challenge was not to the arbitration provision itself but to the "all civil remedies" language, which is found elsewhere in the Customer Agreement outside the arbitration provision and therefore required the court to evaluate the contract as a whole in violation of *Buckeye*. Thus, although there was discussion at the hearing regarding the "all civil remedies" language and mutuality of the arbitration provision, as we discuss in the remainder of this opinion, much of what Appellants now argue specifically on appeal simply was not raised or ruled upon below and is therefore not preserved for appellate review.

It is elementary that this court will not consider arguments that are not preserved for appellate review. *Seidenstricker Farms v. Doss*, 374 Ark. 123, 286 S.W.3d 142 (2008). We will not do so because it is incumbent upon the parties to raise arguments initially to the trial court in order to give that court an opportunity to consider them. *Id.* Otherwise, we would be placed in the position of reversing a trial court for reasons not addressed by that court. *Id.*

We first dispose of those subpoints that are not preserved for our review. These include Appellants' arguments that (1) the fact

that "all civil remedies" is listed on the face of the Customer Agreement in the same sentence as returned check fee, court costs, and reasonable attorney's fees reflects the parties' intent that "all civil remedies" refer to "damages" and not the "forum" in which a party may pursue such damages; and that (2) because the "all civil remedies" language appears outside and independent from the arbitration provision, it would defy the plain meaning of the Customer Agreement and the rules of contract construction to read the "all civil remedies" language as invalid for lack of mutuality. As previously stated, this court does not address arguments presented for the first time on appeal.

Turning now to Appellants' subpoints that are preserved for our review, we first consider the argument that the "all civil remedies" language in the Customer Agreement merely restates the law as codified in the Check-Cashers Act and its implementing regulations and is therefore evidence that the "all civil remedies" language is intended to ensure Appellants' right to recover damages, not to give them access to judicial forums. Below, Appellee cited *Richard Harp Homes, Inc. v. Van Wyk*, 99 Ark. App. 424, 262 S.W.3d 189 (2007), which held that a reference in an arbitration clause to court costs, expenses of litigation, and attorney's fees rendered the arbitration clause ambiguous and therefore defeated mutuality. Appellants attempted to distinguish *Van Wyk* based on the fact that the language at issue in this case was a restatement of the Check-Cashers Act.

We note that the Act and regulations do use very similar language giving a check-casher the right to all civil remedies allowed by law, including receiving the face amount of the check purchased, a returned check fee, court costs, and reasonable attorney's fees. However, the mere statement of such language in the Act does not restore the lack of mutuality of obligation in this Customer Agreement caused by the "all civil remedies" language. This court has consistently and repeatedly held that the reference to "all civil remedies" available to only one party in a check-cashing agreement renders the agreement to arbitrate invalid for lack of mutuality. *See, e.g.*, *E-Z Cash Advance v. Harris*, 347 Ark. 132, 60 S.W.3d 436 (2001). There, this court stated that "[t]aking into account their line of business, it is difficult to imagine what other causes of action against a borrower remain that [the check-casher] would be required to submit to arbitration." *Id.* at 141, 60 S.W.3d at 442. Thus, regardless of the source and the location of the "all civil remedies" language, there is no other remedy for

Appellants to seek in arbitration, and the "all civil remedies" language therefore has the effect of allowing Appellants to go to circuit court, thereby destroying the element of mutuality since Appellee does not also have that right. The location of the "all civil remedies" language in the Customer Agreement and the source of the language have no effect on the issue of mutuality or lack thereof.

Appellants also argue as a subpoint that mutuality of obligation does not require mutuality of remedy. They contend that under this Customer Agreement, the fact that the remedy or damages available to one party may be different than the remedy or damages available to the other party, does not defeat mutuality of obligation in the separate and independent arbitration provision. Contrary to Appellants' assertion, we do not interpret the circuit court's ruling as requiring both parties to have the same remedies. Even if the ruling below did so require, however, we can affirm it for the reason that mutuality of obligation is required and is lacking here. It is axiomatic that this court can affirm a circuit court if the right result is reached even if for a different reason. *Office of Child Support Enforcement v. Wood*, 373 Ark. 595, 285 S.W.3d 599 (2008).

Appellants' second assignment of error is the circuit court's holding that a term outside and independent of the arbitration provision rendered the arbitration provision unenforceable. Appellants contend the circuit court erred in looking to provisions of the contract outside the arbitration provision to evaluate the validity of the arbitration provision. The circuit court ruled that the "all civil remedies" language in the Customer Agreement destroyed the arbitration provision's mutuality. Appellants contend that since the "all civil remedies" language was not part of the arbitration provision itself, the circuit court erroneously evaluated the contract as a whole and thereby contravened *Buckeye Check Cashing*, 546 U.S. 440.

Buckeye does not stand for the proposition argued by Appellants. *Buckeye* holds that it is improper for a court to consider a claim that a contract containing an arbitration clause is invalid as a whole when there is not also a claim that the arbitration clause is itself invalid. *Buckeye* does not, however, also hold that when considering the validity of an arbitration clause, a court is constrained to the clause itself and prohibited from considering other

parts of the contract relating to the agreement to arbitrate disputes arising from the contract. Appellants' argument extends the holding of the *Buckeye* case too far.

Buckeye involved a putative class action filed in Florida state court alleging the deferred deposit contract signed by Buckeye Check Cashing and its customers violated Florida's laws prohibiting usury and deceptive trade practices. Buckeye Check Cashing moved to compel arbitration of that case. The United States Supreme Court granted certiorari to decide "whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality." *Buckeye Check Cashing*, 546 U.S. at 442. The Supreme Court observed that "[t]he crux of the complaint is that the contract as a whole (including its arbitration provision) is rendered invalid by the usurious finance charge" and went on to conclude that "because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court." *Id.* at 444, 446. The Supreme Court ultimately held that, "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449.

Like *Buckeye*, the complaint in the present case does not assert a challenge to the arbitration provision itself, but rather asserts a challenge to the whole contract as being usurious and a deceptive trade practice. However, unlike *Buckeye* where there was no challenge to the arbitration provision itself, Appellee in the present case asserted a claim that the arbitration provision was invalid for lack of mutuality of obligation in her response to the motion to compel arbitration.

The circuit court below clearly stated from the bench that it was not making a ruling on the merits of the validity of the contract as a whole, but was ruling that the "all civil remedies" language appearing on the first page of the Customer Agreement rendered the arbitration provision found in the remainder of the Customer Agreement invalid for lack of mutuality. As we quoted previously in this opinion, the circuit court clearly stated: "I'm not making any ruling with regard to the validity or non-validity of the contract. I'm making my ruling only with regard to the language which I think has to be considered in conjunction with the arbitration language to determine whether or not the arbitration

clause is invalid." This ruling does not amount to an evaluation of the validity of the contract as a whole and therefore does not run afoul of *Buckeye.*

Appellants' third assignment of error is that the circuit failed to strike the allegedly offensive "all civil remedies" clause and enforce the remainder of the arbitration provision. Appellants contend that rather than invalidating the arbitration provision, the circuit court should have, at most, invalidated and severed only the "all civil remedies" language, while giving effect to the intent of the parties to arbitrate claims covered by the arbitration provision. Appellants concede that the arbitration provision does not contain a severance provision. They argue, however, that the essence of the Customer Agreement is that the parties arbitrate any disputes arising from or related to the Customer Agreement and severing the "all civil remedies" language does not change the essence of that intent to arbitrate.

Neither the addendum nor the abstract reveals that Appellants ever asked the circuit court to strike the "all civil remedies" language and give effect to the remainder of the Customer Agreement. Appellants' motion to compel arbitration does not raise the issue. The abstract of the hearing does not indicate this issue was ever presented to or ruled upon by the circuit court. Because Appellants did not raise below the argument that the circuit court should have struck the "all civil remedies" language from the Customer Agreement that it now makes on appeal, we do not consider that argument. *Seidenstricker,* 374 Ark. 123, 286 S.W.3d 142.

Appellee includes an assertion in her brief that this court could affirm the trial court for a reason different from what it ruled — that the arbitration provision was unconscionable. There is no need to address this assertion since we affirm on the lack of mutuality. *See, e.g., The Money Place v. Barnes,* 349 Ark. 411, 78 S.W.3d 714 (2002) (stating that because the arbitration provision was held unenforceable for lack of mutuality, there was no need to discuss whether the arbitration provision was unconscionable).

We conclude that, consistent with *Buckeye,* it was permissible for the trial court to rule on the validity of the arbitration provision because Appellee challenged the arbitration provision on an independent basis from her challenge to the contract as a whole. Appellee's challenge to the contract was that it was a usurious loan, a deceptive trade practice, and a violation of

a court-approved settlement agreement. Her challenge to the arbitration provision was that it was unenforceable as lacking mutuality of obligation. The trial court followed the numerous cases from this court invalidating similar arbitration provisions and contract language as lacking mutuality of obligation and therefore correctly denied Appellants' motion to compel arbitration. The order denying the motion to compel arbitration is affirmed.

Edward GRAYS *v.* ARKANSAS OFFICE of CHILD SUPPORT ENFORCEMENT

07-1202 289 S.W.3d 12

Supreme Court of Arkansas
Opinion delivered November 6, 2008

Billy J. Hubbell, for appellant.

Donna D. Galloway, for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellant Edward Grays appeals from an order of the Drew County Circuit Court granting the motion for declaratory relief filed by Appellee Arkansas Office of Child Support Enforcement ("OCSE"). The circuit court's order granted judgment against Grays in the amount of $13,787.63 for child-support arrears and in the amount of $1,777.72 for related court costs and fees. The circuit court also determined that it would be inequitable for the former custodial parent to be denied the delinquent child support admittedly incurred by Grays, despite the fact that the child at issue had, after reaching the age of majority, received a lump-sum payment for Social Security disability benefits due to his father's disability. Grays argues on appeal that the circuit court erred in concluding that he was not entitled to credit the payment of disability benefits to his son against his child-support arrears. Because this case presents an issue of first impression, of substantial public interest, and in need of clarification or development of the law, our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(b)(1), (4), and (5) (2008). We find no error and affirm.

Pursuant to a decree of divorce filed August 10, 1990, Flossie Grays Junior was awarded custody of her two children with Edward Grays. Grays was ordered to pay $108 bi-weekly in support of the children, Shagala and Shane. Grays was also assessed an annual child-support administrative fee in the amount of $24. Grays's child-support obligation was subsequently altered by the following orders:

July 17, 1998: Grays's obligation reduced to $61 per week because Shagala had been emancipated; $55 in costs assessed.

December 22, 1998: Judgment granted against Grays in the amount of $3,057.20 for past-due child support; Grays ordered to pay $61 per week in current support and $6.10 per week toward arrears; $55 in costs assessed; attorney's fee of $305.72 assessed.

December 21, 1999: Judgment granted against Grays in the amount of $3,579.20 for past-due child support; Grays ordered to pay $61 per week in current support and $9 per week toward arrears; $55 in costs assessed.

June 23, 2000: Judgment granted against Grays in the amount of $5,316.20 for past-due child support; Grays ordered to pay $61 per week in current support and $9 per week toward arrears; $410 in costs and attorney's fees assessed.

July 13, 2001: Judgment granted against Grays in the amount of $1,956.20 for past-due child support; Grays ordered to pay $61 per week in current support and $9 per week toward arrears; $380 in costs and attorney's fees assessed.

December 17, 2003 (order amended January 13, 2004): Judgment granted against Grays in the amount of $8,660.20 for past-due child support; Grays ordered to pay $61 per week in current support and $9 per week toward arrears; $320 in costs and attorney's fees assessed.

March 16, 2005: Judgment granted against Grays in the amount of $12,610.63 for past-due child support; Grays ordered to pay $36 per week in current support; order directed that no amount be paid toward arrears because Grays had no income and was pursuing a claim for Social Security disability benefits.

Body attachments with cash bonds were issued against Grays on June 7, 2000; March 12, 2001; and September 2, 2005. An order entered on October 26, 2005, dismissed the September 2, 2005, body attachment and ordered Grays to resume support payments of $36 per week.

On October 27, 2005, a Social Security Administration Administrative Law Judge found that Grays had been disabled since November 21, 2001. The ALJ issued a decision, based on Grays's June 11, 2003, application, finding that Grays was entitled to a period of disability commencing on November 21, 2001, and continuing through the date of the decision. As a result, Grays received a lump-sum payment of $16,615.20 in disability back pay for the period between June 2002 and January 2006. In 2006, he began receiving monthly payments of $1,067.[1] Those payments were increased to $1,102 per month in 2007.

On August 1, 2006, the Social Security Administration issued a check in the amount of $15,835 to Shane, as an auxiliary benefit to Grays's disability status. This amount represented back

[1] The parties stipulated to this fact below. However, other evidence in the record indicates that Grays's monthly payments were in the amount of $979.

pay for the period between June 2002 and January 2006. Because he had turned eighteen years old on January 3, 2006, Shane was not entitled to continuing monthly payments from the Social Security Administration. In addition, Grays's ongoing child-support obligation had terminated by operation of law due to Shane's reaching the age of majority. However, as of 2006, Grays owed past-due support in the amount of $13,787.63 and unpaid costs and fees in the amount of $1,753.72.[2]

Consequently, OCSE issued an income withholding notice to the Social Security Administration, seeking to recover from Grays's disability benefits. In August of 2006, pursuant to the notice, OCSE began receiving payments of $156 per month. This amount was deducted from Grays's monthly benefits payment. The August 2006 deduction was disbursed to Flossie Junior, while subsequent deductions were placed on "distribution hold" by OCSE.

On August 22, 2006, OCSE filed its motion for declaratory relief in the circuit court, responding to Grays's request that the lump-sum payment from the Social Security Administration to his son be credited against his child-support arrears. OCSE requested that the circuit court determine whether Grays was entitled to the offset. Following a hearing and the submission of briefs by the parties, the circuit court issued a letter opinion, dated July 19, 2007, and formal order, dated July 31, 2007. The court found that the payment to Shane by the Social Security Administration did nothing to relieve the inequities resulting from Grays's chronic failure to pay child support. The court specifically noted that, while the support was intended for Shane's benefit, Flossie bore the costs associated with Grays's failure to pay. Accordingly, the court ordered that the income withholding notice would continue until all judgments against Grays were satisfied in full and directed that those payments that had been collected but placed on distribution hold be released to Flossie and credited toward the judgment for child-support arrears. Grays filed a timely notice of appeal.

Our standard of review for an appeal from a child-support order is de novo on the record, and we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *Ward v.*

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[2] This amount differs from the $1,777.72 judgment ultimately entered for costs and fees by $24, which represents the annual administrative fee assessed at the beginning of 2007.

Doss, 361 Ark. 153, 158, 205 S.W.3d 767, 770 (2005). In reviewing a circuit court's findings, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.* However, a circuit court's conclusions of law are given no deference on appeal. *Id.*

Grays contends that a 2004 decision by the Arkansas Court of Appeals, *Arkansas Office of Child Support Enforcement v. Harris*, 87 Ark. App. 59, 185 S.W.3d 120 (2004), answers the question at issue. The court of appeals in *Harris* affirmed a circuit court's ruling permitting Social Security disability payments made to an adult child to discharge the non-custodial parent's child-support arrearage. *Id.* The decision relied in part upon this court's holding in *Cash v. Cash*, 234 Ark. 603, 353 S.W.2d 348 (1962), in which a non-custodial father was permitted to displace his court-ordered child-support payments by Social Security retirement benefits paid to his son. Our decision in *Cash* was premised largely on equitable principles, specifically the father's supposed inability to retire if forced to continue paying child support and his good-faith efforts to meet his "moral obligation" to his son and former wife. *Id.* at 605-06, 353 S.W.2d at 349-50. The court of appeals in *Harris*, however, was precluded from addressing equitable factors urged by OCSE, such as the financial impact on the custodial parent, the financial standing of the non-custodial parent, and the length of the non-custodial parent's disability, because such factors were not argued at the trial level and thus not preserved for appellate review. 87 Ark. App. at 62, 185 S.W.3d at 122. OCSE argues in the instant case that the *Harris* court's inability to consider equitable factors distinguishes it from the case at bar.

OCSE points to another critical distinction in the *Harris* case. The court of appeals explicitly limited its holding as follows:

> There are differing views as to whether social security benefits can be credited toward *arrearages* in child support. Some courts do not allow it. Others permit it, but allow credit only for arrearages that accrue during the period of disability. Appellant did not argue below that arrearages, per se, were not subject to discharge. For this reason and because the record was not developed on this issue, we leave that question for another day.

Harris, 87 Ark. App. at 62, 185 S.W.3d at 122 n.2 (emphasis in original) (internal citations omitted). Indeed, our review of cases from

other jurisdictions addressing this issue shows a variety of approaches. Some jurisdictions have chosen not to permit credits against the non-custodial parent's child-support arrears, noting that to do so would amount to "ordering the children to pay the accrued arrearages for their own support." *Fuller v. Fuller*, 360 N.E.2d 357, 358 (Ohio Ct. App. 1976); *see also Hennagin v. County of Yolo*, 481 F. Supp. 923 (E.D. Cal. 1979). Others have allowed credits on the basis of Social Security benefits. *See, e.g.*, *Binns v. Maddox*, 327 So. 2d 726 (Ala. Civ. App. 1976); *Perteet v. Sumner*, 269 S.E.2d 453 (Ga. 1980); *Folds v. Lebert*, 420 So. 2d 715 (La. Ct. App. 1982); *Cohen v. Murphy*, 330 N.E.2d 473 (Mass. 1975); *Hanthorn v. Hanthorn*, 460 N.W.2d 650 (Neb. 1990); *Griffin v. Avery*, 424 A.2d 175 (N.H. 1980). The Supreme Court of Kansas has noted as follows:

> Social Security benefits paid to the [custodial parent] for the benefit of the parties' minor children as the result of the [non-custodial parent's] disability may not, however, be regarded as gratuitous. On the contrary, the payments received by the [custodial parent] are for the children as beneficiaries of an insurance policy. The premiums for such policy were paid by the [non-custodial parent] for the children's benefit. The purpose of Social Security is the same as that of an insurance policy with a private carrier, wherein a father insures against his possible future disability and loss of gainful employment by providing for the fulfillment of his moral and legal obligations to his children. This tragedy having occurred, the insurer has paid out benefits to the beneficiaries under its contract of insurance with the [non-custodial parent], and the purpose has been accomplished.

Andler v. Andler, 538 P.2d 649, 653 (Kan. 1975). The rationale for permitting credits against child-support arrears has been similarly articulated by other courts.

Still other jurisdictions have permitted credits but have made distinctions among types of arrearages that may be discharged. For example, some have disallowed credit against arrearages accumulating prior to the date of disability, reasoning that there is no excuse for the failure to pay prior to the onset of disability. *See, e.g.*, *Frens v. Frens*, 478 N.W.2d 750 (Mich. Ct. App. 1992); *Weaks v. Weaks*, 821 S.W.2d 503 (Mo. 1991). Others have allowed credits only against those arrearages accruing after the child's receipt of benefits. *See, e.g.*, *Potts v. Potts*, 240 N.W.2d 680 (Iowa 1976); *Miller v. Miller*, 929 S.W.2d 202 (Ky. Ct. App. 1996);

Mask v. Mask, 620 P.2d 883 (N.M. 1980); *Children & Youth Servs. of Allegheny County v. Chorgo*, 491 A.2d 1374 (Pa. Super. Ct. 1985). With regard to arrearages accrued during the period between the disability date or application for benefits and the commencement of benefits payments, several courts have looked to factors such as whether the failure to pay was willful and whether there was a demonstrated inability to pay. *See, e.g., Miller v. Miller, supra*; *Children & Youth Servs. of Allegheny County v. Chorgo, supra.*

Among the highly varied holdings of these and other cases, we find one consistent similarity: the consideration of equitable factors in an effort to reach a fair and just result. Fact-specific inquiries, most notably the non-custodial parent's history of failure to support, are central to the decisions. This standard is not inconsistent with the approach to child support taken by this court. Child-support cases in this state have long been subject to equitable considerations. *See Parker v. Parker*, 97 Ark. App. 298, 248 S.W.3d 523 (2007); *Borden v. Borden*, 20 Ark. App. 52, 724 S.W.2d 181 (1987). Our Administrative Order Number 10, which sets forth child-support guidelines, directs that it is a rebuttable presumption that the amount of support calculated pursuant to the Family Support Chart is the amount to be awarded. Ark. Sup. Ct. Admin. Order No. 10, § 1. A court setting an award of support "may grant less or more support if the evidence shows that the needs of the dependents require a different level of support." *Id.* The Administrative Order specifically takes into account Social Security disability benefits: "For Social Security Disability recipients, the court should consider the amount of any separate awards made to the disability recipient's spouse and children on account of the payor's disability." *Id.* § 3(c). Thus, we have not foreclosed the possibility that Social Security benefits may affect a non-custodial parent's child-support obligation.

The fact-intensive nature of these cases from other jurisdictions leads us to the conclusion that equity would not be well served by the pronouncement of a bright-line rule allowing or disallowing credits in all situations or allowing credits for arrearages accrued during particular periods of time. Rather, we hold that equitable considerations are applicable in determining whether a non-custodial parent may receive a credit against past-due child support by the payment of Social Security disability benefits to the child for whom support is owed. The discretion in this determination is best left to the circuit court. When considering the equities involved, the instant case is most analogous to

Fowler v. Fowler, 244 A.2d 375 (Conn. 1968), a decision of the Supreme Court of Connecticut. There, the trial court found that "for more than five years the [non-custodial parent] had completely ignored the order of court, that at no time had he made any payment from his personal funds in obedience to the order, and that during that time the minor children received nothing from him until the payments from the Social Security Administration were initiated." *Fowler*, 244 A.2d at 377. The Supreme Court of Connecticut affirmed on appeal the trial court's conclusion that the Social Security Administration's payments to the custodial parent were not allowable as a credit against the non-custodial parent's arrears. *Id.* The holding was limited to the case at bar and did not conclude as a matter of law that such a credit would not be allowed "where the factual situation justifies such an order." *Id.*

The equities in the instant case clearly favor Flossie Junior. She testified at length regarding her difficulty accumulating sufficient income, through her sometimes sporadic jobs as a beautician and substitute school teacher, to cover her expenses. Her expenses include those associated with caring for her nine-year-old daughter from a subsequent marriage and for her elderly mother. Flossie also testified that she has long relied on food stamps, the free school lunch program, and free children's health insurance. Moreover, she stated that she has amassed approximately $10,000 in credit-card debt for family expenses, which she has been unable to repay. In addition, her child-support case against Grays had been open for seventeen years at the time of the hearing below, and she has been forced to obtain multiple judgments against him for his failure to pay.

For his part, Grays points out that he is disabled and has not been gainfully employed since his disabling injury in November of 2001. He also avers that the child-support arrears accumulated mostly during the period of his disability. In addition, he claimed at the hearing to have paid $5,000 in child support at one point, although Flossie denied that this payment had ever been made. Grays also claimed to have purchased school clothes for his son and to have provided health insurance for him while he was enrolled in school. He asserted at the hearing that he was still paying for his son's life insurance.

Flossie Junior testified that her monthly income is less than $700. Grays's monthly disability payments exceed that amount, even after the $156 deduction in accordance with the income

withholding notice. At the time of the hearing, Flossie was supporting her young daughter and elderly mother, while Grays had no dependents.[3] Most importantly, Grays had chronically failed to pay child support, even before his disability, despite multiple judgments against him for arrears. We agree with the circuit court's assessment; the fact that Shane received $15,835 from the Social Security Administration did nothing to relieve the inequities borne by Flossie and caused by Grays's utter failure to honor his child-support obligation.

We hold that, in light of the equities involved, Grays was not entitled to discharge his child-support arrears with the payment of Social Security disability benefits to his son. Accordingly, the order of the circuit court is affirmed.

Affirmed.

Laura NEAL, Individually and as Administratrix of Arvilla Langston, Deceased, David Langston, and Lelia Branch *v.* SPARKS REGIONAL MEDICAL CENTER

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Opinion delivered November 6, 2008

[Rehearing denied December 11, 2008.]

[3] Grays testified that he had remarried but that he and his wife were currently separated and had never lived together. He stated that his wife did not contribute to his household expenses.

Sam Sexton III, for appellants.

Warner, Smith & Harris, PLC, by: *C. Wayne Harris* and *Jason T. Browning*, for appellee.

JIM GUNTER, Justice. Appellants appeal the trial court's denial of their motions to (1) strike appellee's amended answer asserting the defense of charitable immunity and (2) substitute appellee's insurance carrier as the party-defendant. Appellants assert that appellee's failure to timely assert the defense of charitable immunity was prejudicial, therefore the trial court erred in not striking the amended answer. We agree with appellants and reverse.

On July 23, 2003, Arvilla Langston died while under the care of Sparks Regional Medical Center (Sparks), and her children and estate filed suit against Sparks on July 19, 2005, alleging

medical negligence.[1] Sparks filed an answer on September 8, 2005, and an amended answer on January 26, 2007, in which it stated for the first time that, as a not-for-profit Arkansas corporation, it was entitled to charitable immunity. Appellants filed a motion to strike this amended answer as prejudicial, but the motion was denied.

On May 21, 2007, Sparks filed a motion for summary judgment, asserting there was no genuine issue of material fact as to its status as a charitable organization and its qualification for charitable immunity. In their response to the motion, appellants requested that they be allowed to substitute Sparks's insurance carrier, Lexington Insurance Company (Lexington), as the proper party-defendant and to file an amended complaint naming Lexington as the defendant. Appellants also asked that they be granted a 120-day extension to conduct discovery into Sparks's entitlement to charitable immunity, in the event the court denied their motion to substitute Lexington as the party-defendant. The court denied the motion for a discovery extension but held a hearing on the motion for substitution of parties.

At the hearing, held July 13, 2007, appellants conceded that they could not meet proof with proof on the issue of summary judgment but argued that, under the existing case law, their motion to substitute parties should be granted. At the conclusion of the hearing, the court indicated that the motion to substitute would be denied. Prior to a written order to that effect being filed, appellants filed a motion for reconsideration pursuant to Ark. R. Civ. P. 59 and 60, again arguing that their motion for substitution of parties should have been granted and also asserting various constitutional arguments.

On July 25, 2007, the court entered an order granting appellee's motion for summary judgment and denying appellants' motion for substitution of parties. The court found that the substitution was not proper under Ark. R. Civ. P. 25, as appellants were not attempting to substitute a party for a deceased party, nor was it proper under Ark. R. Civ. P. 15 to allow appellants to amend their complaint and name Lexington as the party-defendant, because appellants had not satisfied all the elements necessary for an amended complaint to relate back to the date of the original complaint. Specifically, the court found that appellants

[1] Sparks Medical Foundation was also named as a defendant in the complaint but was later dismissed from the action without prejudice.

had not proven that Lexington received knowledge of the action within 120 days of the filing of the original complaint, nor had appellant shown that Lexington knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against Lexington. To support its ruling, the court cited *George v. Jefferson Hospital Ass'n*, 337 Ark. 206, 987 S.W.2d 710 (1999) (holding that liability carrier named in an amended complaint was entitled to summary judgment when initial action brought against hospital only was not the result of mistake of identity as to proper party and thus did not support relation back for limitation purposes). Finally, on August 8, 2007, the court issued an order denying appellants' motion for reconsideration. Appellants then filed a timely notice of appeal to this court.

Before addressing the merits of this case, a brief discussion of the history of charitable immunity may be helpful. Prior to 2002, the law was well settled that charitable organizations were immune from execution on their property and thus were immune from tort liability. *See, e.g., Helton v. Sisters of Mercy of St. Joseph's Hosp.*, 234 Ark. 76, 351 S.W.2d 129 (1961). Our law provided a remedy, however, in that a charitable organization's liability insurance carrier could be sued directly. *See* Ark. Code Ann. § 23-79-210 (Supp. 2007); *George, supra.*

However, in 2002, this court decided the case of *Clayborn v. Bankers Standard Insurance Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002). In *Clayborn*, this court explained in dicta that there was a distinction between immunity from suit and immunity from liability: immunity from suit is the entitlement not to stand trial, while immunity from liability is a mere defense to a suit. *Id.* The *Clayborn* decision concluded that the direct-action statute provides for direct actions against an insurer only in the event that the organization at fault is immune from *suit* in tort. *Id.*

This new distinction was applied by the court of appeals, *see Stracener v. Williams*, 84 Ark. App. 208, 137 S.W.3d 428 (2003), and confirmed by this court's decision in *Scamardo v. Jaggers*, 356 Ark. 236, 149 S.W.3d 311 (2004) (declining to overrule *Clayborn*). However, in 2005, this court decided *Low v. Insurance Co. of North America*, 364 Ark. 427, 220 S.W.3d 670 (2005), which held that the distinction created in *Clayborn* was out of step with precedent and was overruled. The *Low* decision clarified that the "not subject to suit for tort" language in the direct-action statute is synonymous with a charitable organization's immunity from tort liability, so

where a charitable organization is not subject to an action in tort (due to charitable immunity), its liability insurance carrier is subject to a direct action. The recent case of *Sowders v. St. Joseph's Mercy Health Center*, 368 Ark. 466, 247 S.W.3d 514 (2007), further elucidated the state of the law: "Plaintiffs alleging injury by charitable organizations can bring suit against the charities' liability insurer via the direct-action statute, Ark. Code Ann. § 23-79-210. Further, injured plaintiffs may bring suit against employees of charitable organizations." 368 Ark. at 470, 247 S.W.3d at 517. And finally, in *Felton v. Rebsamen Medical Center*, 373 Ark. 472, 284 S.W.3d 486 (2008), this court clarified that charitable immunity is an affirmative defense that must be specifically pled.

It is within the context of this case law that the present case developed. For their first point on appeal, appellants argue that the trial court erred in denying their motion to strike appellee's amended answer asserting charitable immunity as a defense. Rule 15 of the Arkansas Rules of Civil Procedure provides that a party may amend its pleadings at any time without leave of the court, but if, upon motion of an opposing party, the court determines that prejudice would result, the court may strike the amended pleading. Ark. R. Civ. P. 15(a) (2008). We will not reverse a trial court's decision allowing or denying amendments to pleadings absent a manifest abuse of discretion. *Williams v. Brushy Island Pub. Water Auth.*, 368 Ark. 219, 243 S.W.3d 903 (2006).

Appellants contend that, pursuant to *Clayborn*, *supra*, and *Scamardo*, *supra*, they filed their original complaint against appellee only, rather than appellee and its liability carrier. Appellants note that their complaint simply alleged that appellee was a corporation that operated a hospital in Fort Smith, Arkansas, and in its original answer, appellee admitted it was "a not-for-profit Arkansas corporation" operating a hospital in Fort Smith but did not mention the affirmative defense of charitable immunity. Appellee did not raise this defense until approximately sixteen months later, after the *Low* and *Sowders* decisions, when it filed its amended answer. In its ruling, the trial court found that the additional language in appellee's amended answer regarding charitable immunity "did not plead additional facts or raise any new defenses" and therefore was not prejudicial to appellants. On appeal, appellants urge that appellee's failure to timely assert the defense was prejudicial because, had the defense been asserted earlier, appellants could have added or substituted Lexington as the party-defendant in a

timely manner and also could have conducted discovery on the issue of appellee's eligibility for charitable immunity.

We hold that the trial court erred in holding that appellee's amended answer did not raise any new defenses. Merely asserting its status as a not-for-profit corporation is not equivalent to specifically raising the affirmative defense of charitable immunity, as not all not-for-profit organizations will be immune under the doctrine. *See George, supra* (enumerating the eight factors to determine whether charitable immunity applies); *see also Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997) (holding that public-benefit corporation was not entitled to charitable immunity). And, as previously mentioned, *Felton, supra*, established that charitable immunity must be specifically pled.

We also agree that allowing the amended answer was prejudicial to appellants. At the time appellee filed its original answer, appellants were still within the 120-day period for notifying Lexington of the suit for relation-back purposes under Ark. R. Civ. P. 15(c). But, by the time appellee filed its amended answer, any attempt to add Lexington as a party would have been untimely. This case is distinguishable from *Sowders, supra*, because in that case, the liability pool administered by the Sisters of Mercy did not constitute insurance for purposes of the direct action statute, so there was no liability carrier that the appellant could have added as a defendant and thus no prejudice in applying our holding in *Low* and not allowing the appellant to collect a judgment from the hospital. This case is also distinguishable from *Felton, supra*. In that case, the appellant filed suit against the hospital and the liability carrier, but later nonsuited his claim against the liability carrier. Because the hospital had asserted the defense of charitable immunity in its original answer, there was no prejudice in finding the appellant's second complaint against the liability carrier was time-barred.

Because we find merit in appellants' first argument, we decline to discuss appellants' other points on appeal. The trial court's order denying appellants' motion to strike appellee's amended answer is reversed, and, as the grant of summary judgment was based on appellee's assertion of charitable immunity, the order granting summary judgment to appellee is reversed as well. We remand for further proceedings.

Reversed and remanded.

Sharon McGHEE, Sydney McGhee, Roberto Salas, Charles Stewart, Henry Evans, Craig Savell, and Patrick Henry Hayes, Individually and on Behalf of a Class of Similarly Situated Persons *v.* ARKANSAS STATE BOARD of COLLECTION AGENCIES and Rusty Guinn, Jerry Markham, Randy Bynum, Opal Lang, and Gary Frala, in Their Official Capacities as Board Members of the Arkansas State Board of Collection Agencies

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Opinion delivered November 6, 2008

[redacted]

[redacted]

Arnold, Batson Turner & Turner, by: *Todd Turner*; *Scholtens & Averitt*, by: *Chris Averitt*, for appellants.

Thrash Law Firm, by: *Thomas P. Thrash*, for appellees.

Rose Law Firm, by: *John T. Hardin*, for intervenor Arkansas Financial Services Association.

Deborah Zuckerman, AARP Foundation; *Michael Schuster*, AARP; *Jim Jackson*; and *Eric Halperin*, *Melissa Briggs*, *Daniel Mosteller*, Center for Responsible Lending, for amici curiae AARP, Arkansas Advocates for Children and Families, and Center for Responsible Lending.

Brian G. Brooks, for amicus curiae Arkansas Trial Lawyers Ass'n.

PAUL E. DANIELSON, Justice. Appellants Sharon McGhee, et al. (hereinafter collectively referred to as "McGhee") appeal from the circuit court's order denying their motion for declaratory judgment and finding that the Arkansas Check-Cashers Act, Arkansas Code Annotated §§ 23-52-101–23-52-117 (Repl. 2000 & Supp. 2007), was constitutional. McGhee's sole point on appeal is that the circuit court erred in denying her motion and in finding the Act constitutional. Because we hold that the Check-Cashers Act is unconstitutional in its entirety, we reverse and remand the matter for entry of an order consistent with this court's opinion.

Procedurally, this particular case, initially filed in 2003, comes to the court for the third time on appeal, following two remands. *See McGhee v. Arkansas State Bd. of Collection Agencies*, 368 Ark. 60, 243 S.W.3d 278 (2006) (*McGhee II*); *McGhee v. Arkansas State Bd. of Collection Agencies*, 360 Ark. 363, 201 S.W.3d 375 (2005) (*McGhee I*). Because the underlying facts of this case have

been set out in this court's two previous opinions, there is no need to recite them in full here. Suffice it to say, the matter was originally brought against appellees Arkansas State Board of Collection Agencies and its board members in a complaint alleging an illegal exaction and alleging that all transactions under the Arkansas Check-Cashers Act involved interest rates that violated the usury provision of the Arkansas Constitution. *See* Ark. Const. art. 19, § 13. In addition, McGhee sought a declaratory judgment that the Check-Cashers Act was unconstitutional. *See McGhee I, supra.*

Following our decision in *McGhee I*, in which we held that the circuit court erred in dismissing the case, the circuit court permitted Arkansas Financial Services Association (AFSA) to intervene in the matter.[1] *See McGhee II, supra.* Upon the filing of cross-motions for summary judgment and a hearing on the motions, the circuit court entered its order finding that McGhee had no valid illegal-exaction claim, thereby requiring the dismissal of the claim with prejudice. In addition, the circuit court found that it lacked jurisdiction to hear McGhee's declaratory-judgment claim due to the fact that she had failed to exhaust her administrative remedies. On appeal, we affirmed the circuit court's grant of summary judgment on McGhee's illegal-exaction claim, but reversed and remanded with respect to her claim for declaratory judgment, holding that McGhee was not required to first seek a declaration regarding the constitutionality of the Check-Cashers Act before the Board. *See McGhee II, supra.*

Following our decision in *McGhee II*, the circuit court held a hearing on November 20, 2007, during which McGhee again asked the circuit court to rule on the Act's constitutionality. The circuit court honored McGhee's request and asked that an order be prepared declaring that the Act was constitutional. Accordingly, an order was entered in which the circuit court denied McGhee's request for declaratory judgment and found that the Check-Cashers Act was constitutional. McGhee now appeals from that order.

McGhee asserts that the Check-Cashers Act was designed to accomplish a single purpose — to create an exception to the usury limit for short-term payday loans. She maintains that the legislature violated the Arkansas Constitution when it enacted the check-

[1] The circuit court also granted Arkansas Federal Credit Union's motion to intervene. *See McGhee II, supra.*

casher statutory scheme, which she claims was obviously designed to exempt certain transactions from usury analysis. Moreover, McGhee claims, the Act permits check-cashers to engage in transactions that are truly loans and that involve fees that constitute interest for usury purposes. McGhee avers that the Act at issue does nothing more than allow persons to register with a state agency so that they can assess charges that are no more than illegal interest. She claims that because the Check-Cashers Act runs contrary to Arkansas's anti-usury policy and violates article 19, section 13 of the Arkansas Constitution, the circuit court erred in finding the Act constitutional.

The Board counters, initially, that because no actual, justiciable controversy was presented to the circuit court, any declaratory judgment on the constitutionality of the Check-Cashers Act was improper. With respect to the merits of the instant appeal, the Board asserts that both the legislature and this court have carefully considered the current statutory regulations of the Act at issue, and neither found the regulations were in conflict with the constitutional doctrine of separation of powers, nor incompatible with the Arkansas Constitution. The Board additionally submits that after removing an unconstitutional provision of the statute, the General Assembly attempted to continue regulating what was once an unregulated industry for the public's benefit. It avers that McGhee cannot reasonably claim that all transactions by entities licensed under the Act are usurious. The Board urges that because the Act does not in any way attempt to limit or restrict these businesses' liability for a violation of Arkansas's usury laws, it is not clearly or unmistakably inconsistent with or in conflict with the Arkansas Constitution. The Board, finally, maintains that no provision of the Act, as currently written, violates the Arkansas Constitution, and, further, that McGhee has failed to meet her burden of proving the Act unconstitutional.

AFSA also responds, maintaining that McGhee failed to meet her burden of proving that the Act is unconstitutional. It further contends that McGhee has not presented an adequate record to this court in support of her request for relief and that there is no evidence that there was a justiciable controversy before the circuit court. In addition, AFSA urges that the General Assembly's use of definitions within the Act did not render the Act unconstitutional. McGhee replies that this court's prior decisions

in this case demonstrate that there is a justiciable controversy and that she was entitled to a declaration on the constitutionality of the Check-Cashers Act.

I. Justiciable Controversy

We must first address the contention of the Board and AFSA that no justiciable controversy exists in the instant case, and, thus, that McGhee's request for a declaratory judgment on the constitutionality of the Act was improper. Their argument is without merit.

As McGhee points out, we at least suggested in a prior opinion that McGhee's actions with respect to her request for a declaratory judgment were proper. In *McGhee II*, we specifically rejected the argument of the Board and AFSA that McGhee was required to first seek a declaration regarding the constitutionality of the Act before the Board itself, commenting:

> Here, the heart of Appellants' complaint is that they are being injured by the regulations set forth in the Check-Cashers Act due to the fact that the Board continues to license and regulate payday lenders under this Act, thereby allowing them to charge usurious interest rates in violation of article 19, section 13. Thus, Appellants properly sought a declaration in circuit court that the Check-Cashers Act was unconstitutional. Accordingly, we reverse and remand this matter to the circuit court.

368 Ark. at 69, 243 S.W.3d at 285.

But in addition, it is clear to this court that declaratory relief lies in the instant case. Arkansas's declaratory-judgment statute provides that:

> Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Ark. Code Ann. § 16-111-104 (Repl. 2006). While this section recognizes a party's right to a declaratory judgment, a justiciable

controversy is required. *See Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002). Declaratory relief will lie where: (1) there is a justiciable controversy; (2) it exists between parties with adverse interests; (3) those seeking relief have a legal interest in the controversy; and (4) the issues involved are ripe for decision. *See Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996). On appeal, the question of whether there was a complete absence of a justiciable issue shall be reviewed de novo on the record of the circuit court. *See Jegley, supra.*

Here, a justiciable controversy is indeed present between McGhee and the Board as to the implementation, application, and effect of the Check-Cashers Act. McGhee, as one who has engaged in transactions authorized by an Act that she believes is unconstitutional, and the Board, which is charged with licensing and regulating the businesses engaged in these transactions, are indeed parties with adverse interests. In addition, McGhee certainly has a legal interest in the Board's exercise of its authority under the Act, and the matter is clearly ripe for decision, where the declaratory-relief claim is the sole remaining claim in the action, as previously stated by this court in *McGhee II*. Accordingly, declaratory relief lies. Moreover, we have held that a declaratory judgment is especially appropriate in disputes between private citizens and public officials about the meaning of the constitution or of statutes. *See McDonald v. Bowen*, 250 Ark. 1049, 468 S.W.2d 765 (1971). It is, therefore, clear to this court that declaratory relief was proper in the instant case.

II. Constitutionality of the Check-Cashers Act

In reviewing the constitutionality of an act, we recognize that every act carries a strong presumption of constitutionality. *See City of Cave Springs v. City of Rogers*, 343 Ark. 652, 37 S.W.3d 607 (2001). The burden of proof is on the party challenging the legislation to prove its unconstitutionality, and all doubts will be resolved in favor of the statute's constitutionality, if it is possible to do so. *See id.* An act will be struck down only when there is a clear incompatibility between the act and the constitution. *See id.*

We previously held that section 23-52-104(b) (Repl. 2000) of the Check-Cashers Act was "an invalid attempt to evade the usury provisions of the Arkansas Constitution and, further, that such an attempt violate[d] the constitutional mandate requiring separation of powers set forth in Article 4 of the Arkansas Constitution." *Luebbers v. Money Store, Inc.*, 344 Ark. 232, 234, 40 S.W.3d

745, 746 (2001).[2] However, McGhee's claim in this case is that the Check-Cashers Act, in its entirety, violates the usury provisions of the Arkansas Constitution. The usury provisions in our constitution provide, in pertinent part:

> (a) General Loans:
>
> (i) The maximum lawful rate of interest on any contract entered into after the effective date hereof shall not exceed five percent (5%) per annum above the Federal Reserve Discount Rate at the time of the contract.
>
> . . . .
>
> (b) Consumer Loans and Credit Sales: All contracts for consumer loans and credit sales having a greater rate of interest than seventeen percent (17%) per annum shall be void as to principal and interest and the General Assembly shall prohibit the same by law.

Ark. Const. art. 19, § 13(a, b).

We have held that the purpose of Arkansas's strong anti-usury policy, as reflected by the prohibition of usury in our constitution, is to protect borrowers from excessive interest rates. *See State ex rel. Bryant v. R & A Inv. Co., Inc.*, 336 Ark. 289, 985 S.W.2d 299 (1999). Moreover, we have observed that the plain language of subsection (b) of article 19, section 13 "mandates that the General Assembly prohibit usurious contracts." *Id.* at 294, 985 S.W.2d at 301. The question before us, then, is whether the Check-Cashers Act permits usurious contracts.

Only if the transaction at issue constitutes a loan and if the fees charged constitute interest will the constitutional prohibition against usurious interest rates apply. *See Luebbers, supra.* Accordingly, we must determine whether the transactions authorized by the Check-Cashers Act constitute loans and whether the fees charged constitute interest.

a. Whether the transactions constitute loans

Generally speaking, a deferred-presentment transaction, or "payday loan," has been described as a transaction in which the consumer writes a check, the amount of which includes the

[2] Consequently, the General Assembly repealed that subsection. *See* Act 1962 of 2005, § 106.

amount of the cash to be advanced to the customer, plus a service fee. *See* Dee Pridgen & Richard M. Alderman, *Consumer Credit and the Law* § 5:6 (2008). The understanding is that the business advancing the funds "will not attempt to cash the check until the due date." *Id.* On the due date, the customer "can simply allow the check to be cashed, or can renew or 'rollover' the transaction by payment" of another service fee. *Id.* In Arkansas, "deferred presentment option" has been defined by our General Assembly as:

> a transaction pursuant to a written agreement involving the following combination of activities in exchange for a fee:
>
> (A) Accepting a customer's personal check dated on the date it was written;
>
> (B) Paying that customer an amount of money equal to the face amount of that check less any fees charged pursuant to this chapter; and
>
> (C) Granting the customer the option to repurchase the customer's personal check for an agreed period of time prior to presentment of such check for payment or deposit. The term "deferred presentment" includes related terms such as "delayed deposit", "deferred deposit", or substantially similar terms evidencing the same type of transaction[.]

Ark. Code Ann. § 23-52-102(5) (Supp. 2007).

Initially, we must determine whether the transaction permitted by the Act constitutes a loan, which would then call into question whether any fee collected by a check-casher is interest. "Loan" is defined as "[a] thing lent for the borrower's temporary use; esp., a sum of money lent at interest." *Black's Law Dictionary* 954 (8th ed. 2004). "To constitute a loan, there must be a contract under which, in substance, one party transfers to the other money that the other party agrees to repay absolutely, together with additional amounts as agreed for its use, regardless of its form." 47 C.J.S. *Interest & Usury* § 192 (2008). Likewise, this court has observed that "[w]hen a loan is made, the money is borrowed for a fixed time, and the borrower promises to repay such amount at a fixed future date." *Warren v. Nix*, 97 Ark. 374, 380-81, 135 S.W. 896, 898 (1911).

It is clear from the statutory definition set forth above that an Arkansas check-casher pays, pursuant to a written agreement, an agreed-upon amount to its customer, less any fee charged pursuant

to the Act, upon presentment of the customer's check payable to the check-casher. In addition, that customer can "repurchase" his or her check within the agreed period of time. In other words, when the customer "repurchases" his or her check, he or she must pay the check-casher the amount of the check. We hold that such a transaction is a loan, as the check-casher is clearly loaning money to its customer for a fee with the expectation of repayment. *See, e.g.*, *Betts v. McKenzie Check Advance of Florida, LLC*, 879 So. 2d 667 (Fla. Dist. Ct. App. 2004) (holding that there could be no question that what takes place in a deferred-presentment transaction is essentially an advance of money or a short-term loan).

b. Whether the fees charged constitute interest

Next, we must determine whether the fee paid to the check-casher by the customer constitutes interest. We have previously defined "interest" as "[t]he compensation which is paid by the borrower of money to the lender for its use, and, generally, by a debtor to his creditor in recompense for his detention of the debt." *Winston v. Personal Fin. Co. of Pine Bluff, Inc.*, 220 Ark. 580, 585, 249 S.W.2d 315, 318 (1952) (quoting *Bouvier's Law Dictionary*). In *Winston*, we held that fees charged under the Arkansas Installment Loan Law, which were part of the lender's overhead expense in doing business, were "in reality, nothing more or less than interest charges[.]" *Id.*, 249 S.W.2d at 318. Our review of the instant Act reveals that it specifically authorizes a check-casher's charge of "a reasonable fee to defray operational costs incurred[.]"[3] Ark. Code Ann. § 23-52-104(a) (Supp. 2007). Because that fee is

[3] The statute further provides:

(b) Unless otherwise authorized by this chapter, the fees authorized by this section shall not exceed the following:

(1) For the service of selling currency or check in exchange for checks, without regard to whether a deferred presentment option is involved:

(A) A fee not to exceed five percent (5%) of the face amount of the check if the check is the payment of any kind of state public assistance or federal social security benefit payable to the bearer of the check or the check is otherwise a check issued by a federal or state governmental entity;

(B) A fee not in excess of ten percent (10%) of the face amount of any personal check or money order; or

in reality an amount owed to the lender in return for the use of borrowed money, we must conclude that the fees authorized clearly constitute interest.

Our conclusion is further evidenced by the Act's requirement that any agreement for a deferred-presentment option shall contain a written explanation that "shall contain a statement of the total amount of any fees charged for the deferred presentment option expressed both in United States currency *and as an annual percentage rate.*" Ark. Code Ann. § 23-52-106(c) (Repl. 2000) (emphasis added). "Annual percentage rate," commonly referred to as an APR, is "[t]he actual cost of borrowing money, expressed in the form of an annualized *interest* rate." *Black's Law Dictionary* 831 (8th ed. 2004) (emphasis added). Despite the Act's attempt to label these charges as fees, that does not exempt them from our scrutiny. *See, e.g.*, *Luebbers*, *supra*. As we have oft stated, "The law shells the covering and extracts the kernel. Names amount to nothing when they fail to designate the facts." *Luebbers*, 344 Ark. at 239, 40 S.W.3d at 750. In other words, merely because the Act so labels does not make it so. For the foregoing reasons, we hold that the fees authorized by the Act unmistakably constitute interest.

c. Whether the Act permits usurious charges

With these conclusions in mind, we turn to McGhee's claim that the Act authorizes usurious transactions. We hold that there is no question that it does. According to our calculations,[4] if a customer wrote a check-casher a check for $100, incurring an interest charge of ten percent (10%), plus a $10 fee (both of which

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(C) A fee not in excess of six percent (6%) of the face amount of the check in the case of all other checks. Such a fee may be collected separately or by paying the customer an amount of money equal to the face amount of the check less the appropriate fee under this chapter;

(2) For a deferred presentment option which involves a personal check, an additional fee not to exceed ten dollars ($10.00) may be charged by a check-casher; and

(3) In addition to the foregoing fees, a check-casher may charge a fee of no more than five dollars ($5.00) to set up an initial customer account and issue an optional identification card for providing check-cashing services. A replacement optional identification card may be issued at a cost not to exceed five dollars ($5.00).

Ark. Code Ann. § 23-52-104(b) (Supp. 2007).

[4] According to information previously published by the Board, which is included in the record, an APR is calculated as follows:

are authorized by the Act) for a thirty-one (31) day loan,[5] it would result in an APR of 294%.[6] In the instant case, sample contracts contained in the record reflected APR rates ranging from 168.20% to 558.71%. Such rates of interest are clearly and unmistakably usurious and in violation of article 19, section 13.[7]

Because the Act so clearly authorizes usurious interest rates, it cannot stand. Here, AFSA argues that the Act regulates two different types of businesses, check-cashing and deferred-presentment options, and that should this court deem any portion of the Act unconstitutional, we should remand the matter to the circuit court to have those portions severed. We will not do so. To determine whether the invalidity of part of an act is fatal to the entire legislation, we look to: (1) whether a single purpose is meant to be accomplished by the act, and (2) whether the sections of the act are interrelated and dependent upon each other. *See City of North Little Rock v. Pulaski County*, 332 Ark. 578, 968 S.W.2d 582

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1. customer check amount - payment to customer = finance charge

2. payment to customer = amount financed

3. APR = finance charge / [(amount financed x days outstanding) / 365]

[5] "A check-casher shall not defer presentment of any check for less than six (6) calendar days nor more than thirty-one (31) calendar days after the date the check is sold to the check-casher." Ark. Code Ann. § 23-52-106(d). For a six-day loan involving the same amounts, the APR would be as much as 1521%.

[6] Despite the Act's limitation on the loan amount to $400, a thirty-one day loan of that amount would still result in an APR of 168%, and a six-day loan would result in an APR of 869%. *See* Ark. Code Ann. § 23-52-106(m).

[7] Indeed, some commentators maintain that such transactions can result in an annual percentage rate of unimaginable proportion. *See* Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 Yale J. on Reg. 181 (2008) (suggesting 780%); Jean Ann Fox, *Fringe Bankers: Economic Predators or a New Financial Services Model?*, 30 W. New Eng. L. Rev. 135 (2007) (suggesting an annual interest rate of 390% to 780% for a $300 loan costing between $45 and $90 for a two-week term); Joseph R. Falasco, Comment, *Who's Getting Used in Arkansas: An Analysis of Usury, Check Cashing, and the Arkansas Check-Cashers Act*, 55 Ark. L. Rev. 149 (2002) (suggesting that the Arkansas Check-Cashers Act permits interest rates in excess of 2000%); Charles A. Bruch, Comment, *Taking the Pay out of Payday Loans: Putting an End to the Usurious and Unconscionable Interest Rates Charged by Payday Lenders*, 69 U. Cin. L. Rev. 1257 (2001) (suggesting annual percentage rates from 390% to 7300%, with an average of 500%).

(1998). The mere fact that an act contains a severability clause is to be considered, but is not alone determinative. *See id.*

While Act 1216 of 1999 does contain a severability clause in section 19, the Act further provides that the purpose of the Act was "to provide an Act to license and regulate check-cashing and deferred presentment option businesses." In addition, the Emergency Clause of the Act proclaims that "the effectiveness of this act on its passage or approval is essential to the operation of the deferred presentment check-cashing and other check-cashing business in Arkansas[.]" Act 1216 of 1999, § 21. Despite the Act's severability clause, it is evident to this court from both of these statements that the General Assembly's intent was to pass the Act as a whole or not at all. *See, e.g., City of North Little Rock, supra.* Furthermore, our review of the Act reveals that its provisions concerning the business of check-cashing and the business of deferred-presentment options are so intertwined that severance would be inappropriate. *See U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994) (observing that when portions of an act are mutually connected and interwoven, severability is not appropriate). For these reasons, we declare the entirety of the Check-Cashers Act unconstitutional.

On a final note, it was argued to this court both in the briefs and at oral argument by those in favor of the Act that the check-cashers provide a service to Arkansas citizens that would not otherwise be available. While such a statement might have some semblance of truth, we simply "must refuse to allow arguments, however plausible, to lead us away from the plain wording and spirit of our Constitution." *Winston*, 220 Ark. at 587, 249 S.W.2d at 319. Our duty in these types of cases was eloquently stated in a previous decision involving a usurious loan pursuant to article 19, section 13:

> This section is clear and unambiguous. With the wisdom and policy of it the courts have nothing to do. It is their duty to carry into effect according to its true intent, to be gathered from its own words, without regard to the hardships incident to the faithful execution of such laws.

German Bank v. DeShon, 41 Ark. 331, 337 (1883) (decision under prior version of article 19, section 13, which provided that all contracts for a greater rate of interest than ten per centum per annum shall be void).

In sum, because the Check-Cashers Act clearly authorizes loans charging usurious rates of interest in contravention of the limits set forth in article 19, section 13, we hold that the Act, in its entirety, clearly and unmistakably conflicts with our constitution and is unconstitutional. We, therefore, reverse the order of the circuit court and remand for entry of an order consistent with this opinion.

WILLS, J., not participating.

Roger and Ruth ANDERSON d/b/a Anderson Auto Salvage *v.* BNSF RAILWAY COMPANY

08-232 289 S.W.3d 52

Supreme Court of Arkansas
Opinion delivered November 6, 2008

Eichenbaum, Liles & Heister, P.A., by: *Christopher O. Parker*, for appellants.

Barrett & Deacon, P.A., by: *John C. Deacon*, *Brandon J. Harrison*, and *Andrew H. Dallas*, for appellee.

PER CURIAM. Appellants Roger and Ruth Anderson, owners of Anderson Auto Salvage, appeal from an order entered by the Craighead County Circuit Court that vacated a decision by the Arkansas State Highway Commission (Commission). Because the Andersons 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.

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 deficien-

> cies, 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.

The Andersons' brief in this case is deficient for multiple reasons. The Andersons failed to abstract key portions of a hearing before the Commission held on January 23, 2007; specifically, the Andersons did not abstract arguments presented on the issue of preemption by federal law. Further, the Andersons failed to adequately abstract arguments on preemption and the Commission's alleged procedural errors that were presented to the circuit court at a hearing held on October 5, 2007.[1] Finally, the Andersons' addendum omits relevant material, including requests for a hearing before the Commission, notice of hearings, BSNF's petition for review filed in the circuit court, and the parties' briefs filed in the circuit court. The appellee submitted a supplemental abstract and addendum, which would normally cure the appellant's deficiencies. *See Cortinez v. Ark. Supreme Court Comm. on Prof'l Conduct*, 353 Ark. 104, 111 S.W.3d 369 (2003). However, BSNF's supplemental abstract is also deficient in that it does not condense arguments and testimony presented at hearings held before the Commission and the circuit court; instead, BSNF essentially reproduced the transcript.

Because the Andersons have failed to comply with Rule 4-2(a)(5), we order them to file a substituted abstract, addendum, and brief within fifteen days from the date of entry of this order. If the Andersons fail to do so within the prescribed time, the judgment appealed from may be affirmed for noncompliance with Rule 4-2. After service of the substituted abstract, addendum, and brief, BSNF shall have an opportunity to revise or supplement its brief in the time prescribed by the Court.

Rebriefing ordered.

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[1] The Appellants incorrectly labeled this hearing as "Hearing Before the Arkansas Highway Commission of November 05, 2007" in their brief's Table of Contents. The record shows that this hearing was before the circuit court, and that it was held on October 5, 2007.

Ymari Boyce REID *v.* STATE of Arkansas

CR 08-1221 289 S.W.3d 54

Supreme Court of Arkansas
Opinion delivered November 6, 2008

John L. Kearney, for appellant.

No response.

PER CURIAM. Appellant, Ymari Boyce Reid, by and through her attorney, John L. Kearney, filed a motion for rule on clerk to file her record and have her appeal docketed on October 17, 2008. The State has not responded to the motion. The clerk refused to accept the record because the record before us does not show strict compliance with Arkansas Rule of Appellate Procedure–Civil 5(b)(1)(C).

We have held that Rule 5(b)(1) applies to both civil and criminal cases for the determination of the timeliness of a record on appeal. *See Bond v. State*, 373 Ark. 37, 280 S.W.3d 20 (2008) (per curiam). Nevertheless, on September 18, 2008, this court adopted a rule change to Arkansas Rule of Appellate Procedure–Criminal 4, and specifically Rule 4(c), to provide for notice to prosecutors of record extensions and a deemed consent to the

extension if the prosecutor does not object within ten days after being served a copy of the extension motion:

> A motion by the defendant for an extension of time to file the record shall explain the reasons for the requested extension, and a copy of the motion shall be served on the prosecuting attorney. The circuit court may enter an order granting the extension if the circuit court finds that all parties consent to the extension and that an extension is necessary for the court reporter to include the stenographically reported material in the record on appeal. If the prosecuting attorney does not file a written objection to the extension within ten (10) days after being served a copy of the extension motion, the prosecuting attorney shall be deemed to have consented to the extension, and the circuit court may so find.

In re Rules of Supreme Court & Court of Appeals, Rule 4-3, 374 Ark. App'x 566 (Sept. 18, 2008) (per curiam).

In the instant case, counsel for Reid states "on information and belief" in her motion for rule on clerk that the prosecutor was served with the motion for an extension of time to file the record. The prosecutor did not file a written objection; nor did he contest the facts set forth in Reid's motion for rule on clerk. Under the new rule, Rule 4(c), Reid is in compliance because the prosecutor was served with the extension motion and filed no objection. Though the extension granted by the trial court occurred before the effective date of Rule 4(c), which was October 1, 2008, the rule is remedial, and we apply it retroactively.

Granted.

TERIS, LLC; Op-Tech Environmental Services, Inc.; CSX Transportation, Inc. *v.* Harold CHANDLER; Connie Chandler; Jerry Fifer; Pearline Fifer; Benito Glosson; Latoria Glosson; Jimmie Lark; Mildred Lark; Alvin McGhee; Sheila McGhee; Carolyn Yarbrough; Eddie Yarbrough, Jr.

08-692 289 S.W.3d 63

Supreme Court of Arkansas
Opinion delivered November 13, 2008

[redacted]

[redacted]

Fee, Smith, Sharp & Vitullo, L.L.P., by: *Thomas W. Fee, Howard J. Klatsky*, and *P. Wes Black*; *Compton, Prewett, Thomas & Hickey, L.L.P.*, by: *Matt Thomas*, for appellant Teris, L.L.C.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Sherry P. Bartley*, for appellant Op-Tech Environmental Services, Inc.

Friday, Eldredge & Clark, LLP, by: *Kevin A. Crass* and *R. Christopher Lawson*, 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 appeal of a class-action certification is before us again after we reversed and remanded the matter due to the fact that the certification order

contained two different class definitions. *See Teris, LLC v. Golliher*, 371 Ark. 369, 266 S.W.3d 730 (2007) (*Teris I*). Appellants Teris, LLC, Op-Tech Environmental Services, Inc., and CSX Transportation, Inc., again argue that the trial court erred in granting Appellees' request for class certification. As this is a second appeal, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(7). We find no error and affirm.

The underlying facts of this case are sufficiently set forth in *Teris I*. Suffice it to say, Appellees, who are individuals who were within the mandatory evacuation area following an explosion and fire at the Teris facility, filed suit against Appellants and sought class-action status. Upon an order by the trial court granting class certification, Appellants appealed to this court, arguing that class certification was not warranted in several respects. *See Teris I*. Because the trial court's order contained differing class definitions, we reversed and remanded the matter for clarification as to the appropriate class definition.

Upon remand, Appellees filed a motion submitting an amended and substituted order granting class certification. In the proposed order, four plaintiffs were removed from the case caption and the class was defined as follows:

> (a) All adults;
>
> (b) Who as of January 2, 2005;
>
> (c) Resided or occupied a business premise in Areas A, B, or C, as shown on Exhibit "1"; and
>
> (d) Who, in fact, physically evacuated from Areas A, B, or C, as shown on Exhibit "1" because of the fire and explosion event at Teris on that date.

In addition to removing certain named plaintiffs and modifying the class definition, the proposed order sought the following additional changes:

> (b) Clarifies that the damages issue to be resolved in a common trial is limited to the value of the discomfort, disruption and inconvenience proximately caused due to each class member being evacuated from his or her home or business premises due to the

January 2, 2005 event that gives rise to this action, and further sets out that these claims may be tried in two subclasses of those who returned the evening of January 2, 2005, and those who were allowed to return the following day;

(c) Provides that the court will determine the issue of strict or absolute liability, not the jury; and

(d) Provides that individual trials will be held, if necessary, on elements of damages that are not common to each member of the class. These trials will be limited to elements of damages proximately caused by the January 2, 2005, incident that are not common to the entire class, including, without limitation, (i) actual medical expenses associated with physician visits; (ii) actual expenses related to meals, lodging, and travel resulting from being evacuated; (iii) lost income, earnings, or wages; (iv) expenses actually incurred, or compensation for, removing soot and smoke residue from real and personal property.

The trial court held a hearing on the proposed amended order on May 2, 2008. Thereafter, the court entered of record the amended and substituted order granting class certification. This appeal followed.

Standard of Review

Class actions are governed by Rule 23 of the Arkansas Rules of Civil Procedure which provides, in pertinent part:

(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.

(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.

Our law is well settled that the six requirements for class-action certification include: (1) numerosity, (2) commonality, (3) typicality, (4) adequacy, (5) predominance, and (6) superiority. *See Gen. Motors Corp. v. Bryant*, 374 Ark. 38, 285 S.W.3d 634 (2008).

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. *ChartOne, Inc. v. Raglon*, 373 Ark. 275, 283 S.W.3d 576 (2008); *Ark. 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. Neither the trial court nor this court shall delve into the merits of the underlying claims when deciding whether the Rule 23 requirements have been met. *Id.* In this regard, our court has said that " 'a trial court may not consider whether the plaintiffs will ultimately prevail, or even whether they have a cause of action.' " *Bryant*, 374 Ark. at 42, 285 S.W.3d at 638 (quoting *Carquest of Hot Springs, Inc. v. Gen. Parts, Inc.*, 367 Ark. 218, 223, 238 S.W.3d 916, 920 (2006)). We, thus, view the propriety of a class action as a procedural question. *See id.*

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, as well as some procedural aspects of the certification order. Remaining mindful of our standard in reviewing class-certification orders, we now turn to the issues on appeal.

1. Class Definition

The first argument on appeal is whether the trial court erred in certifying this as a class action because of an insufficient class

definition. Teris[1] argues that the class as defined by the amended and substituted order does not provide sufficiently objective criteria with which to identify class members. Specifically, Teris contends that the class definition fails to define the phrase "occupied a business premises" or the term "evacuated" and further avers that in order to ascertain class membership, the trial court will necessarily have to engage in an individualized inquiry as to whether a person evacuated and the subjective reasons for doing so. Appellees counter that the terms utilized in the class definition are normal, everyday terms and that the definition provides a feasible manner for determining class membership.

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, 613-14, 232 S.W.3d 444, 448 (quoting *Hicks*, 349 Ark. 269, 280-81, 78 S.W.3d 58, 64-65). This court further elaborated that a class must be susceptible to definition and cannot be amorphous or imprecise. *Hicks*, 349 Ark. 269, 78 S.W.3d 58; *Ferguson v. Kroger Co.*, 343 Ark. 627, 37 S.W.3d 590 (2001). In *Ferguson*, 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.

The present case is distinguishable from *Ferguson* and *Southwestern Bell Yellow Pages v. Pipkin Enterprises., Inc.*, 359 Ark. 402, 198 S.W.3d 115 (2004), two notable cases where this court found that

[1] Neither Op-Tech nor CSX challenges the sufficiency of the class definition.

a class was not properly defined. In *Pipkin*, a case involving an allegation that the appellant improperly charged interest on overdue payments for advertising contracts, the court stated that there were no objective criteria that the circuit court could use to identify class members. The class was defined as: "All Arkansas customers of Defendants who paid or were charged usurious interest charges since November 15, 1997." *Pipkin*, 359 Ark. at 405, 198 S.W.3d at 117. This court reasoned that the circuit court, in determining class membership, would have to make a determination of the ultimate issue, which was whether each prospective class member had been charged interest in excess of that allowed by the Arkansas Constitution.

In *Ferguson*, 343 Ark. 627, 37 S.W.3d 590, this court affirmed the trial court's denial of class certification on the basis that there was no defined class, nor was it possible to define the class. *Ferguson* involved a proposed class action against Kroger for negligence, breach of contract, unjust enrichment, misrepresentation, and conversion stemming from allegations that the store induced people to shop there by misrepresenting the savings from double coupons. In ruling that there was no defined class, this court pointed out that identifying class membership was practically an insurmountable challenge because of all the varied facts at issue in the case. This court concluded that under that proposed definition, anyone could claim to have been induced to shop at Kroger to take advantage of the double coupons, and there would be no objective criteria, i.e., records, to verify such claim.

Here, the class is defined as all adults, who as of January 2, 2005, resided or occupied a business premise in Areas A, B, or C, as shown on Exhibit "1"; and who, in fact, physically evacuated from Areas A, B, or C, as shown on Exhibit "1" because of the fire and explosion event at Teris on that date.[2] This definition clearly provides objective criteria for ascertaining class membership without requiring an investigation into the merits of each individual's claim. *See, e.g.*, *Bryant*, 374 Ark. 38, 285 S.W.3d 634. Teris's argument that the definition is deficient for failing to define certain terms is without merit, as those terms are capable of being understood.

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[2] Exhibit 1 is a geographic map detailing the three areas near the Teris facility from which individuals evacuated following the explosion and fire.

2. *Typicality*

Second, both Teris and Op-Tech[3] argue that the trial court's order should be reversed because the class members' claims and defenses are not typical of the class. According to Appellants, the experiences of the named representatives with regard to existence of an injury, nature and cause of an injury, and calculation of damages are not typical of the purported class. According to Appellants, the injuries of the putative class members are neither sufficiently similar nor typical.

Appellees argue to the contrary that while the exact impact of Appellants' conduct on each of them may not be precisely the same, it does not mean that the value of each claim is so different as to warrant separate trials. In advancing their argument that they satisfied the typicality requirement, Appellees rely on this court's holding in *Summons v. Missouri Pacific Railroad*, 306 Ark. 116, 813 S.W.2d 240 (1991), and argue that the present case is virtually indistinguishable from *Summons*.

In *Summons*, this court affirmed the class certification of plaintiffs who claimed they suffered a variety of damages when the defendant's train overturned and released volatile and toxic chemicals into the area. The common issues in that case were the existence of strict liability, and whether the railroad was negligent, while the individual issues were proximate causation and the extent of damages suffered by each class member. In addressing the typicality factor in *Summons*, this court referred to H. Newberg, *Class Actions* § 3.13, and stated:

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was

[3] Reference to Op-Tech is actually reference to both CSX and Op-Tech who submitted a joint brief in this matter, but for purposes of clarity, we will simply refer to Op-Tech where it is necessary to distinguish among Appellants.

> directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims. [Footnotes omitted.]

306 Ark. at 121, 813 S.W.2d at 243.

[redacted] Much like in *Summons*, Appellants here attempt to argue that there is no typicality because Appellees' claims vary, both among each other and from other possible class members. This argument reveals, however, the flawed analysis utilized by Appellants in addressing the issue of typicality. As explained by Newberg, and approved by the court in cases such as *Summons* and its progeny, the correct inquiry focuses on whether the claims of the representatives and the class members are based on the same legal theory and include allegations that the same illegal conduct affected the representatives and the class sought to be represented.

Here, Appellees alleged negligence and strict liability on the part of Appellants as a result of the explosions and fires at the Teris facility that resulted in their evacuation. These allegations are the same for all parties. In addressing the criteria of typicality, the trial court noted that all of the claims arose from a single event, the fire and explosion at the Teris facility and that one element of damage sought is common to all representatives and class members, namely damages for discomfort, disruption, and inconvenience. The fact that individual members of the class may have varying damages as a result of the single incident, the explosions and fires and resulting evacuation, does not defeat the conclusion that typicality is satisfied. In fact, our case law is clear that the essence of the typicality requirement is the conduct of the defendants and not the varying fact patterns and degree of injury or damage to individual class members. *See BNL Equity Corp. v. Pearson*, 340 Ark. 351, 10 S.W.3d 838 (2000); *Summons*, 306 Ark. 116, 813 S.W.2d 240. Accordingly, we cannot say that the trial court erred in finding that Appellees established the requirement of typicality.

3. Predominance

As their next point on appeal, Teris and Op-Tech argue that class certification is inappropriate in this matter because common issues of fact and law do not predominate over individual issues. Teris takes issue with that part of the trial court's order that provides that "[e]ach Plaintiff and class member . . . suffered at least

one element of damage that was common to all, namely the discomfort, disruption, and inconvenience proximately resulting from the evacuation." According to Teris, this fact has not been proven and the levels of alleged discomfort, disruption, and inconvenience will be different for all class members. Op-Tech avers that certification is not warranted where the only thing that class members have in common is that they were exposed to an explosion at the Teris facility. According to Op-Tech, the issue of proximate cause is inherently individual for each class member and is not suitable for a common trial. Finally, within this argument, Op-Tech argues that allowing this matter to proceed as a class action would violate their right to due process.

Appellees counter that there is commonality here, as the issues of liability, allocation of fault, causation, and damages are common to all class members. Moreover, because each of these issues predominates over any individual issues it was proper for the trial court to grant class certification. Moreover, Appellees aver that the damages at issue were proximately caused by a single event and were suffered by every member of the class. Finally, Appellees argue that there is no merit to Op-Tech's claim regarding a violation of its constitutional rights.

In addressing the issue of predominance, the trial court noted that it does not merely compare the individual versus common claims, but rather must decide if the common issues predominated over individual issues that could be resolved during a decertified stage of bifurcated proceedings. The trial court further noted that Appellants' common conduct resulting in the fire and explosion forms the basis for the class action and affected all class members by causing their evacuation and thus predominated over any individual issues. We cannot say that the trial court abused its discretion in this regard.

Rule 23(b) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Ark. R. Civ. P. 23(b). In *Johnson's Sales Co. v. Harris*, 370 Ark. 387, 260 S.W.3d 273 (2007), this court reiterated 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. *Id.* Moreover, this court

has 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. *Id.*

The ultimate question to be resolved in analyzing the issue of predominance is whether there are overarching issues that can be addressed before resolving individual issues. *Johnson's Sales*, 370 Ark. 387, 260 S.W.3d 273. However, if preliminary issues are individualized, then the predominance requirement is not satisfied. *See id.* Indeed, a case that presents numerous individual issues regarding the defendants' conduct, causation, injury, and damages will best be resolved on a case-by-case basis. *Id.*

This court has noted that it is more inclined to approve class certification in mass-accident cases than in products-liability or toxic-tort cases. *See Baker v. Wyeth-Ayerst Labs. Div.*, 338 Ark. 242, 992 S.W.2d 797 (1999). *Baker*, a products-liability case stemming from the manufacture of certain diet drugs later discovered to cause health problems, explained the distinction between the two different types of mass-tort cases, stating:

> Mass-tort actions, however, present unique certification problems because they generally involve numerous individual issues as to the defendant's conduct, causation, and damages. Courts, however, have recently distinguished between two different types of mass-tort actions: 1) mass-accident cases where injuries are caused by a single catastrophic event occurring at one time and place; and 2) toxic-tort or products-liability cases where the injuries are a result of a series of events occurring over a considerable length of time and under different circumstances. *See* James W. Moore, *Moore's Federal Practice* § 23.47[4] (3d ed. 1999); Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §§ 17.01 to 17.06 (3d ed. 1992); Charles Alan Wright et al., *Federal Practice and Procedure* § 1783 (2d ed. 1986). Due to the enormity and complexity of the individual issues presented by toxic-tort and products-liability cases, class certification is more common in mass-accident cases than in toxic-tort or products-liability case. *See* James W. Moore, *supra* § 23.47[4] (citing numerous products-liability and toxic-tort cases where class certification was denied); Herbert B. Newberg & Alba Conte, *supra* § 17.22 (citing several products-liability cases involving tetracycline, bendectin, and DES where class certification was denied).

338 Ark. at 247, 992 S.W.2d at 800. While this court ultimately determined that class certification was not appropriate in *Baker* because there were numerous and complex individual issues that predominated over any common claims, *Baker* is distinguishable from the present case.

Here, there are common questions regarding liability that can be easily resolved and these questions predominate over any individual issues that may arise. As the trial court reasoned, most of the discomfort, disruption, and inconvenience claims are sufficiently similar that they may be resolved in a single trial. The fact that damages may vary for members of the class does not defeat the finding of predominance. Appellants' attempts to argue that some people may claim damages for physical injuries, while others had no physical manifestations following the fire and explosions and thus there can be no commonality or predominance is simply unpersuasive. In *Bryant*, 374 Ark. 38, 285 S.W.3d 634, this court reiterated that the mere fact that individual issues and defenses may be raised does not defeat class certification where there are common questions regarding a defendant's wrongdoing. Moreover, in examining predominance, we do not merely compare the number of individual versus common claims. Finally, the damages sought in this case are identical to the damages sought in *Summons*, 306 Ark. 116, 813 S.W.2d 240.

Before leaving this point, we note that we are unpersuaded by Op-Tech's reliance on *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598 (5th Cir. 2006), a mass-accident case stemming from a chemical-plant fire. There, the court rejected a motion for class certification because it found individual issues regarding exposure, doses, health effects, and damages would dominate any common claims. *Steering Committee* is distinguishable from the present case, both factually and procedurally. First, there was no evacuation at issue in *Steering Committee* but rather claims for personal injury resulting from the exposure to the fire; whereas here, the principal claims are for inconvenience related to evacuating, a situation similar to that in *Summons*, where certification was appropriate. Moreover, *Steering Committee* was decided under the federal standard for class certification, which requires a more rigorous review that has previously been rejected by this court. Accordingly, we find no merit in the argument that the predominance element has not been satisfied.

Finally, we note that Op-Tech argues that allowing this case to proceed as a class action would violate their rights to

due process because it would result in separate juries addressing individual issues. Appellees counter that this court has recognized that a bifurcated process of certifying a class to resolve preliminary, common issue, followed by a decertified process to resolve individual issues is consistent with Rule 23. We agree.

We recently addressed and rejected a party's argument that a bifurcated proceeding would result in a constitutional violation in *Bryant*, 374 Ark. at 52, 285 S.W.3d at 644, and stated:

> Nor does the possibility of bifurcation render the instant class certification unconstitutional. As we have previously held, we do not know at the point of certification whether more than one jury would ultimately be necessary, and we will not speculate on the question of the inevitability of bifurcated trials or issue an advisory opinion on an issue that well may not develop. *See, e.g.*, *BNL Equity Corp. v. Pearson*, 340 Ark. 351, 10 S.W.3d 838 (2000).

Accordingly, there is no merit to Op-Tech's argument in this regard.

4. Superiority

Next, Appellants argue that reversal of the class-certification order is warranted because a class action is not the superior method for handling this matter. In this regard, Appellants contend that because numerous individual issues must be resolved on a case-by-case determination, a class action is not superior, and that this case is not manageable as a class action under the class-certification order. More specifically, Op-Tech argues that under the amended and substituted order, the trial court's determination that there will be a common trial, followed by a decertified phase of individual trials to determine damages, highlights its argument that this action is not manageable as a class action and magnifies the constitutional problems, specifically the violation of Appellants' right to due process.

Appellees argue that a class action is the superior method for handling this matter and that this court has never before required an explanation as to how a bifurcated proceeding complies with the superiority element. Appellees assert that most, if not all, issues will be resolved in the course of a common trial, and that only some class members will have additional damages claims that warrant an individual trial. Finally, Appellees contend that the circuit court has the ability to manage and guide the instant litigation.

Rule 23(b) requires "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Ark. R. Civ. P. 23(b). This court has repeatedly held that the superiority requirement is satisfied if class certification is the more "efficient" way of handling the case, and it is fair to both sides. *See Johnson's Sales*, 370 Ark. 387, 260 S.W.3d 273. Where a cohesive and manageable class exists, we have held that real efficiency can be had if common, predominating questions of law or fact are first decided, with cases then splintering for the trial of individual issues, if necessary. *Id.* This court has further stated that when a trial court is determining whether class-action status is the superior method for adjudication of a matter, it may be necessary for the trial court to evaluate the manageability of the class. *Bryant*, 374 Ark. 38, 285 S.W.3d 634. Furthermore, the avoidance of multiple suits lies at the heart of any class action. *Id.*

Here, the trial court found that a class action was the superior method for proceeding because the common questions predominate and thus a class action was the most realistic means for disposing of a large number of claims arising out of the same event and based on the same operative facts. We disagree with Appellants that the trial court erred in this regard. Appellants' argument that there are many individual issues that will have to be decided on a case-by-case basis is simply not supported by the record. As we explained in *Summons*:

> 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.

306 Ark. at 126, 813 S.W.2d at 245 (quoting D. Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind. L. Rev. 560 (1986-1987)).

Moreover, we disagree with Appellants' assertion that this case is not manageable as a class action. Rule 23 specifically contemplates the ability of the circuit court to decertify a class if it

becomes too unwieldy and states: "An order under this section may be altered or amended at any time before the court enters final judgment." Ark. R. Civ. P. 23(b). Finally, language from *Pearson*, 340 Ark. at 363, 10 S.W.3d at 845, is instructive on this issue:

> We have no hesitancy in placing the management of this class action in the trial court. That is what the rule contemplates, and, as already described, real efficiencies can be obtained by resolving common issues, both for the plaintiff class and the appellants. Were we, on the other hand, to speculate on class management or direct the trial court at this stage to present the parties with a management plan, we would be interfering in matters that clearly fall within the trial court's bailiwick.

Likewise, we recognize in the instant action that the trial court may proceed with this class action as it deems fit. Accordingly, we find no error in the trial court's ruling on the element of superiority.

5. Factual Findings

[redacted] Teris argues that the certification order should be vacated because it includes factual findings that have never been made or even requested. Some of those findings related to (1) door-to-door notifications; (2) shifting winds; (3) radio broadcasts made; (4) opinions of a fire chief and a member of the Arkansas Geographic Information Office regarding reasonableness of any evacuation; and (5) a finding that every adult in the evacuation area "suffered at least one element of damage that was common to all." According to Teris, such findings were never requested and are not supported by the record.

We disagree with Teris's argument in this regard for two reasons. First, the record reveals that CSX actually filed a request for written findings of fact and conclusions of law. Moreover, Rule 23 requires a trial court to include specific findings and conclusions in a certification order. Second, Teris in advancing this argument simply provides a list of facts it deems is not supported by the record but fails to explain how the findings relating to those facts are deficient. It is well settled that we will not make a party's argument for them or consider an argument that is not properly developed. *See Hanks v. Sneed*, 366 Ark. 371, 235 S.W.3d 883 (2006).

6. Exclusion of Some Claims

Op-Tech argues that Appellees' plan to sacrifice the personal-injury and property-damage claims of class members in order to achieve certification is disingenuous and does not cure the defects in the certification order. In this regard, Teris argues that the amended and substituted order's provision excluding from the class "[a]ny person believing they suffered a permanent personal injury, or permanent diminution in the value of their real property" renders the class-certification order inconsistent, deficient, and that it should be voided. In support of their argument, Op-Tech relies on *Thompson v. American Tobacco Co.*, 189 F.R.D. 544 (D. Minn. 1999), a case where certification was denied after the named plaintiffs reserved certain personal injury and damages claims. Appellees counter that they have never proposed to represent anyone with a personal-injury claim, and more importantly, know of no one who claims to have suffered a personal injury as a result of the event at Teris.

There is no merit to Op-Tech's argument. Simply because this proposed class defines its members in a way that does not include people with personal injuries or permanent injuries does not render it inconsistent. Such people may pursue their own claims or be part of another class, which based on the hearing before the circuit court, appears to be the case. We reiterate that Rule 23 gives the trial court discretion to manage the class as it deems fit.

7. Denial of a Jury Trial

Op-Tech next argues that the amended order improperly denies it a jury trial on the strict-liability claim. In the amended order, the trial court stated that it, not a jury, would determine the issue of strict or absolute liability. Op-Tech argues that a claim based on a theory of strict-liability involves issues of fact that must be resolved by a jury. Thus, according to Op-Tech, the trial court's removal of the claim for strict liability from the jury's consideration is prejudicial and violates its Seventh Amendment right to a trial by jury. Appellees counter that it is the law in Arkansas that a trial court first determines whether the theory of strict liability applies, with a jury then deciding the issues of proximate causation and damages.

We are unable to address the merits of this point on appeal, as Op-Tech is raising this specific argument for the first time on appeal. A review of the record reveals that at the hearing

on the amended and substituted order, counsel for CSX objected to the submission of the amended and substituted order on the basis that it went beyond the clarification of the class definition. In so arguing, counsel mentioned, in passing, the strict-liability issue and his belief that this provision was not in the prior class-certification order. At no point in arguing before the circuit court did counsel for any of the Appellants specifically challenge that portion of the order stating that the trial court would determine the applicability of strict liability or claim that it was an incorrect statement of the law. As such, this argument is being raised for the first time on appeal and this court will not reach the merits of the argument. It is well settled that we will not consider arguments made for the first time on appeal. *Ark. Dep't of Human Servs. v. Huff*, 347 Ark. 553, 65 S.W.3d 880 (2002).

8. Reliance on Evacuation Map

[redacted] As a final point, Op-Tech argues that the trial court's reliance on the evacuation map to define the class is insufficient to satisfy the requirements of Rule 23, as reliance on the map is too speculative to satisfy the numerosity requirement. Appellees counter that Op-Tech has failed to cite any binding authority in support of its argument on this point and thus should not be considered by this court. We agree. In advancing the instant argument, the only authority relied on by Op-Tech in support of its position is an unpublished federal district court case from Tennessee that has no precedential effect in this court. Thus, we decline to address the merits of this argument; there is no citation to binding authority, and this court will not develop a party's argument for it. *See, e.g.*, *Hanks*, 366 Ark. 371, 235 S.W.3d 883.

Affirmed.

Ray DOTSON d/b/a Ozark Mountain Carriages and d/b/a Ozark Carriages *v.* CITY of LOWELL, a Municipal Corporation

08-240 289 S.W.3d 55

Supreme Court of Arkansas
Opinion delivered November 13, 2008

Watson Law Firm, by: *K. Adell Ralston*, for appellant.

Harrington, Miller, Neihouse & Kieklak, P.A., by: *Thomas N. Kieklak*, for appellees.

ROBERT L. BROWN, Justice. Appellant Ray Dotson, a resident of Washington County, appeals from the Benton County circuit judge's November 2, 2007 order dismissing Dotson's amended counterclaim and granting the petition for replevin of the appellee, the City of Lowell, an Arkansas municipal corporation and a city of the first class, which exists entirely within Benton County. Dotson asserts three points on appeal. We affirm.

On October 5, 2004, the City of Lowell's city council passed an ordinance authorizing then-mayor Phil Biggers to purchase a stagecoach from Dotson for $16,500. The stagecoach was intended to serve as a symbol of the City of Lowell's history, and it was anticipated that the stagecoach would be used at events to promote the city. This transaction was consummated on October 20, 2004. In February of 2006, the City of Lowell contacted Dotson for help in refurbishing the stagecoach. Dotson arranged for the stagecoach to be repaired by Lantham Coach Works in Tipton, Missouri. The City of Lowell tendered four checks to Dotson totaling $10,000 in connection with these services. Upon return from Missouri, the stagecoach remained with Dotson.

On May 23, 2007, the City of Lowell made a written demand on Dotson to return the stagecoach. On that same date, Dotson presented the City of Lowell with an itemized list of expenses associated with the stagecoach totaling $28,248, but he did not return the stagecoach. On June 1, 2007, Dotson claimed that on December 11, 2006, he had entered into an enforceable contract with then-mayor Biggers whereby he had the right to keep the stagecoach. This document, entitled Memorandum of Understanding, stated that in return for Dotson's prior assistance in procuring, refurbishing, and storing the stagecoach, Dotson would

be entitled to use the stagecoach in his private business. Dotson demanded that the City of Lowell comply with the agreement contained in the Memorandum of Understanding.

On June 15, 2007, the City of Lowell filed a complaint and petition for replevin in the Benton County Circuit Court, seeking the return of the stagecoach from Dotson. Dotson next filed a motion to dismiss in which he claimed that venue was improper in Benton County under Arkansas Code Annotated section 16-60-116(a), which requires that an action be brought in the county in which the defendant resides. The City of Lowell filed a response in which it alleged that section 16-60-116(a) had been superseded by Act 649 of 2003, now codified at Arkansas Code Annotated section 16-55-213(a) (Repl. 2005), which allows an action to be brought in the county in which the plaintiff resided. In an order dated June 22, 2007, the circuit judge ruled that venue was proper in Benton County under section 16-55-213(a).

Dotson then filed an answer and a counterclaim against the City of Lowell for breach of contract and unjust enrichment. The City of Lowell moved to dismiss Dotson's counterclaim and alleged the affirmative defenses of illegality and statute of frauds. In an order dated November 2, 2007, the circuit judge held that the Memorandum of Understanding was void for illegality because it allowed Dotson to use property purchased with public funds for his private benefit in violation of article 12, section 5, and article 16, section 13, of the Arkansas Constitution and Arkansas common law, and that, even if the memorandum of understanding was not void for illegality, it would be unenforceable under the statute of frauds because it lacked a reasonable description of the lease term. The circuit judge dismissed Dotson's counterclaim for failure to state a claim upon which relief could be granted and ordered him to return the stagecoach to the City of Lowell.

I. Improper venue

For his first point on appeal, Dotson claims that the circuit judge erred in ruling that venue was proper in Benton County under Arkansas Code Annotated section 16-55-213(a), which allows civil actions to be brought in the county in which the plaintiff resided at the time of the events giving rise to the claim. Dotson urges that Arkansas Code Annotated section 16-60-116(a), which is a general venue statute and provides that actions must be brought in the county in which the defendant resides, was the controlling venue statute and, thus, Washington County was the

proper venue. The City of Lowell counters that venue was proper in Benton County because the newer general venue statute, section 16-55-213(a), repealed by implication section 16-60-116(a).

We turn then to an analysis of section 16-55-213(a) and section 16-60-116(a). This is a matter of statutory construction, which this court reviews de novo. *See McMickle v. Griffin*, 369 Ark. 318, 254 S.W.3d 729 (2007). The General Assembly is vested with the power to establish venue under the Arkansas Constitution. Ark. Const. amend. 80, § 10. It is this court's fundamental duty, as well as a basic rule of statutory construction, to give effect to the legislative purpose set by the venue statutes. *See Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995).

Since 1838, the General Assembly has provided that, in the absence of a statutory exception, the basic rule of venue is that a defendant must be sued in the county where he or she resides or is summoned. *See id.* To that end, Arkansas Code Annotated section 16-60-116(a) provides that "every other action may be brought in any county in which the defendant or one (1) of several defendants resides or is summoned." Nevertheless, in 2003, the General Assembly enacted Act 649 of 2003, the "Civil Justice Reform Act." Although the act primarily focused on tort reform, Act 649 contained the following venue provision now codified at Arkansas Code Annotated section 16-55-213(a):

> (a) *All civil actions* other than those mentioned in §§ 16-60-101—16-60-103, 16-60-107, 16-60-114, and 16-60-115, and subsection (e) of this section must be brought in any of the following counties:
>
> (1) The county in which a substantial part of the events or omissions giving rise to the claim occurred;
>
> (2)(A) The county in which an individual defendant resided.
>
> (B) If the defendant is an entity other than an individual, the county where the entity had its principal office in this state at the time of the accrual of the cause of action; or
>
> (3)(A) The county in which the plaintiff resided.
>
> (B) If the plaintiff is an entity other than an individual, the county where the plaintiff had its principal office in this state at the time of the accrual of the cause of action.

Ark. Code Ann. § 16-55-213(a) (Repl. 2005) (emphasis added).

The City of Lowell contends that venue was proper in Benton County because Arkansas Code Annotated section 16-55-213(a) repeals by implication Arkansas Code Annotated section 16-60-116(a). Repeals by implication, however, are not favored, and this court will make every effort to read seemingly conflicting statutes in a harmonious manner if possible. *Griffin*, 369 Ark. at 325, 254 S.W.3d at 737; *Great Lake Chem. Corp. v. Bruner*, 368 Ark. 74, 243 S.W.3d 285 (2006). Repeal by implication is recognized in two situations: (1) where the provisions of two statutes are in irreconcilable conflict with each other; and (2) where the legislature takes up the whole subject anew and covers the entire ground of the subject matter of a former statute and evidently intends the latter statute as a substitute. *Uilkie v. State*, 309 Ark. 48, 827 S.W.2d 131 (1992).

Recently, in *Wright v. Centerpoint Energy Resources Corp.*, 372 Ark. 330, 276 S.W.3d 253 (2008), this court was asked to determine whether the new statute, section 16-55-213(a), repealed by implication section 16-60-112(a), which specifically provides that personal injury and wrongful-death actions shall be brought in the county where the accident occurred, or in the county where the person injured or killed resided at the time of the accident. The appellant in *Wright* was the personal representative of the estate of the deceased, who had died from carbon monoxide poisoning in her apartment in Craighead County. Although the deceased had resided in Craighead County at the time of her death and the accident had occurred in Craighead County, the appellant elected to file a wrongful-death action in his county of residence, Crittenden County, arguing that venue was proper in the county in which he, as the plaintiff, resided under section 16-55-213(a). The appellant argued that section 16-60-112(a) was in conflict with section 16-55-213(a) and, thus, had been repealed by implication.

This court disagreed, however, finding that the two statutes could be harmonized. In reviewing, section 16-55-213(a) as a whole, this court determined that a wrongful-death action could be brought in only three counties: (1) the county where a substantial part of the events or omissions giving rise to the claim *occurred*; (2) where an individual defendant *resided*; and (3) where the plaintiff *resided*. *See Wright*, *supra* (emphasis added). This court determined that the use of the past tense in the subsections of

section 16-55-213(a) showed that the General Assembly intended for venue to be fixed "where the plaintiff or defendant *resided at the time of the events giving rise to the cause of action.*" *Id.* (emphasis in original). Accordingly, venue was fixed, under both statutes, at the time of the events giving rise to the claim — here, the time of injury or death — thereby precluding the appellant, who was appointed personal representative of the decedent's estate after the accident, from being a "plaintiff" under section 16-55-213(a).

The City of Lowell insists that *Wright* is distinguishable here. We agree. First, the City of Lowell asserts that the statute at issue here, section 16-60-116(a), is like section 16-55-213(a), in that both are general default venue statutes that apply only when other specific venue statutes do not, while the statute at issue in *Wright*, section 16-60-112(a), was a specific venue statute applicable only to personal injury and wrongful-death actions. Second, the City of Lowell notes that in *Wright*, both statutes used the past tense in fixing venue, whereas here the newer statute, section 16-55-213(a), fixes venue at the time the cause of action arose and uses the past tense, while the older statute, section 16-60-116(a), fixes venue as defendant's residence at the time the suit is filed, as evidenced by the legislature's use of the present tense "resides."

We conclude that section 16-55-213(a) repeals by implication section 16-60-116(a). First, the two statutes are in irreconcilable conflict with each other. Section 16-55-213(a) provides that *all civil actions*, excluding a few statutory exceptions, must be brought in one of three counties: (1) the county in which a substantial part of the events or omissions giving rise to the claim occurred; (2) the county in which an individual defendant resided; or (3) the county in which the plaintiff resided. Additionally, the use of the past tense in these subsections evidences the fact that the General Assembly intended for venue to be fixed at the time of the events giving rise to the claim. *See Wright, supra.* The older statute, section 16-60-116(a), on the other hand, provides that venue is proper in any county where the defendant "resides," which means that the General Assembly intended for venue to be fixed at the time the suit is filed. *See Quinney*, 320 Ark. at 185, 895 S.W.2d at 542. Therein lies the conflict. Section 16-60-116(a) provides for a venue — a county where a defendant resides at the time the lawsuit is filed — that is not permitted under section 16-55-213(a).

In sum, we are persuaded of this conflict by the fact that the new general default venue statute expressly fixes venue for "[a]ll civil actions," with certain noted statutory exceptions. It also fixes

venue at the time the events giving rise to the cause of action occurred, while the existing general default venue provision fixes venue at the time the cause of action is filed. Both points are evidence of the General Assembly's intent to adopt a new general venue scheme as a substitute for section 16-60-116(a). David Newbern and John Watkins have noted the conflict between these provisions in their Arkansas Practice Series on Civil Practice and Procedure:

> Act 649 seems to fall into both categories [of repeal by implication]. First, Ark. Code Ann. § 16-55-213(a) establishes a new general rule for venue quite different from the former rule set forth in Ark. Code Ann. § 16-60-116(a), thereby creating an irreconcilable conflict. Second, the plain language of § 16-55-213(a) — i.e., that "[a]ll civil actions," with certain exceptions, "must be brought in the following counties" — demonstrates the General Assembly's intent to adopt a new venue scheme as a substitute for the old.

Newbern & Watkins, 2 Arkansas Practice Series, Civil Practice and Procedure § 9:1 n.8 (4th ed.). We affirm the circuit judge on this point.

II. Illegality

For his next point, Dotson asserts that the circuit judge erred in finding that his counterclaim failed to state a claim upon which relief could be granted due to the illegality of the alleged agreement. Dotson contends that the City of Lowell lacked standing to bring an illegal exaction claim and also that there can be no illegal exaction where there is a mutual benefit to the parties.

In arguing this point, the parties disagree over the applicability of article 16, section 13, of the Arkansas Constitution dealing with illegal exactions and article 12, section 5, which prohibits lending public money to individuals. The parties also disagree over whether the public-purpose doctrine controls the issue under our common law. *See, e.g., Chandler v. Bd. of Trs. of Teacher Ret. Sys.*, 236 Ark. 256, 365 S.W.2d 447 (1963). We decline to resolve this issue by an interpretation of the Arkansas Constitution or the public-purpose doctrine. This court has made it clear that we will not address a constitutional question if we can resolve the case without doing so. *Herman Wilson Lumber Co. v. Hughes*, 245 Ark. 168, 431 S.W.2d 487 (1968).

We turn, rather, to Arkansas law and specifically to the powers of municipalities set out in the Arkansas Code:

> (a) Municipal corporations are empowered and authorized to sell, convey, lease, rent, or let any real estate or personal property owned or controlled by the municipal corporations. This power and authorization shall extend and apply to all such real estate and personal property, including that which is held by the municipal corporation for public or governmental uses and purposes.
>
> . . . .
>
> (c) The execution of all contracts and conveyances and lease contracts shall be performed by the mayor and city clerk or recorded, when authorized by a resolution, in writing, approved by a majority vote of the city council present and participating.

Ark. Code Ann. § 14-54-302(a), (c) (Repl. 1998).

The record in this case is devoid of any resolution by the City of Lowell's city council authorizing Dotson's private usage of the stagecoach under the alleged Memorandum of Understanding. We conclude, therefore, that illegality is readily established by the fact that private use of the stagecoach by Dotson was never sanctioned by resolution of the City of Lowell city council, as required by section 14-54-302(c). This noncompliance was noted by the circuit judge in his order in which he said: "No written resolution has been alleged to have been approved by a majority vote of the Lowell City Council. Accordingly, section (a) A.C.A. § 14-54-302 is inapplicable to the facts before this Court."

Although the circuit judge did not address the effect of the City of Lowell's noncompliance with section 14-54-302(c) as the basis for his finding that the alleged contract was illegal, it is axiomatic that this court can affirm a circuit court if the right result is reached even if for a different reason. *See, e.g.*, *Alphin v. Alphin*, 364 Ark. 332, 219 S.W.3d 160 (2005). We hold that the absence of the city council's resolution is fatal to the validity and viability of the alleged Memorandum of Understanding.[1]

For this reason, we affirm the circuit judge's dismissal of Dotson's counterclaim and his order for the return of the stagecoach to the City of Lowell. Because we decide this case as we do,

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[1] Subsequent ratification of the alleged agreement by the City of Lowell's city council was not argued before the circuit judge or on appeal. *See, e.g.*, *Day v. City of Malvern*, 195 Ark. 804, 114 S.W.2d 459 (1938). Accordingly, we do not address it.

it is unnecessary for us to address the remaining issues raised by the parties. We further decline to address Dotson's argument raised in his brief on appeal that Arkansas Code Annotated section 14-58-303(a) applies, as no ruling on this point was made by the circuit judge. It is well settled that issues not ruled on by the trial judge will not be considered on appeal. *See, e.g., Ghegan & Ghegan, Inc. v. Barclay*, 345 Ark. 514, 49 S.W.3d 652 (2001).

Affirmed.

MAMO TRANSPORTATION, INC. *v.* Artee WILLIAMS, Director, Department of Workforce Services

08-29 289 S.W.3d 79

Supreme Court of Arkansas
Opinion delivered November 13, 2008

Robinson, Staley, Marshall & Duke, by: *Thomas B. Staley*, for appellant.

Allan Pruitt, for appellee.

JIM GUNTER, Justice. This appeal arises from a decision of the Board of Review of the Arkansas Department of Workforce Services (the Board) finding that Appellant Mamo Transportation, Inc. (Mamo) is required to pay unemployment insurance taxes for services performed by drivers for wages because Mamo failed to meet the three-prong test set out in Ark. Code Ann. § 11-10-210(e) (Supp. 2007). We affirm the Board's decision.

Mamo is a Nevada corporation that provides a "drive-away" service in which it transports larger vehicles from a point of origin to a point of destination. Mamo is headquartered in Osceola, Indiana and operates throughout the forty-eight contiguous states and Canada. Mamo contracts with drivers to drive the vehicles. It has dispatch offices in Indiana, Pennsylvania, North Carolina, and Arkansas. Mamo's safety director testified that Mamo has 316 "independent contractors" on an active list. The driver calls Mamo if he or she wants to work driving a vehicle. The drivers do not contact customers directly, but provide services for customers obtained by Mamo. The price is negotiated between the driver and Mamo. If the driver makes the commitment to transport the vehicle, Mamo notifies the customer that a driver has been assigned to their load. Mamo gains a profit by paying the driver less

than what the customer pays Mamo. Mamo does not have exclusive agreements with its drivers. The drivers pay for their own training, although Mamo ensures that federal safety requirements are met. The drivers are free to drive the route decided upon by the driver; they provide their own transportation once a run is completed, pay for fuel and other expenses and provide tools which might be necessary.

Sylvia Jones-Allen, a resident of Arkansas, entered into an "Independent Contractor Driver Service Agreement" with Mamo. During her first ninety days driving for Mamo, Allen drove a 13'6" truck under an 11'8" bridge, causing $9,008 worth of damage to the truck. Mamo then terminated Allen's contract. On April 14, 2003, Allen filed a request for unemployment benefits. She indicated that she was an independent contractor on the unemployment forms. Mamo agreed that Allen was an independent contractor.

Upon review, the Arkansas Department of Workforce Services ("Department") determined that Mamo "exercised sufficient direction and control over the drivers and other workers to the degree necessary to establish an employer/employee relationship." Mamo requested a fact-finding hearing, contending that the factual determination made by the Department in applying Ark. Code Ann. § 11-10-210(e)(1), (2), and (3) was not supported by the facts and that the drivers and workers were not employees of Mamo. A hearing was conducted by the Board on October 19, 2004. The Board found that Mamo was a covered employer subject to the payment of unemployment insurance taxes because it failed to meet Ark. Code Ann. § 11-10-210(e)(2).

The Arkansas Court of Appeals affirmed the Board's decision. *See Mamo Transp. Inc. v. Director, Dept. of Workforce Services*, 101 Ark. App. 68, 270 S.W.3d 379 (2007). We granted Mamo's petition for review on May 15, 2008. Upon a petition for review, we consider a case as though it had been originally filed in this court. *Texarkana Sch. Dist. v. Conner*, 373 Ark. 372, 284 S.W.3d 57 (2008).

On appeal, Mamo argues that (1) the Board "ignored the plain, ordinary and common sense meaning of the language of the statute resulting in an absurd outcome not intended by the Arkansas legislature" and (2) the contractors at issue were independent contractors not subject to Arkansas unemployment taxes. Mamo specifically argues that the Arkansas legislature did not

intend for the language of Ark. Code Ann. § 11-10-210(e)(2) to describe every road and highway in the United States and Canada as a "place of business" of Mamo. In response, the Department contends that the Board's decision is supported by substantial evidence and complies with Ark. Code Ann. § 11-10-210.

We affirm the decision of the Board of Review if it is supported by substantial evidence. *Coker v. Director*, 99 Ark. App. 455, 262 S.W.3d 175 (2007). Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Id.* We view the evidence and all reasonable inferences deducible there from in the light most favorable to the Board's findings. *Id.* Even if the evidence could support a different decision, our review is limited to whether the Board could have reasonably reached its decision based on the evidence presented. *Id.*

In this case, we are called upon to construe provisions of Arkansas Code Annotated section 11-10-210. We review issues of statutory construction de novo. *Ark. Comprehensive Health Ins. Pool v. Denton*, 374 Ark. 162, 286 S.W.3d 698 (2008). The basic rule of statutory construction is to give effect to the intent of the General Assembly. *Id.* In determining the meaning of a statute, the first rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* This court construes the statute so that no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible. *Id.* When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to resort to rules of statutory construction. *Id.* However, this court will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent. *Id.* This court seeks to reconcile statutory provisions to make them consistent, harmonious, and sensible. *Id.*

Arkansas Code Annotated § 11-10-210(e) states:

> (e) Service performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the director that:
>
> (1) Such individual has been and will continue to be free from control and direction in connection with the performance of the service, both under his or her contract for the performance of service and in fact; and

> (2) The service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
>
> (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Id. According to the statute, an employment relationship exists unless all three of the above elements are met. Here, the Board concluded that the first element was met, the second element was not met, and did not rule on the third element. Therefore, we are limited in our review to § 11-10-210(e)(2).

The Board concluded that Mamo failed to meet the second requirement of § 11-10-210(e) in that the course of business for both Mamo and the drivers is providing the delivery of vehicles, and Mamo's places of business consist of not only its office, but also the roadways on which the drivers transport the vehicles. On appeal, Mamo presents no argument that the Board was incorrect in finding that delivery of the vehicles was in the course of Mamo's business, so we will only address whether the Board erred in its finding regarding Mamo's place of business.

Looking at the language of the statute, the second prong is not met unless the service is performed outside of all the places of business of the enterprise for which the service is performed. Mamo provides a "drive-away" service for its customers by transporting various types of vehicles throughout the United States and Canada. Its business is to take vehicles from origin to destination. Therefore, the "enterprise for which the service is performed" in this case is the transportation of vehicles. *Black's Law Dictionary* 1169 (7th ed. 1999) defines "place of business" as "a location at which one carries on a business."

The Board relied on *Home Care Professionals of Arkansas, Inc. v. Williams*, 95 Ark. App. 194, 235 S.W.3d 536 (2006), in making its determination that Mamo's places of business include the roadways. In *Home Care Professionals*, the court of appeals held that Home Care Professionals (HCP) failed to meet the second prong of the statute. HCP was a home-care referral service. HCP maintained a list of caregivers who were able to provide home-care services. Once HCP received a request for a service from a client, HCP would find a caregiver willing to perform the service. The

caregiver would sign an independent contract. The client and caregiver would negotiate a schedule and the terms of the caregiver's engagement. Once the caregiver completed the service, the caregiver would turn in a time sheet and be paid by HCP the amount paid by the client minus HCP's referral fee. In holding that HCP's caregivers were not independent contractors, the court of appeals stated:

> In regard to the place of business aspect of the second part of the test, an employer's place of business has been found to include not only the location of a business's office, but also the entire area in which a business conducts business. *See Missouri Association of Realtors v. Division of Employment Security*, 761 S.W.2d 660 (Mo. App. 1988); *Employment Security Commission of Wyoming v. Laramie Cabs, Inc.*, 700 P.2d 399 (Wyo. 1985); and *Vermont Institute of Community Involvement, Inc. v. Department of Employment Security*, 436 A.2d 765 (Vt. 1981). More specifically, the representation of an entity's interest by an individual on a premises renders the premises a place of the employer's business. *See Carpetland*, [*Carpetland U.S.A. v. Illinois Dep't of Employment Security*, 201 Ill.2d 351, 776 N.E.2d 166 (2002)].

Home Care Prof'ls, 95 Ark. App. at 199, 235 S.W.3d at 540-41. Other states with statutes almost identical to § 11-10-210 have addressed the issue of what constitutes a "place of business." In *Chicago Messenger Service v. Jordan*, 825 N.E.2d 315 (Ill. Ct. App. 2005), the appellate court of Illinois held that an employer's couriers were employees, rather than independent contractors, for the purposes of the Unemployment Insurance Act. The court stated:

> Finally, we reject CMS' claim that it is merely a broker of delivery service. This is essentially the same argument that was made by the limousine company and rejected in *O'Hare-Midway*. Here, the usual course of business involved the pickup and delivery of packages by the couriers, similar to the pickup of passengers that was the usual course of business in *O'Hare-Midway*. As we have already noted, the couriers' service is performed by transporting the packages, like the limousine passengers, from one location to another. Again, it stands to reason that the company's interests are represented during the performance of that service and that the place of business includes travel between one location and another. Therefore, the couriers perform their services on the roadways, which are, then, for purposes of section

> 212(B), the place of business. *See O'Hare-Midway*, 232 Ill. App. 3d at 113, 173 Ill. Dec. 171, 596 N.E.2d 795.

Chicago Messenger Serv., 825 N.E.2d at 328. Similarly, in *O'Hare-Midway Limousine Service v. Baker*, 596 N.E.2d 795 (Ill. App. Ct. 1992), the Illinois Appellate Court found that, because chauffeurs represented the interests of the limousine company whenever they picked up passengers, the usual course of business was on the roadways traveled.

The Supreme Court of Wyoming also addressed the place-of-business issue in *Employment Security Commission of Wyoming v. Laramie Cabs, Inc.*, 700 P.2d 399 (Wyo. 1985), in which the court interpreted a statute similar to § 11-10-210. The court found that a taxicab company's business consisted of providing transportation to customers by leasing taxicabs to drivers. The court held that the taxicabs themselves must be considered the company's place of business because "the essence of Laramie Cabs' business is conducted in cabs between the customer's origin and destination, not in the company office." *Laramie Cabs*, 700 P.2d at 407.

■ For the purpose of defining terms under Ark. Code Ann. § 11-10-210, we hold that "place of business" is the place where the enterprise is performed. An enterprise's place of business must be decided on a case-by-case basis. In *Home Care Professionals*, the home-care service was performed in the customer's home; in *O'Hare-Midway*, the limousine service was performed on the roadways traveled; in *Chicago Messenger Service*, the service of transporting packages was performed on the roadways; in *Laramie Cabs*, the taxicab service was performed in the taxicab itself. Here, Mamo's enterprise, transporting vehicles, is performed in the vehicle itself between the point of origin and the point of destination. As in *Home Care*, the enterprise for which the service is performed takes place within the property of the customer. Under the facts in this case, we hold that, in addition to the physical locations of its dispatch offices, Mamo's places of business include the location of the transported vehicle.

Because Mamo has failed to meet its burden set out in § 11-10-210(e), it is not exempt from paying unemployment insurance taxes on its drivers. The Board was correct in its decision that Mamo's drivers "do not perform their services outside of all the places of Mamo's business." However, we hold that Mamo's enterprise takes place inside the trucks, rather than on the road-

ways. Accordingly, we affirm the result reached by the Board, even though it announced the wrong reason. *See Hardy v. Wilbourne*, 370 Ark. 359, 259 S.W.3d 405 (2007).

Affirmed.

CORBIN and DANIELSON, JJ., concur.

BROWN, J., dissents.

PAUL E. DANIELSON, Justice, concurring. I concur in the decision to affirm the Board's decision, but would do so using the same rationale as the Board. As evidenced by its own representative's testimony, Mamo is in the business of providing its clients transportation of the clients' vehicles. Thus, its enterprise for which the service is performed is, in fact, transportation.

While Mamo has four main offices from which it dispatches drivers to provide Mamo's transportation service to its clients, it is my opinion that "all the places of business," in this case, would encompass the roadways on which Mamo's drivers travel. Nothing is unclear about the term "place of business." Indeed, *Black's Law Dictionary* defines the term as "[a] location in which one carries on a business." *Black's Law Dictionary* 1187 (8th ed. 2004). That differs from a business's "principal place of business," which is defined as "[t]he place of a corporation's chief executive offices, which is typically viewed as the nerve center." *Id.* Accordingly, the term "all the places of business" encompasses *wherever* the business's services are performed. Here, "all the places of business" includes the roadways.

In the instant case, the service being provided by Mamo, transportation, necessarily takes place on the roadways or airways. Transportation, by its nature, does not occur in one physical location or place of business. It simply is a different creature from the typical business venture. Indeed, a "place of business" determination will vary from case to case depending on the business in which the employer is engaged. Here, all the places of business includes the roadways, as found by the Board. *See, e.g.*, *Vermont Inst. of Cmty. Involvement v. Dep't of Employment Sec.*, 140 Vt. 94, 436 A.2d 765 (1981) (observing that an employer's place of business includes not only the location of its offices, but also the entire area in which it conducts business). Because there was substantial evidence to support the Board's decision, I would affirm.

CORBIN, J., joins.

ROBERT L. BROWN, Justice, dissenting. I write to draw the General Assembly's attention to the fact that confusion abounds in this case over what section 11-10-210(e)(2) means and over where the places of business of Mamo Transportation are for the enterprise of transporting large vehicles. Four justices apparently believe that *all* transporting vehicles used by *all* independent contractors contracting with Mamo are Mamo's "places of business." Two justices interpret "places of business" even more expansively to include every inch of roadway where the transporting vehicle used by independent contractors is traveling. In other words, the entire road system traversed by every transporting vehicle is a place of business for Mamo. I interpret places of business to be those locations where Mamo actually conducts its business, which includes its headquarters in Indiana and its four dispatch offices.

Though, admittedly, there is a conflict of authority in foreign jurisdictions, the reasoning of the Massachusetts Supreme Judicial Court is persuasive to me in defining places of business. *See Athol Daily News v. Bd. of Review of the Div. of Employment & Training*, 786 N.E.2d 365 (Mass. 2003). In *Athol*, the issue was whether unemployment compensation benefits should be paid to adult newspaper deliverers who delivered newspapers house to house and elsewhere. The Supreme Judicial Court of Massachusetts interpreted the same "places of business" language as we have in our Code and denied benefits. The court had this to say:

> The division's assertion that the News's "places of business," for purposes of the second part of the ABC test, includes the geographic area tracked by all of the News's delivery routes, is illogical. The one decision cited by the division in support of its position, *Richardson Bros. v. Board of Review of Dep't of Employment Sec.*, 198 Ill.App.3d 422, 144 Ill.Dec. 607, 555 N.E.2d 1126 (1990), concerned truck drivers who distributed garden plants to retail outlets, and not carriers who deliver newspapers to private homes. To the extent that language employed by the Illinois court suggests that a newspaper delivery route is a newspaper company's place of business for purposes of G.L. c. 151A, we respectfully disagree. *See id.* at 430, 144 Ill.Dec. 607, 555 N.E.2d 1126, citing *Eutectic Welding Alloys Corp. v. Rauch*, 1 Ill.2d 328, 115 N.E.2d 898 (1953) ("where an employing unit assigns a specific area to an individual for the purpose of selling its product . . . that area is the place of business of the enterprise").

Athol, 786 N.E.2d at 372 n.11.

Similarly, the Appeals Court of Massachusetts, Suffolk, interpreted this same language in connection with taxicab drivers who were independent contractors and dispatched from the business premises of Town Taxi. *See Comm'r of the Div. of Unemployment Assistance v. Town Taxi of Cape Cod, Inc.*, 862 N.E.2d 430 (Mass. App. Ct. 2007). In holding that places of business did not include taxi cab routes, the court said:

> The service performed by the drivers occurred outside the business premises of Town Taxi. Although the taxicabs were stored and the dispatch system was operated at the business premises of Town Taxi, the drivers did not transport customers on those premises. Compare *Althol Daily News*, 439 Mass. at 179, 786 N.E.2d 365 (where carriers picked up newspapers from employer's distribution center and delivered them to individual houses, stores, bundle drops, or vending machines, "all of the carriers ma[d]e deliveries outside of premises owned by the [employer] or which could fairly be deemed its 'place of business' ").

Town Taxi, 862 N.E.2d at 435.

Nor does the court of appeals case in *Home Health Care Professionals of Arkansas, Inc. v. Williams*, 95 Ark. App. 194, 235 S.W.2d 836 (2006), give the majority the "cover" it would like. In that case, caregivers provided a fixed service at a fixed location, the patient's home, and the court of appeals held that the home locations were places of business of the Home Health Care enterprise. In the case before us, however, under the majority's interpretation, Mamo's places of business along any roadway would be all transporting vehicles for as long as it took the independent contractors to travel to their destinations. That interpretation is excessively broad and, to use the language of the Massachusetts Supreme Judicial Court, "illogical."

It is clear to me that the General Assembly drew a distinction in section 11-10-210(e)(2) between where the service is being performed, which could include the roadways on the one hand, and "places of business of the enterprise for which the service is performed," which are obviously the premises, on the other. Ark. Code Ann. § 11-10-210(e)(2) (Repl. 2002). Yet the majority opinion conflates the two, which adds to the confusion.

At oral argument before this court, counsel for the Department of Workforce Services admitted that this issue had been difficult for his agency and "a tough one," as he put it. While

providing unemployment benefits is a worthy purpose, the qualifying factors, it is submitted, should be established by the General Assembly and not by an overbroad and illogical interpretation by the courts.

I respectfully dissent.

CITY of JACKSONVILLE, ARKANSAS *v.*
CITY of SHERWOOD, ARKANSAS, Sherwood Holding Co., LLC, Metropolitan Realty & Development, LLC, LILAC, LLC, Greg Heslep, and Michael B. Clayton

08-386 289 S.W.3d 90

Supreme Court of Arkansas
Opinion delivered November 13, 2008

Robert E. Bamburg, for appellant.

Stephen R. Giles, for appellees.

JIM GUNTER, Justice. This appeal arises from a September 11, 2007 judgment of the Pulaski County Circuit Court affirming the Pulaski County Court's decision to grant Appellees' petition for annexation. We affirm the rulings of the circuit court.

On May 11, 2006, Appellee landowners Sherwood Holding Company, LLC, Metropolitan Development, LLC, LILAC, LLC, and Greg Heslep petitioned for four tracts of real property totaling approximately 1951 acres to be annexed into the City of Sherwood. Sherwood Holding Co. is the owner of Tract 1, Metropolitan Realty & Development is the owner of Tract 2, LILAC is the owner of Tract 3, and Heslep is the owner of Tract 4. Tract 1, containing approximately 640 acres, is contiguous with the northern boundary of Sherwood. Tract 2, containing approximately 589 acres, is contiguous with Tract 1. Tract 3, containing 608 acres, and Tract 4, containing 112 acres, are contiguous by virtue of their connection with Tract 1. Appellee Michael Clayton is the authorized agent appointed by the landowners, and also serves as Sherwood's city engineer.

Appellant City of Jacksonville submitted a resolution opposing the annexation of the properties into Sherwood. On June 20, 2006, a hearing was held regarding the petition for annexation in Pulaski County Court. The county court granted annexation on August 3, 2006. Appellant appealed this order to the Pulaski County Circuit Court. The circuit court held a bench trial on May 30, 2007. On May 31, 2007, the circuit court entered its judgment,

affirming the order of the county court and approving the annexation of Tracts 1, 2, 3, and 4. Appellant now appeals.

On appeal, Appellant asserts that (1) the circuit court erred in affirming and approving the annexation of Appellees' properties into the City of Sherwood by the county court because there was insufficient proof presented to the county court to make a determination of the *Vestal* criteria; (2) the circuit court erred in its application of the *Vestal* criteria by failing to complete an established statutory and case law criteria assessment of what is right, proper, and reasonable in an annexation; and (3) the circuit court erred in granting Appellees' petition for annexation in ruling that Ark. Code Ann. § 14-56-413 and § 14-56-426 do not prohibit annexation into Sherwood those portions of Tracts 1, 2, and 3, which lie within Jacksonville's extraterritorial planning jurisdiction and the air installation compatible use zones ("AICUZ zones").

The five criteria used to decide if annexation is proper were set out by this court in *Vestal v. City of Little Rock*, 54 Ark. 321, 15 S.W. 891 (1891):

> (1) Whether the property is platted and held for sale or use as municipal lots;
>
> (2) Whether platted or not, if the lands are held to be sold as suburban property;
>
> (3) Whether the lands furnish the abode for a densely settled community or represent the actual growth of the municipality beyond its legal boundary;
>
> (4) Whether the lands are needed for any proper municipal purposes such as for the extension of needed police regulation; and
>
> (5) Whether the lands are valuable by reason of their adaptability for prospective municipal uses.

See also Ark. Code Ann. § 14-40-603(a) (Repl. 1998) (requiring that the prayer of the petitioner for annexation be "right and proper").

We have stated that these five criteria should be considered in the disjunctive, and an annexation is proper if any one of the five factors is met. *Town of Houston v. Carden*, 332 Ark. 340, 965 S.W.2d

131 (1998); *Gay v. City of Springdale*, 298 Ark. 554, 769 S.W.2d 740 (1989) (*Gay II*); *Lee v. City of Pine Bluff*, 289 Ark. 204, 710 S.W.2d 205 (1986); *Gay v. City of Springdale*, 287 Ark. 55, 696 S.W.2d 723 (1985) (*Gay I*). The criteria apply regardless of whether the annexation proceeding was initiated by the city or by adjoining landowners. *Town of Houston, supra*; *Chastain v. Davis*, 294 Ark. 134, 741 S.W.2d 632 (1987); *Louallen v. Miller*, 229 Ark. 679, 317 S.W.2d 710 (1958); *Cantrell v. Vaughn*, 228 Ark. 202, 306 S.W.2d 863 (1957). If a part of the proposed area does not meet one of the five requirements, the annexation of the entire area is void in toto. *Town of Houston, supra*; *Gay II, supra*; *Chastain, supra*; *Chappell v. City of Russellville*, 288 Ark. 261, 704 S.W.2d 166 (1986).

Appellant first asserts that the circuit court's order was an affirmance of a flawed county court ruling because there was insufficient proof presented to the county court to make a determination of the *Vestal* criteria. In response, Appellees contend that, regardless of how the proceeding was initiated, the circuit court properly treated this action as an independent attack on the annexation by holding a trial de novo.

Appellant filed a complaint in the circuit court to prevent the annexation, and it is our responsibility to determine whether the circuit court's findings of fact are clearly erroneous. *See City of Dover v. Russellville*, 346 Ark. 279, 57 S.W.3d 171 (2001). Because our review is one from the circuit court, we are unable to address Appellant's argument on this issue because it erroneously seeks our review of the county court proceeding. *Id.*

For its next argument, Appellant asserts that the circuit court erred in its application of the *Vestal* criteria by failing to complete the established statutory and case-law criteria assessment of what is right, proper, and reasonable in an annexation. In response, Appellees contend that Appellant has failed to meet its burden of proof that the lands proposed for annexation do not meet any one of the statutory requirements of § 14-40-302 and *Vestal*.

Tracts 1 through 4 contain raw timberland and/or floodplain acreage ranging from 112 acres to 640 acres. This general area lies between the cities of Sherwood and Jacksonville, with tracts divided by Bayou Meto, a natural waterway. Appellant asserts that the property east of Bayou Meto is part of the natural growth pattern for Jacksonville and should not be annexed into Sherwood. Appellant contends that the circuit court failed to complete an

assessment of the four tracts under the *Vestal* criteria and did not address the factors of reasonableness set out in *City of Marion v. Guaranty Loan & Real Estate Co.*, 75 Ark. App. 427, 58 S.W.3d 410 (2001).

It is Appellant's burden to demonstrate that the land fails to meet at least one of the criteria of Ark. Code Ann. § 14-40-302, also known as the *Vestal* criteria. *See Town of Houston, supra.* The circuit court concluded that the land met two of the requirements: (1) the land is held to be sold as suburban property; and (2) the land is valuable by reason of its adaptability for prospective municipal purposes.

Testimony from the trial supports the circuit court's conclusion. Steve Deere, a real estate developer and President of Sherwood Holding Company, testified that the company intended to "probably develop mainly residential housing in that area." Terry Paff, President of Metropolitan Realty and Development, testified that "[w]e develop residential subdivisions, which is the biggest part of our plan with this property." Andrew Collins, President of Cypress Properties, which manages Lilac, LLC, testified that he was aware that any development in the area would have to be approved by the Jacksonville Planning Commission. Greg Heslep, real estate developer and owner of Tract 4, testified that he planned to develop his land as commercial and multi-family developments. All four real estate developers testified that they thought that their land would be more valuable in the City of Sherwood rather than in an unincorporated area. They also stated that they were aware of, and would comply with, Sherwood's land development regulations and Jacksonville's zoning regulations designed to protect the fly zone of the Little Rock Air Force Base.

Michael Clayton, Sherwood's city engineer, testified that he was appointed as the agent for the landowners. According to Clayton, Sherwood Wastewater had passed a one-cent sales tax dedicated for sewer system improvements and conducted a feasibility analysis for sanitary sewer for Tracts 1 through 4. He testified that they have approximately $2.2 million dollars set aside for a "skeleton sewer system." He also testified that the City of Sherwood is preparing to extend utilities and to provide fire and police protection to the annexed areas.

Dwight Pattison, the planning consultant for the city of Sherwood, testified that the city adopted a "master street plan" and "land use plan," which primarily show residential develop-

ment for the annexed areas. He further testified that "the recommended area's highest use is suburban development." According to Pattison, the only area remaining for Sherwood to expand is the area north of its boundaries. "This annexation represents the actual growth of Sherwood beyond its boundaries." Based on the above testimony, the circuit court was not clearly erroneous in finding that the land is being held for development as suburban property and that the land is adaptable for prospective municipal purposes. Since at least one of the *Vestal* criteria has been met, we hold that annexation was proper.

Appellant also asserts that the circuit court failed to address the reasonableness factors set out in *Marion, supra.* In *Marion*, the Arkansas Court of Appeals analyzed the *Vestal* criteria and also a reasonableness standard utilized by other jurisdictions to determine whether annexation was "right and proper." First, the circuit court did not address the *Marion* reasonableness standard in its order. The failure to obtain a ruling precludes appellate review because there is no order of a lower court on the issue for this court to review on appeal. *Bob Cole Bail Bonds, Inc. v. Brewer*, 374 Ark. 403, 288 S.W.3d 582 (2008). Second, our case law only requires us to analyze and apply the *Vestal* criteria to issues regarding annexation, and we are not required to adhere to the reasonableness standard set out in *Marion*. Therefore, we reject Appellant's argument that the circuit court was clearly erroneous in not addressing the *Marion* reasonableness standard.

For its next point on appeal, Appellant asserts that the circuit court erred in ruling that Ark. Code Ann. §§ 14-56-413 and 14-56-426 do not prohibit annexation of the tracts that lie within Jacksonville's extraterritorial planning jurisdiction and the AICUZ zones. Reviewing issues of statutory interpretation, this court first construes a statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Wal-Mart Stores, Inc. v. D.A.N. Joint Venture III, L.P.*, 374 Ark. 489, 288 S.W.3d 627 (2008). When the language of a statute is plain and unambiguous, conveying a clear and definite meaning, the court does not resort to the rules of statutory construction. *Id.* If there is an ambiguity, the court looks to the legislative history of the statute and other factors, such as the language used and the subject matter involved. *Id.* The court strives to reconcile statutory provisions relating to the same subject to make them sensible, consistent, and harmonious. *Id.*

We will first address section 14-56-413 (Repl. 1998), which states, in pertinent part:

> (a)(1)(A) The territorial jurisdiction of the legislative body of the city having the planning commission, for the purposes of this subchapter, shall be exclusive and shall include all land lying within five (5) miles of the corporate limits.
>
> (B) If the corporate limits of two (2) or more municipalities of the first or second class are less than ten (10) miles apart, the limits of their respective territorial jurisdictions shall be a line equidistant between them, or as agreed on by the respective municipalities.

A land use plan is meant to be just that, a plan. *Taylor v. City of Little Rock*, 266 Ark. 384, 583 S.W.2d 72 (1979). It is not to be legally binding on the city. *Id.* A comprehensive plan "is a policy statement to be implemented by zoning regulations, and it is the latter that has the force of the law . . . . Furthermore, a comprehensive plan, when it has been prepared by the planning board or agency, is generally deemed to be advisory, rather than controlling, and it may be changed at any time." *Id.* at 387-88, 583 S.W.2d at 73-74 (citing 82 Am. Jur. 2d *Zoning and Planning* § 69).

The circuit court cited to *Arkansas Soil & Water Conservation Comm'n v. City of Bentonville* (*ASWCC*), 351 Ark. 289, 92 S.W.3d 47 (2002), in its ruling that Jacksonville's claim of extraterritorial jurisdiction for water projects was not exclusive. In *ASWCC*, we were asked to construe § 14-56-413, and § 15-22-503, empowering the Commission to approve all water projects. Reading the two statutes harmoniously, we held that the city did not have exclusive jurisdiction over water projects in a five-mile extraterritorial planning area surrounding the city and that the Commission was within its statutory authority when it adopted its plan, even though the plan encroached on the city's planning area.

Here, the mid-point between Jacksonville and Sherwood is west of Bayou Meto. At the hearing, the mayor of Jacksonville, Tommy Swaim, testified that portions of Tracts 2 and 3 east of Bayou Meto are critical to Jacksonville because the city has plans for construction of a water tower in the area to improve water pressure in that area. Kirby Rowland, consulting engineer for the Jacksonville Water Department, testified that he participated in the development of the water department's master plan that was approved by the Arkansas Soil and Water Conservation Commis-

sion. According to Rowland, the master plan provided that another water supply is required to meet Jacksonville's future needs through 2020. Jacksonville has contracted with Central Arkansas Water to create the infrastructure needed to provide water lines to Jacksonville, and the service areas of Tracts 2 and 3 were included as part of the calculated costs for this infrastructure. Michael Clayton testified that Sherwood was preparing to extend utilities into the annexed area, but would not object to Jacksonville providing water services in Tracts 2 and 3.

Once the land is annexed into Sherwood, Jacksonville will lose its extraterritorial planning jurisdiction over the land. *See City of Sherwood v. Dupree Co.*, 263 Ark. 442, 565 S.W.2d 425 (1978). Looking at the plain language of the statute as well as our case law, we affirm the circuit court's ruling that "Jacksonville's plans for the area are not superior to and do not defeat the landowner's right to petition for annexation to another city."

We now turn to Appellant's assertion that § 14-56-426 (Repl. 1998) prohibits annexation of the portions of tracts one and three that are affected by the AICUZ zoning ordinance. Section 14-56-426 states, in pertinent part:

> (a) Any city of the first class in this state within which there lies in whole or in part an active-duty United States Air Force military installation shall enact a city ordinance specifying that within five (5) miles of the corporate limits future uses on property which might be hazardous to aircraft operation shall be restricted or prohibited.

Appellant contends that, by granting annexation, the circuit court is requiring property developers and homeowners to secure building permits and inspections from two different municipalities before construction can be undertaken in the area, and that such a process is "neither right, proper, nor reasonable."

The Little Rock Air Force Base is located entirely within the Jacksonville city limits, and Jacksonville has enacted an ordinance in compliance with § 14-56-426. That statute is not applicable to Sherwood, although a portion of the land sought to be annexed is covered by the provisions of the statute. The express language of § 14-56-426 does not prohibit annexation of the land into Sherwood; however, because a state statute dictates the Jacksonville AICUZ ordinances, Sherwood is obligated to comply with those Jacksonville ordinances. *Cf. City of Dover v. City of Russellville*, 363

Ark. 458, 215 S.W.3d 623 (2005) (where state statute authorized Russellville flood-prevention ordinance and rendered its violation a nuisance, Dover was required to comply with the Russellville ordinances). Accordingly, we affirm the rulings of the circuit court.

Affirmed.

Joe THELMAN *v.* STATE of Arkansas

CR 08-444 289 S.W.3d 76

Supreme Court of Arkansas
Opinion delivered November 13, 2008

Wilson Law Firm, P.A., by: *E. Dion Wilson*, for appellant.

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

ELANA CUNNINGHAM WILLS, Justice. Appellant Joe Thelman has attempted to appeal an order of the Phillips County Circuit Court by which he was granted immunity and ordered to testify in the ongoing criminal trial of Edward Joshaway. We hold that the order granting immunity is not a final, appealable order, and we dismiss his appeal.

The State of Arkansas charged Joshaway with theft in May of 2006. The grand jury indictment alleged that Joshaway and appellant Joe Thelman participated in taking money from the Helena-West Helena School District by deception. A second grand jury indictment charged Joshaway with conspiracy to commit theft, by conspiring with Thelman to create false invoices to be submitted to the Helena-West Helena School District.

The cases against Joshaway and Thelman were originally consolidated for trial. However, Thelman and another co-defendant, Bobby Jones, later moved for a severance from Joshaway. That motion was granted, and Thelman and Jones were subsequently tried and found not guilty. After those not guilty verdicts, the State proceeded to try Joshaway alone.

As part of its prosecution, the State named Thelman as a key witness against Joshaway.[1] The prosecutor, Fletcher Long, sent a letter and accompanying subpoena to Thelman on February 25, 2008, informing him that he would be required to appear and testify in the Joshaway trial. Thelman replied, informing Long that

[1] At the hearing on the State's petition to grant immunity, the prosecutor informed the court that he would have to dismiss the charges against Joshaway if Thelman refused to testify.

he would not testify and would invoke his Fifth Amendment privilege against self-incrimination. Long then filed a petition for grant of use immunity pursuant to Ark. Code Ann. § 16-43-603 (Repl. 1999) and Ark. Code Ann. § 16-43-604 (Repl. 1999), asking the circuit court to enter an order affording Thelman immunity from the use of his truthful testimony against him in any future proceeding that might be brought against him.

The circuit court entered such an order on March 10, 2008, granting Thelman use immunity and directing him to "testify fully and completely in this cause of action and responsively to any questions [that] he may be asked by the Prosecuting Attorney or defense counsel." The court's order cautioned Thelman that his "refusal to testify in accordance with this order constitutes a Class B misdemeanor and that he may be imprisoned or fined for his failure to so testify."

In a hearing held the same day, Thelman informed the court that, despite the granting of immunity, he would not testify in the Joshaway trial. The circuit court then stated from the bench that it was holding him in contempt of court and ordered him confined in the Phillips County jail until he filed a notice of appeal. Thelman immediately filed his notice of appeal, stating his intent to appeal "from the ruling issued by [the circuit] court regarding [the] grant of use immunity." On appeal, he argues that the circuit court erred in holding him in contempt for refusing to comply with the court's order compelling his testimony.

Before we can consider the merits of Thelman's argument on appeal, however, we must address an issue raised by the State in its response to Thelman's jurisdictional statement. The State contends that Thelman has attempted to appeal from an order that is not final and appealable — the order granting him use immunity — and thus this court lacks jurisdiction to consider Thelman's appeal under Ark. R. App. P.–Civ. 2(a)(1). We agree.

As just noted, Thelman's sole point on appeal is that the circuit court erred in holding him in contempt for refusing to testify after he invoked his Fifth Amendment right against self-incrimination. An order of contempt is a final, appealable order. *See, e.g., Cent. Emergency Med. Servs., Inc. v. State*, 332 Ark. 592, 966 S.W.2d 257 (1998); *Young v. Young*, 316 Ark. 456, 872 S.W.2d 856 (1994). However, Thelman's notice of appeal is not taken from a contempt order. Rather, as mentioned above, Thelman's notice of

appeal stated that he was appealing "from the ruling issued by [the circuit] court regarding [the] grant of use immunity."

Rule 3(e) of the Rules of Appellate Procedure provides that a notice of appeal shall, among other things, "designate the judgment, decree, order, or part thereof appealed from." Ark. R. App. P.–Civ. 3(e) (2008). A notice of appeal must therefore designate the judgment or order appealed from, and an order not mentioned in the notice of appeal is not properly before an appellate court. *See Wright v. State*, 359 Ark. 418, 198 S.W.3d 537 (2004) (citing *Ruffin v. State*, 64 Ark. App. 98, 983 S.W.2d 146 (1998)). In addition, our court of appeals has held that a notice of appeal must be "judged by what it recites and not what it was intended to recite." *Rawe v. Rawe*, 100 Ark. App. 90, 249 S.W.3d 162 (2007); *see also Ark. Dep't of Human Servs. v. Shipman*, 25 Ark. App. 247, 253, 756 S.W.2d 930, 933 (1988) (although it was "readily apparent" that Department of Human Services employees intended to appeal from their contempt conviction, that matter was not properly before the appellate court where the notice of appeal made no reference to the contempt order).

In this case, Thelman's notice of appeal recites that he is appealing the circuit court's order "regarding [the] grant of use immunity," not the court's decision to hold him in contempt. However, we have been unable to find any authority that would support a conclusion that an order compelling testimony in exchange for a grant of immunity is a final, appealable order. This court has held in an analogous context that an order denying a protective order to quash a prosecutor's subpoena is "not a final order for appeal purposes." *In re Badami*, 309 Ark. 511, 513, 831 S.W.2d 905, 906 (1992). There, we held that such an order "is not a final judgment or order under [Ark. R. App. P.–Civ.] 2(a)(1), nor is it an order under Rule 2(a)(2) which determines the 'action.' " *Id.* at 513, 831 S.W.2d at 906. In a subsequent case, *Central Emergency Medical Services v. State*, 332 Ark. 592, 966 S.W.2d 257 (1998), this court noted that there was no "final appealable order" problem where the subject of a prosecutor's subpoena duces tecum appealed from the *order holding it in contempt*, and not from the order denying its motion to quash the subpoena.

In a similar vein, over a century ago, the United States Supreme Court held that an order compelling testimony and the production of documents pursuant to a subpoena duces tecum was not appealable, even where the individual whose testimony was

being compelled asserted a claim of privilege under the Fifth Amendment. *See Alexander v. United States*, 201 U.S. 117 (1906). The Court reasoned that "such an order may coerce a witness, leaving him no alternative but to obey or be punished[,] . . . but from such a ruling it will not be contended there is an appeal." *Id.* at 121. Rather, the Court said, the court compelling the testimony should "go farther, and punish the witness for contempt of its order — then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case." *Id.* It is only when the contempt power is exercised that the "matter becomes personal to the witness and a judgment as to him," and only then may an appeal be taken. *Id.* at 122; *see also Cobbledick v. United States*, 309 U.S. 323 (1940) (order denying a motion to quash a subpoena duces tecum and directing a witness to appear before a grand jury was not a final decision that could be appealed); *United States v. Ryan*, 402 U.S. 530 (1971) (order compelling the production of documents pursuant to a subpoena duces tecum was not an appealable order; concluding that the subject of the subpoena had another option: "he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him").

[redacted] Accordingly, applying this same reasoning, we hold that an order requiring testimony in exchange for a grant of use immunity is not a final appealable order. *See, e.g.*, *In re Ryan*, 538 F.2d 435, 437 (D.C. Cir. 1976) (order compelling testimony and production of documents in exchange for immunity "stands on the same footing as any other order compelling testimony and the production of documents; and the Supreme Court has consistently held that such orders are not final and hence not appealable"). Had Thelman wished to appeal the circuit court's order holding him in contempt, he could have had the contempt order reduced to writing and entered by the court. *See Hewitt v. State*, 362 Ark. 369, 208 S.W.3d 185 (2005) (an oral order is not effective until entered of record); Ark. Sup. Ct. Admin. Order No. 2(b)(2) (a judgment, decree, or order is entered when file-stamped by the clerk).

It is the appellant's obligation to properly preserve an issue for review. *See Hewitt, supra* (holding that, where the defendant failed to obtain an order on the motion to withdraw his plea separate from the judgment entered on his guilty plea, he was left with no order to appeal); *Beshears v. State*, 340 Ark. 70, 8 S.W.3d 32 (2000). As Thelman failed to have the circuit court reduce the contempt order to writing and enter it in accordance with Admin-

istrative Order No. 2, and as the order granting use immunity was not itself an appealable order, we conclude that Thelman's appeal must be dismissed.

ASBURY AUTOMOTIVE USED CAR CENTER *v.*
Patric BROSH, Mark Lunsford, Mel Anderson, NCAS, LLC
d/b/a New Century Auto Sales

08-526 289 S.W.3d 88

Supreme Court of Arkansas
Opinion delivered November 13, 2008

Warner, Smith & Harris, PLC, by: *G. Alan Wooten* and *Stephanie Harper Easterling*, for appellant.

Conner & Winters, LLP, by: *John R. Elrod*, *Todd P. Lewis*, and *Kerri E. Kobbeman*, for appellee Patric Brosh.

PER CURIAM. In the mid-1990s, appellees Patric Brosh, Mark Lunsford, and Mel Anderson started a business, New Century Auto Sales ("New Century"), another appellee to this action, to sell used cars from Wal-Mart parking lots. After developing a business plan, and entering into a lease agreement with Wal-Mart, New Century decided to market its plan. It approached Asbury Automotive Used Car Center, L.L.C. ("Asbury"), the appellant in this action, about purchasing the plan. Asbury expressed interest and ultimately the parties signed the contracts that are the center of this dispute — the Purchase Agreement, whereby Asbury agreed to purchase the business plan from New Century and to enter into the leases with Wal-Mart, and three separate Employment Agreements, whereby Asbury agreed to employ Brosh, Lunsford, and Anderson for an annual base salary of $300,000 per year.

By August 2003, the parties were in dispute, and Asbury terminated its leases with Wal-Mart and its employment contracts with Brosh, Lunsford, and Anderson. As a result, the appellees filed suit against Asbury in Washington County Circuit Court on a breach of contract claim. Asbury answered and filed a motion for a stay of proceedings and to compel arbitration pursuant to arbitration provisions in the disputed contracts. The circuit court held a hearing on the matter, and determined that the arbitration agreements lacked mutuality of obligation and, as a result, denied Asbury's motion. Asbury filed an interlocutory appeal, and this court affirmed the circuit court, agreeing that the provisions lacked mutuality of obligation. *Asbury Auto. Used Car Ctr., L.L.C. v. Brosh*, 364 Ark. 386, 220 S.W.3d 637 (2005).

The case was then tried before a jury, which rendered a verdict in favor of Asbury. Following the verdict, appellant filed a motion for attorneys' fees, pursuant to Arkansas Code Annotated section 16-22-308 (Repl. 1999), requesting attorneys' fees and costs from the appellees. The circuit court entered an order denying the appellant's motion. The order specifically held that section 16-22-308 did not apply because "the parties intended and anticipated that in the event there was a controversy or dispute arising out of or relating to the Agreements, or any breach thereof, then each party would bear their own costs and attorneys' fees." The appellant filed a timely notice of appeal.

We are unable to consider appellant's appeal at this time because its brief is not in compliance with Arkansas Supreme Court Rule 4-2(a). Ark. R. Sup. Ct. 4-2(a) (2008). Our rules require that the appellant include all relevant pleadings, documents, or exhibits, essential to an understanding of the case on appeal, in the addendum portion of the brief. *Id.* R. 4-2(a)(8). Furthermore, our rules state that:

> 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).

Ark. R. Sup. Ct. 4-2(b)(3) (2008). Finally, the rules make clear that an appellee may prepare a supplemental addendum if material on which it relies is not in the appellant's addendum. *Id.* R. 4-2(a)(8).

In this case, the appellant failed to include photocopies of the complete Purchase Agreement and Employment Agreement in its addendum. These contracts form the basis of the dispute and are essential to this court's understanding of the case on appeal. Furthermore, the appellees' brief relies heavily on the severability provisions of the contracts; however, the appellees did not prepare a supplemental addendum including a copy of the provisions. We note that the complete contracts are not included in the record filed in the instant appeal. However, the appellant may use the

pertinent portions of the first record in order to bring its addendum in compliance with Rule 4-2(a)(8). *See id.* R. 4-2(a)(5) (on a second or subsequent appeal, the abstract shall include a condensation of all pertinent portions of the transcript filed on any prior appeal); *Drymon v. State*, 327 Ark. 375, 378, 938 S.W.2d 825, 826-27 (1997) (the relevant portions of the first record do not need to be included in the record filed in the second appeal; the record of the first trial was already filed with the appellate court in the earlier appeal and is a public record that need not be incorporated on the second appeal).

Accordingly, we order appellant to file a substituted brief, curing the deficiencies in the addendum, within fifteen days from the date of entry of this order. 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 filed in this appeal.

Rebriefing ordered.

Ledell LEE *v.* STATE of Arkansas

CR 08-160 289 S.W.3d 61

Supreme Court of Arkansas
Opinion delivered November 13, 2008

Durrett & Coleman, by: *Gerald A. Coleman*, for appellant.

No response.

PER CURIAM. In 1993, the appellant, Ledell Lee, was convicted of capital murder and sentenced to death. His conviction and sentence were affirmed by this court in *Lee v. State*, 327 Ark. 692, 942 S.W.2d 231, *cert. denied*, 522 U.S. 1002 (1997). Lee then filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37, on grounds that his trial attorneys rendered ineffective assistance of counsel. The circuit court appointed counsel to represent Lee in the postconviction proceedings. Following a hearing on the petition, the circuit court entered an order denying Lee's request for relief. This court affirmed the order in *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001). However, in 2006, we granted a motion by Lee to recall that mandate because it was clear on the record that he had been denied effective assistance of counsel during his first Rule 37 proceeding. *Lee v. State*, 367 Ark. 84, 238 S.W.3d 52 (2006). We remanded the case to the circuit court for a new hearing on Lee's claims that he received ineffective assistance of counsel at trial.

The circuit court held another Rule 37 hearing on August 28, 2007, and, on November 21, 2007, entered an order denying Lee's motion for postconviction relief. The order relied on testimony from the August 28, 2007 hearing, stipulated testimony from evidentiary hearings held in January and March of 1999, and trial testimony. Appellant filed a notice of appeal in this court alleging that the circuit court erred in denying his Rule 37 petition with respect to alleged ineffective assistance of counsel in both the guilt and penalty phases of his trial.

We are unable to consider appellant's appeal at this time because his brief is not in compliance with Ark. Sup. Ct. R. 4-2(a) (2008). Our rules require an appellant to abstract all 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. *Id.* R.

4-2(a)(5). Furthermore, on a second or subsequent appeal, the abstract must include a condensation of all pertinent portions of the transcript filed on any prior appeal. *Id.* Our rules also require that the appellant include all relevant pleadings in the addendum portion of his brief. *Id.* R. 4-2(a)(8).

In this case, the appellant failed to abstract all relevant portions of the guilt and penalty phases of his underlying criminal trial. Lee also failed to abstract the relevant testimony from the first Rule 37 proceeding. Finally, the addendum is deficient because Lee failed to include a copy of his amended Rule 37 petition. Our Rules state that:

> 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).

Ark. R. Sup. Ct. 4-2(b)(3) (2008).

Accordingly, we order appellant to file a substituted brief, curing the deficiencies in the abstract and addendum, within fifteen days from the date of entry of this order. After service of the substituted brief, the appellee shall have an opportunity to file a responsive brief in the time prescribed by the supreme court clerk, or to rely on the brief previously filed in this appeal.

Rebriefing ordered.

INTERNATIONAL PAPER CO. *v.*
CLARK COUNTY CIRCUIT COURT

08-861 289 S.W.3d 103

Supreme Court of Arkansas
Opinion delivered November 20, 2008

Rose Law Firm, by: *Tim Boe*, *Patrick J. Goss*, and *Robyn P. Allmendinger*, for petitioner.

Arrington Law Firm, PLLC, by: *Claudene T. Arrington*, for respondent.

DONALD L. CORBIN, Justice. Petitioner, International Paper Company, invokes this court's jurisdiction to request a writ of prohibition to prevent the Clark County Circuit Court from exercising jurisdiction over matters alleged to be within the exclusive jurisdiction of the Arkansas Workers' Compensation Commission. Our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(3). We find merit to Petitioner's request and grant the writ of prohibition.

Our review of the pleadings reveals the following information. On January 6, 2004, Edna Pennington suffered a fatal, accidental injury while employed at Petitioner's Gurdon, Arkansas, facility. She was cleaning wood chips from the floor near a Hammer Hog Wood Chipper machine when her clothing became entangled in the shaft of the machine. Her cause of death was craniocerebral and facial trauma; she also suffered rib fractures and abrasions of her trunk and extremities. Petitioner had been granted authority from the Commission to self-insure its workers' compensation obligations. Petitioner, through a claims-management service, began paying weekly benefits to the decedent's husband, Gerald Pennington, and their minor son. Currently, the Death and Permanent Total Disability Fund is set to assume liability for payment of benefits in August of 2009.

On January 5, 2006, Gerald Pennington, individually and as personal representative of his wife's estate, filed a complaint in Clark County Circuit Court. He later amended the complaint, which stated numerous allegations, the gist of which was that Mrs. Pennington's injury and death were caused by Petitioner's failure to maintain a safe work environment and by Petitioner's intentional, deliberate, and willful conduct. The complaint alleged further that Petitioner's conduct was outrageous and intended to cause severe emotional distress and mental anguish.

Petitioner first responded to the complaint by filing a motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief may be granted. The circuit court considered the pleadings in the light most favorable to Mr. Pennington, as the party asserting the claims, and denied the motion to dismiss by order entered May 30, 2007. Petitioner then answered

the complaint. Respondent filed a motion to set a pretrial scheduling order. Petitioner then filed its petition for a writ of prohibition in this court.[1]

A writ of prohibition is extraordinary relief that is appropriate only when the circuit court is wholly without jurisdiction. *Coonrod v. Seay*, 367 Ark. 437, 241 S.W.3d 252 (2006). The writ is appropriate only when there is no other remedy available. *Id.* When considering a petition for a writ of prohibition, this court confines its review to the pleadings in the case. *Id.* Prohibition is a proper remedy when the jurisdiction of the trial court depends upon a legal rather than a factual question. *Id.* Prohibition is never issued to prohibit a trial court from erroneously exercising jurisdiction. *Erin, Inc. v. White County Circuit Court*, 369 Ark. 265, 253 S.W.3d 444 (2007). Writs of prohibition are prerogative writs, extremely narrow in scope and operation; they are to be used with great caution and forbearance. *Id.* They should issue only in cases of extreme necessity. *Id.*

In support of its request for a writ of prohibition, Petitioner first contends that the circuit court is wholly without jurisdiction of the claims alleged in the complaint because they are within the exclusive jurisdiction of the Arkansas Workers' Compensation Commission. We agree that, at this point in the litigation, the circuit court is wholly without jurisdiction of the matters alleged in this complaint.

Generally, an employer who has secured for its employees the benefits of workers' compensation is immune from liability for damages in a tort action brought by an injured employee, his legal representative, dependents, and next of kin. *Gourley v. Crossett Pub. Schs.*, 333 Ark. 178, 968 S.W.2d 56 (1998). This rule, known as the exclusivity doctrine, arises from Ark. Code Ann. § 11-9-105 (Repl. 2002), which provides that "[t]he rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, [or] next of kin." This court has on occasion rendered certain

[1] Two parties filed responses to this petition — Clark County Circuit Court Judge John Thomas and Gerald Pennington, individually and as personal representative of his wife's estate. The proper party as respondent to a petition for writ of prohibition is the circuit court, not the judge, and not an injured worker's representative. *See Travelers Ins. Co. v. Smith*, 329 Ark. 336, 947 S.W.2d 382 (1997).

court-defined narrow exceptions to this general rule, such as when an employer willfully and intentionally injures an employee. *Gourley*, 333 Ark. at 181, 968 S.W.2d at 57-58 (citing *Hill v. Patterson*, 313 Ark. 322, 855 S.W.2d 297 (1993)).

Over ten years ago, this court recognized that its concurrent-jurisdiction approach was resulting in duplicative litigation and therefore contravening the purpose of the Arkansas Workers' Compensation Act, currently codified at Ark. Code Ann. §§ 11-9-101 to -1001 (Repl. 2002 & Supp. 2007), to achieve uniformity, simplicity, and speed in the disposition of cases. *VanWagoner v. Beverly Enters.*, 334 Ark. 12, 970 S.W.2d 810 (1998). This court therefore abandoned the concurrent-jurisdiction approach in favor of the administrative law rule of primary jurisdiction allowing the Commission to decide the applicability of the Workers' Compensation Act. *Id.* In so doing, this court stated as follows:

> We hold that the exclusive remedy of an employee or her representative on account of injury or death arising out of and in the course of her employment is a claim for compensation under § 11-9-105, and that the commission has exclusive, original jurisdiction to determine the facts that establish jurisdiction, unless the facts are so one-sided that this issue is no longer one of fact but one of law, such as an intentional tort. *See Angle v. Alexander*, 328 Ark. 714, 719, 945 S.W.2d 933 (1997) (citing *Miller v. Ensco, Inc.*, 286 Ark. 458, 461, 692 S.W.2d 615 (1985)) (explaining that, before an employee is free to bring a tort action for damages against an employer, the facts must show that the employer had a "desire" to bring about the consequences of the acts, or that the acts were premeditated with the specific intent to injure the employee). In so holding, we overrule all prior decisions to the extent that they are inconsistent with this opinion.

334 Ark. at 16, 970 S.W.2d at 812.

If, as the Respondent circuit court states in its response to this petition, there are facts alleged in the pleadings that are in need of further development, then, according to *VanWagoner*, the Commission is the forum with the exclusive jurisdiction to determine those facts relevant to the applicability of the Workers' Compensation Act. *VanWagoner* clearly states that it is the Commission that has exclusive jurisdiction to determine the facts that establish jurisdiction. The issue is one of "jurisdiction to deter-

mine jurisdiction," as distinguished from "jurisdiction to hear the merits of the case." *Nucor Corp. v. Rhine*, 366 Ark. 550, 555, 237 S.W.3d 52, 57 (2006).

Here, the complaint alleges that Petitioner committed numerous acts such as failure to make reasonable inspection of the equipment, failure to provide a safe workplace, failure to provide safety gear and lockdown measures, and violation of governmental safety regulations, among others. Our case law is clear that these types of allegations are covered exclusively by the Workers' Compensation Act, within the exclusive jurisdiction of the Commission, and are rarely if ever sufficient to satisfy the intentional tort exception to the Act's exclusive-remedy provision. *See, e.g.*, *Miller v. Ensco, Inc.*, 286 Ark. 458, 692 S.W.2d 615 (1985). In addition, the complaint alleges intentional torts involving mental anguish such as intentional infliction of emotional distress and outrage. However, because all the allegations in this complaint are so intertwined, we cannot conclude the facts are so one-sided as to render the issue no longer one of fact, but of law. *See VanWagoner*, 334 Ark. 12, 970 S.W.2d 810. Accordingly, at this stage of the litigation, we conclude the Commission has exclusive jurisdiction to determine the applicability of the Act to the matters alleged in the complaint, and the circuit court is therefore wholly without jurisdiction.

Before granting a writ of prohibition, however, we must next determine if Petitioner has any other adequate remedy. As a general rule of appellate procedure, the denial of a motion to dismiss is not an appealable order under Ark. R. App. P.–Civ. 2. *Lenders Title Co. v. Chandler*, 353 Ark. 339, 107 S.W.3d 157 (2003). Moreover, this court has stated that a writ of prohibition is not the appropriate remedy following a denial of a motion to dismiss. *Ulmer v. Circuit Court of Polk County*, 366 Ark. 212, 234 S.W.3d 290 (2006). An appeal after a trial on the merits is not adequate, contends Petitioner, because it would contravene the very purpose of the Act and allow the floodgates of litigation to be opened simply by alleging matters in a complaint. This court has stated that where encroachment on the jurisdiction of the Workers' Compensation Commission is clear, a writ of prohibition is clearly warranted. *W. Waste Indus. v. Purifoy*, 326 Ark. 256, 930 S.W.2d 348 (1996) (citing *Hill v. Patterson*, 313 Ark. 322, 855 S.W.2d 297 (1993)); *see also Erin, Inc.*, 369 Ark. 265, 253 S.W.3d 444. Any perceived error in the Commission's decision on jurisdiction may

be tested and reviewed on appeal. *Erin, Inc.*, 369 Ark. 265, 253 S.W.3d 444. Because at this point in the litigation the exclusive jurisdiction of this case lies with the Commission, encroachment on the Commission's jurisdiction is clear, and we therefore grant the writ of prohibition.

Because we grant the writ of prohibition on jurisdictional grounds, we need not consider Petitioner's argument concerning the election-of-remedies doctrine.

Writ granted.

Cameron Duane WILLIAMS *v.* STATE of Arkansas

CR 08-619 289 S.W.3d 97

Supreme Court of Arkansas
Opinion delivered November 20, 2008

James H. Phillips and *Knutson Law Firm*, by: *Gregg A. Knutson*, for appellant.

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

JIM GUNTER, Justice. Appellant Cameron Williams was convicted of two counts of capital murder and now appeals his conviction, asserting that the trial court erred in denying his motion for directed verdict because the State failed to sufficiently corroborate his accomplices' testimony. Because this is a criminal appeal in which life imprisonment has been imposed, this court has jurisdiction under Arkansas Supreme Court Rule 1-2(a)(2). We find that appellant's argument is not preserved for our review and affirm.

On the night of June 5, 2006, Sean Johnson and Monte Johnson were shot and killed in Hindman Park in Little Rock. After a ten-month investigation, appellant, Albert Reed, and Nathan Gilcrease were charged, as accomplices, with kidnapping and capital murder, and Latifah Johnson, a friend of appellant's, and Mariah Powell, Reed's then-girlfriend, were charged with hindering apprehension or prosecution.

At appellant's trial, the following pertinent testimony was presented. Mariah Powell testified that on June 5, 2006, she and Latifah Johnson went with the victims to a house on Reck Road, which is where she was living at the time and where she knew Reed was waiting. Powell testified that she knew Reed was going to beat up Monte Johnson, with whom she had a past sexual relationship, due to her continued contact with Monte and an ongoing dispute between Reed and Monte over some stolen property. She testified that when they arrived at the house on Reck Road, she saw Nathan Gilcrease's car parked next door. She testified that she, Sean, and Monte walked into the house and into a back bedroom, where appellant suddenly jumped out of the closet holding a handgun. She testified that Gilcrease then came in the bedroom holding a "chopper," meaning a rifle. She testified that Reed began questioning the victims about his stolen property, and appellant hit Sean in the face with the gun. Powell testified that she had not expected there to be guns there, and she ran from the house because she was scared. She stated that she returned to the house on Reck Road about an hour later to pick up some of her belongings, and she saw blood on the cover of the bed. She testified that, after that night, she overheard appellant talking to his girlfriend on the phone and joking about killing the victims. She testified that appellant told her that if she went to the police, he

would kill her. Powell insisted that she had not set up the victims to be killed and that she thought they were just going to fight.

Colleen Wright, appellant's girlfriend and the mother of his child, testified that about two weeks after the murders, she contacted the police and told them she had information about the killings. She told the police that a girl had set up the victims and that the shooters had taken the victims to Hindman Park. She testified that this statement was not true and that she only said it because she was mad at appellant. Wright testified that she gave another statement to the police on July 12, 2006, in which she named Reed as one of the shooters and told police that Reed had a dispute with one of the victims over his girlfriend, "Red" (one of Powell's street nicknames is "Red"). She testified that she told police that she saw appellant the day after the murders, that he told her that he, Reed, and Gilcrease had beat up the victims and put them in the trunk of Monte Johnson's car, and that he had "merked some dudes in the park." She testified that appellant actually told her that he hadn't done anything in the park, and she was just making up the information that she gave to the police. She testified that appellant had never admitted to taking part in the murders.

Detective J.C. White with the Little Rock Police Department testified about the various statements given by Colleen Wright and also testified about his interview with appellant after appellant's arrest. Appellant's recorded statement was played for the jury. In that statement, appellant said that he, Reed, and Gilcrease had gone to the house on Reck Road on the night of June 5, 2006. He stated that after Mariah Powell arrived with Sean and Monte, Reed began questioning Monte about his stolen property. Appellant stated that Reed began hitting Monte with his hand and that Gilcrease had a gun pointed at Monte. Appellant said he did not want to be a part of what was going on and wanted to go home, so he went outside and got in Gilcrease's vehicle to wait for him. Appellant said that when Reed came out of the house, he had a gun and ordered Sean and Monte into the trunk of Monte's car. Appellant stated that Reed then drove Monte's car to Hindman Park, and he and Gilcrease followed in Gilcrease's vehicle. According to appellant, he stayed in the vehicle while Reed and Gilcrease opened the trunk of Monte's car, shot several times into the trunk, and then asked appellant for some duct tape that was in Gilcrease's vehicle. Appellant said he threw them the duct tape.

Appellant stated that Monte and Sean tried to run away and were shot by Reed and Gilcrease.

Albert Reed testified that he was involved in the murders of Sean and Monte Johnson and that he had pled guilty to two counts of murder in the first degree. He testified that while he was present at Hindman Park at the time of the shooting, it was appellant and Gilcrease who fired the guns. Reed testified that he had intended to confront Monte about his relationship with Powell, but appellant and Gilcrease both had guns and began hitting the victims with the guns. Reed stated that he addressed Gilcrease by name and told him to stop hitting, and Gilcrease became angry and said "they know who I am now" and that he had to kill them now. Reed testified that appellant retrieved some duct tape from another room and that Gilcrease duct-taped the victims while appellant held them at gunpoint. Reed stated that Gilcrease put the victims in the trunk of Monte's car and directed Reed to drive the car to Hindman Park. Once they were at the park, according to Reed, Gilcrease and appellant shot the victims as they tried to run away.

At the close of the State's case, appellant made the following directed verdict motion:

> Okay, Judge, the Defense will move for a directed verdict specifically that — by stating that the State has not — as the State has failed to prove a prima facie case as to the kidnapping allegation, specifically, that has been alleged in the felony information. The State has failed to produce proof which taken in the light most favorable to the State would prove that my client participated in any — any way with the actual kidnapping itself. As a matter of fact, the proof actually showed to the contrary. The Defense would further move that — no, I'll — we'd just ask the case to be dismissed, Your Honor.

The court denied the motion and its renewal at the close of all the evidence. Appellant was found guilty of two counts of capital murder and sentenced to two life sentences without the possibility of parole, to be served concurrently. He then filed a timely appeal to this court.

This court treats a motion for directed verdict as a challenge to the sufficiency of the evidence. *Reese v. State*, 371 Ark. 1, 262 S.W.3d 604 (2007). 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 conclu-

sion 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.*

[redacted] On appeal, appellant argues that the State failed to produce sufficient evidence of his participation in the kidnapping, specifically by failing to corroborate the accomplice testimony of Albert Reed and Mariah Powell. But, as illustrated by the quoted motion above, this is not the same argument advanced by appellant at trial. At trial, appellant advanced only the general argument that the State had failed to prove that he participated in the kidnapping and did not raise the issue of accomplice corroboration. We also note that appellant did not request a finding that Reed and Powell were accomplices as a matter or law, nor did he request a jury instruction on the required corroboration of accomplice testimony.

This court has consistently held that a party is bound by the scope of the arguments made at trial, and we will not consider an argument raised for the first time on appeal. *Watson v. State*, 358 Ark. 212, 188 S.W.3d 921 (2004). In addition, Rule 33.1(a) of the Arkansas Rules of Criminal Procedure requires a motion for directed verdict to "state the specific grounds therefor," and this requirement extends to any challenge to the sufficiency of the evidence corroborating an accomplice's testimony. *Gardner v. State*, 364 Ark. 506, 221 S.W.3d 339 (2006). The failure to challenge the sufficiency of accomplice-corroboration evidence in a directed verdict motion precludes appellate review on that ground. *Id.* This is true even in cases where a sentence of life imprisonment is imposed, as it is this court's duty, pursuant to Ark. Sup. Ct. R. 4-3(h), to examine the record for error on objections decided adversely to the appellant, not to address arguments that might have been made. *Tillman v. State*, 364 Ark. 143, 217 S.W.3d 773 (2005).

Pursuant to Arkansas Supreme Court Rule 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. *Id.*

Affirmed.

Justin EWELL *v.* STATE of Arkansas

CR 08-584 289 S.W.3d 101

Supreme Court of Arkansas
Opinion delivered November 20, 2008

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

Dustin McDaniel, Att'y Gen., by: *Eileen W. Harrison*, Ass't Att'y Gen., for appellee.

ELANA CUNNINGHAM WILLS, Justice. Following a bench trial in the Pulaski County Circuit Court, appellant Justin Ewell was convicted of aggravated robbery, theft of property, and two counts of kidnapping. Ewell received an enhanced sentence of life imprisonment under Ark. Code Ann. § 5-4-501(d)(1)(A) (Supp. 2007) for aggravated robbery because of his previous violent felony convictions. The trial court also sentenced Ewell to serve three concurrent ten-year sentences for the theft of property and kidnapping convictions. On appeal, Ewell brings one point for reversal,

arguing that the trial court erred by denying this motion for a directed verdict. We affirm.

The State presented evidence that on July 22, 2005, victims Courtney Orange and Farren Norwood were at a carwash cleaning a car belonging to Orange's boyfriend. Both victims testified that they saw Ewell approach them with a gun and demand the car from Orange. The keys were in the ignition, but Ewell was unable to start the car. The victims testified that Ewell then got out of the car and ordered them, at gunpoint, to get into the car with him. They complied. Once the car was started, with Orange and Norwood inside, Ewell lost control of the car after exiting the carwash, crashed it into a drainage ditch, and ran away from the scene. Orange and Norwood later identified Ewell from a photo line-up at the police station and he was arrested.

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). 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. On appeal, this court does not weigh the evidence presented at trial, as that is a matter for the fact-finder; nor does the appellate court assess the credibility of the witnesses. *Ridling v. State*, 360 Ark. 424, 203 S.W.3d 63 (2005).

Ewell specifically argues that the trial court erred by denying his motion for a directed verdict because the State failed to introduce substantial evidence that identified him as the perpetrator of the theft, robbery, and kidnapping. Although victims Orange and Norwood identified Ewell as the perpetrator in a pretrial photo line-up and in the courtroom, when they were asked on cross-examination whether they noticed a small tattoo on his face, they responded that they did. However, the victims testified that they did not report to police that the perpetrator had any identifying tattoos. Ewell argues that the victims' failure to report that the perpetrator had a tattoo on his face rendered their eyewitness testimony so inconsistent that it was insufficient to identify him as the perpetrator.

Unless there is an allegation of a constitutional violation in an eyewitness identification procedure, the reliability of a

witness's identification is a question for the fact-finder. *Phillips v. State,* 344 Ark. 453, 40 S.W.3d 778 (2001). On appeal, the fact-finder's decision will not be disturbed when it is supported by substantial evidence. *Stipes v. State,* 315 Ark. 719, 870 S.W.2d 388 (1994). This court has repeatedly held that "unequivocal testimony identifying the appellant as the culprit is sufficient to sustain a conviction." *Id.* at 721, 870 S.W.2d at 389.

Here, the victims' pretrial and in-court identification of Ewell was unequivocal and provided sufficient evidence to support his convictions. Even if Ewell had established that his tattoo pre-dated the theft, robbery, and kidnapping, which he did not, any alleged inconsistencies in eyewitness testimony became an issue of credibility for the fact-finder to determine. Accordingly, we affirm the trial court's verdict.

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 Ewell, and no prejudicial error has been found.

Affirmed.

Gregory Christopher DECAY *v.* STATE of Arkansas

CR 08-1259 289 S.W.3d 96

Supreme Court of Arkansas
Opinion delivered November 20, 2008

[redacted]

Denny Hyslip and *Julie C. Tolleson*, for appellant.

No response.

PER CURIAM. Denny Hyslip and Julie C. Tolleson, full-time, state-salaried public defenders for the Fourth Judicial District, were appointed by the trial court to represent appellant, Gregory Christopher Decay. Following a jury trial, Decay was convicted of two counts of capital murder and sentenced to death as to both counts. A notice of appeal was timely filed and a request for the transcribed record was filed in this case.

[redacted] Mr. Hyslip and Ms. Tolleson now ask to be relieved as counsel for appellant in this criminal appeal based on the case of *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000), where we held that full-time, state salaried public defenders were ineligible for compensation for their work on appeal. Since *Rushing*, the General Assembly passed Arkansas Code Annotated § 19-4-1604(b)(2)(B) (Supp. 2007), which states:

> A person employed as full-time public defender who is not provided a state-funded secretary may also seek compensation for appellate work from the Arkansas Supreme Court or the Court of Appeals.

Mr. Hyslip and Ms. Tolleson's motion states that they are provided with a full-time, state-funded secretary. Accordingly, we grant their motion to withdraw as attorneys. Mr. Dale Adams will be substituted as attorney for appellant in this matter. The clerk will establish a new briefing schedule.

SOUTHERN BANK of COMMERCE *v.*
UNION PLANTERS NATIONAL BANK

08-288 289 S.W.3d 414

Supreme Court of Arkansas
Opinion delivered December 4, 2008

Branch, Thompson, Philhours & Warmouth, by: *Robert F. Thompson, III*, for appellant/cross-appellee.

Lyons, Emerson & Cone, PLC, by: *Jim Lyons*, for appellee/cross-appellant.

DONALD L. CORBIN, Justice. The instant appeal presents the question of whether Appellee Union Planters National Bank is a holder in due course, as defined by the Uniform Commercial Code, and is entitled to seek payment from Appellant Southern Bank of Commerce after a cashier's check issued by Southern Bank was declined due to insufficient funds. On appeal, Southern Bank argues that the trial court erred in finding that Union Planters was a holder in due course. Southern Bank also argues that the trial court's award to Union Planters of prejudgment interest was in error. Union Planters cross-appeals and argues that the trial court erred in denying its request for an award of attorney's fees. We affirm, both on direct appeal and on cross-appeal.

This case stems from a transaction between Raymond and Diane Crutchfield and Regions Bank, whereby Regions approved the Crutchfields' application for a loan that included a refinancing of their home. At the time, Union Planters held a $97,100 loan against the Crutchfields' home. Regions contracted with Julia Gray, a closing agent with Security Title, to close the Regions loan, including the payoff to Union Planters. Regions transferred $129,000 to Gray to fund the Crutchfields' new loan. Security Title then issued a check on September 5, 2003, drawn on Southern Bank and made payable to Union Planters in the amount of $95,506.42, but this check was declined due to insufficient funds. Thereafter, Union Planters contacted Gray and notified her

that she must provide a cashier's check in exchange for the returned check. Gray then issued a personal check, drawn on First National Bank, in the amount of $95,214.20, which she deposited into Security Title's account at Southern Bank, in order to obtain a cashier's check that was made payable to Union Planters in the amount of $95,506.42. Gray then delivered the cashier's check to Union Planters on October 21, 2003, for "the payoff on the Crutchfield loan" and to cover charges stemming from the prior insufficient check.

According to Greg Miller, President of Southern Bank, he received a call from the Federal Reserve on October 22, 2003, informing him that Gray's check drawn on First National was being returned because it was drawn on insufficient funds. The next day, Miller spoke with Joe Turney, an official with Union Planters, and advised him that Southern Bank would be returning its previously issued cashier's check because Gray had obtained it through fraud. Turney advised Miller to contact Union Planters' fraud department in Memphis, Tennessee, which Miller did. When Southern Bank received the cashier's check on October 23, it stamped it "refer to maker" and returned it to Union Planters. Originally, Union Planters' internal loan history showed that the Crutchfields' loan was paid in full, but the loan was returned to Union Planters' books after the cashier's check was returned, and therefore Union Planters did not release its mortgage on the Crutchfields' property.

Counsel for Union Planters contacted Regions Bank and demanded that Union Planters' mortgage be paid in full. Union Planters threatened to foreclose on the property if Regions did not comply. Then, however, Union Planters and Regions entered into negotiations that resulted in a merger of the two banks. Union Planters subsequently entered into an agreement promising not to sue Regions or the title insurer over Gray's fraudulent cashier's check.[1] Union Planters then filed suit against Southern Bank on February 24, 2005, alleging that it was a holder in due course of the cashier's check and requesting that Southern Bank be required to pay the check.

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[1] Gray was indicted in federal district court and ultimately pleaded guilty to one count of bank fraud. As part of her plea agreement, Gray was ordered to pay restitution to Bank of Paragould in the amount of $50,655.22 and to Southern Bank in the amount of $95,506.42. At the time of the trial of this matter, Gray had been making restitution payments to Southern Bank.

A bench trial was held in Craighead County Circuit Court on July 3, 2007. At the conclusion of the trial, the court held that Union Planters was not a holder in due course pursuant to Ark. Code Ann. § 4-3-302 (Supp. 2001), because it did not give value for the cashier's check as defined in Ark. Code Ann. § 4-3-303 (Supp. 2001). Union Planters then filed a motion under Ark. R. Civ. P. 59 to alter or amend the judgment. After taking the motion under advisement, the circuit court reversed its previous order, finding that because the cashier's check was transferred as payment of an antecedent loan that Union Planters had against the Crutchfields, Union Planters was a holder in due course. Thus, the court entered a judgment in favor of Union Planters in the amount of $95,506.42. The trial court entered a subsequent order on November 27, 2007, declining to award attorney's fees to either party, but granting an award of prejudgment interest to Union Planters in the amount of $20,320.61 and costs of $174.58. Southern Bank then appealed, and Union Planters cross-appealed on the order declining to award it attorney's fees.

As its first point on appeal, Southern Bank argues that the trial court erred in entering judgment in favor of Union Planters because it was not a holder in due course, as it took the cashier's check with sufficient notice of Gray's fraud and it did not give value for the cashier's check. Union Planters counters that the trial court correctly determined that it was a holder in due course because it took the check for value, in good faith, and without notice that the check had been dishonored. More specifically, Union Planters avers that it gave value for the check as it was an instrument issued or transferred as payment of, or as security for, an antecedent claim. Union Planters is correct.

We begin our review by turning to the applicable statutes. Section 4-3-302(a)(2) defines a holder in due course as one who takes "the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored[.]" Section 4-3-303(a)(3) specifically provides that an instrument is transferred for value if it "is issued or transferred as payment of, or as security for, an antecedent claim against any person[.]" Thus, the question to be decided is whether Union Planters took the cashier's check for value as set out in section 4-3-303, and without notice, so that it is entitled to holder-in-due-course status.

The issue of whether a bank was a holder in due course was addressed by this court in *Byrd v. Security Bank*, 250 Ark. 214, 464 S.W.2d 578 (1971). In that case, the appellants executed blank

promissory notes in favor of a gin company. The gin company then filled in the notes for varying amounts and assigned them to the appellee Security Bank. After the notes matured and went unpaid, Security Bank brought suit. The court found that Security Bank was a holder in due course because the notes were taken for value as they were accepted for "payment of, or in security, for an antecedent claim[.]" *Id.* at 217, 464 S.W.2d 580.

Considering this court's holding in *Byrd* and giving the words of 4-3-303 their plain meaning, it appears that the trial court correctly concluded that Union Planters was a holder in due course, where it accepted the cashier's check for payment of the Crutchfields' loan, an antecedent claim. Southern Bank's argument that Union Planters cannot be a holder in due course because it never acted on the cashier's check, i.e., it never released the mortgage on the Crutchfields' property, is inapposite. Here, the evidence at trial was that Union Planters never released the note, the loan remained on the books, and the Crutchfields have made no payments on Union Planters' loan.[2] Thus, Southern Bank's assertion that a finding that Union Planters was a holder in due course would result in a windfall is simply without merit, as Union Planters' ability to collect on the cashier's check as a holder in due course will simply allow it to finally discharge the Crutchfields' mortgage that remains unpaid.

Moreover, we are unpersuaded by Southern Bank's reliance on *American Federal Savings & Loan v. Madison Valley Properties, Inc.*, 958 P.2d 57 (Mont. 1998), in support of its contention that Union Planters cannot be a holder in due course. In that case, a customer obtained a cashier's check from Valley Bank by using stolen funds and then used the cashier's check to pay off a debt he had with American Federal. Once American Federal learned of the customer's fraud, it stopped the payoff on the customer's loan. In addressing the issue of whether American Federal was a holder in due course, the Montana court, relying on Montana's version of the UCC, held that the cashier's check was not issued or transferred for value where the lending institution did not release its security interest in the collateral before it received notice that the check was being rescinded. The court reasoned that, while the

[2] The Crutchfields are making payments on the loan proceeds made available by Regions Bank that were turned over to Julia Gray for purposes of closing the Crutchfields' loan.

lender had taken certain internal administrative steps toward discharging the note and releasing the lien, those could all be administratively rescinded and, in fact, were rescinded. The court ultimately concluded that, by not irrevocably releasing its security interest, the lender had not taken the cashier's check for value by the time it received notice.

While the fact situation is somewhat similar to the one now before us, we disagree that the reasoning utilized by the Montana court is applicable here. In fact, we find the case of *Peoria Savings & Loan Ass'n v. Jefferson Trust & Savings Bank of Peoria*, 410 N.E.2d 845 (Ill. 1980), to be more instructive in the instant matter. There, the Illinois Supreme Court concluded that a bank gave value the instant it accepted a cashier's check, even though no bookkeeping entry was made with respect to the deposit of the check until after the plaintiff bank had issued a stop-payment order. The court noted that in enacting Illinois's version of the UCC the legislature had not included a requirement that value was not given until the instrument was posted or applied to an account. Accordingly, the court opined no such requirement should be read into the statute. Likewise, our legislature in enacting section 4-3-303(a)(3) did not include any language requiring a party to take immediate action on the antecedent claim in order to obtain holder-in-due-course status, and we will not read such a requirement into the statute. Accordingly, Union Planters took the cashier's check for value.

Next, we must determine whether Union Planters took the cashier's check with knowledge of its deficiency. For the following reasons, we conclude that Union Planters took the cashier's check without such notice. A person has "notice" of a fact if the person: (1) has actual knowledge of it; (2) has received a notice or notification of it; or (3) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists. *See* Ark. Code Ann. § 4-1-202 (Supp. 2007). In addressing the issue of notice, this court has held that the burden is on the appellant to demonstrate that the appellee took an instrument with actual knowledge of its infirmity or defect. *See Cruce v. Dillard*, 203 Ark. 451, 156 S.W.2d 879 (1941). In *Cruce*, the court concluded that where the instrument was complete and regular on its face, was acquired by appellee before it was overdue, and had not previously been dishonored, there was no merit to the appellant's argument that the appellee took the instrument with knowledge of its defect.

Here, it is undisputed that Union Planters did not learn that the check was going to be dishonored until the day after it had been received by Union Planters. Southern Bank avers, however, that the notice received after the cashier's check was transferred prevents Union Planters from claiming to be a holder in due course. In advancing its argument, Southern Bank points to section 4-3-302(f) and argues that such notice was effective as it prevented Union Planters from releasing the Crutchfields' mortgage. Section 4-3-302(f) states that "[t]o be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it." While this section sets forth prerequisites that must be satisfied before notice can be deemed effective, it does not stand for the proposition that a party takes an instrument with notice of a defect when such notice is received after transfer of that instrument. A person receives notice when it comes to that person's attention. *See* Ark. Code Ann. § 4-1-202(e)(1). At the time Union Planters took the cashier's check, it did not have notice of the check's insufficiency, as it was not brought to Union Planters' attention until the day after the check was negotiated. Accordingly, because Union Planters took the cashier's check in good faith, for value, and without knowledge of its insufficiency, Union Planters was a holder in due course.

Next, Southern Bank argues that if this court affirms the trial court's finding that Union Planters was a holder in due course, Union Planters is not entitled to prejudgment interest, as Union Planters cannot demonstrate that it has been injured by Southern Bank's actions.

This court recently addressed an award of prejudgment interest and stated:

> Prejudgment interest is compensation for recoverable damages wrongfully withheld from the time of the loss until judgment. *See Reynolds Health Care Servs., Inc. v. HMNH, Inc.*, 364 Ark. 168, 217 S.W.3d 797 (2005); *Ozarks Unlimited Res. Coop., Inc. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169 (1998). Prejudgment interest is allowable where the amount of damages is definitely ascertainable by mathematical computation, or if the evidence furnishes data that makes it possible to compute the amount without reliance on opinion or discretion. *See id.* This standard is met if a method exists for fixing the exact value of a cause of action at the time of the occurrence of the event that gives rise to the cause of action. *See Reynolds*, 364 Ark. 168, 217 S.W.3d 797. Where prejudgment interest may be

> collected at all, the injured party is always entitled to it as a matter of law. *See id.*; *Ozarks*, 333 Ark. 214, 969 S.W.2d 169. Nevertheless, prejudgment interest is always dependent upon the initial measure of damages being determinable immediately after the loss and with reasonable certainty. *See Wooten v. McClendon*, 272 Ark. 61, 612 S.W.2d 105 (1981).

Sims v. Moser, 373 Ark. 491, 509, 284 S.W.3d 505, 519 (2008). As we stated in *Sims*, it is irrefutable that the key factor in determining the appropriateness of prejudgment interest is whether the exact value of the damages at the time of the occurrence of the event that gives rise to the cause of action is definitely ascertainable, without reliance upon opinion or discretion. *See also Pro-Comp Mgmt., Inc. v. R.K. Enters., LLC*, 372 Ark. 190, 272 S.W.3d 91 (2008).

Here, the issue is not one of whether the exact amount of damages is definitely ascertainable; rather Southern Bank contends that Union Planters is not entitled to prejudgment interest because it suffered no damages. According to Southern Bank, this case is analogous to the situation presented to this court in *Sorrells v. Bailey Cattle Co.*, 268 Ark. 800, 595 S.W.2d 950 (1980). There, this court declined to award a prevailing plaintiff prejudgment interest because the plaintiff could have taken possession of the property they were purchasing but chose not to do so. Thus, Southern Bank argues that Union Planters could have demanded that Regions pay off the Crutchfields' mortgage, but chose not to, and therefore should be denied prejudgment interest. There is no merit to this argument, as Union Planters' recourse as a holder in due course was against Southern Bank and Southern Bank's failure to honor the cashier's check prevented Union Planters from closing the Crutchfields' loan and further caused Union Planters to incur the present litigation in order to recover on that check. Accordingly, we cannot say the trial court's order of prejudgment interest was in error.

On cross-appeal, Union Planters argues that it was entitled to attorney's fees pursuant to Ark. Code Ann. § 16-22-308 (1999), and thus it was error for the trial court to deny its request for such fees. Southern Bank counters that the decision to award attorney's fees is discretionary, and the trial court properly determined an award of fees was not warranted in this case. Specifically, Southern Bank contends that Union Planters took no action to release the Crutchfields' mortgage, Union Planters received a large benefit

from the court's order, and Southern Bank suffered a loss, therefore, it was proper to deny the request for attorney's fees.

An award of attorney's fees is governed by section 16-22-308, which provides:

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

This court has recognized that because of the trial judge's intimate acquaintance with the trial proceedings and the quality of service rendered by the prevailing party's counsel, we usually recognize the superior perspective of the trial judge in determining whether to award attorney's fees. *Chrisco v. Sun Indus.*, 304 Ark. 227, 800 S.W.2d 717 (1990). The decision to award attorney's fees and the amount to award are discretionary determinations that will be reversed only if the appellant can demonstrate that the trial court abused its discretion. *Nelson v. River Valley Bank & Trust*, 334 Ark. 172, 971 S.W.2d 777 (1998).

An award of attorney's fees under section 16-22-308 is not mandatory; rather, it is a matter within the discretion of the trial court. Considering the deference that we give to a trial court's decision regarding attorney's fees, we cannot say that Union Planters has demonstrated that the trial court abused its discretion in denying the request for attorney's fees.

Affirmed on direct appeal; affirmed on cross-appeal.

Michael BIBBS; L.D. Mason; MJ Construction Company, Inc.; Joyce Bradley Babin, as Trustee for Lloyd Dwight Mason and Brenda Lee Mason; and James F. Dowden, as Trustee for Michael J. Bibbs and Audrey C. Bibbs *v.*
COMMUNITY BANK of BENTON

08-378 289 S.W.3d 393

Supreme Court of Arkansas
Opinion delivered December 4, 2008

Eichenbaum, Liles & Heister, P.A., by: *James H. Penick, III*, for appellants.

Watts, Donovan & Tilley, P.A., by: *David M. Donovan*; and *Stuart Law Firm, P.A.*, by: *J. Michael Stuart* and *Ginger Stuart Schafer*, for appellee.

ROBERT L. BROWN, Justice. Appellants, Michael Bibbs, L.D. Mason, and MJ Construction Company, Inc., appeal from the circuit judge's judgment granting summary judgment and dismissal in favor of appellee Community Bank. The appellants assert three points on appeal. We affirm the judgment.

This dispute arises from a loan agreement between Community Bank and Bibbs, Mason, and MJ Construction. Bibbs and Mason are shareholders of MJ Construction — a dirt moving and development business. In 2000, Bibbs, Mason, and MJ Construction purchased 120 acres in Lonoke County with the intent to develop a subdivision. The purchase was financed with a three-year, $375,000 loan from Community Bank, with Community Bank taking a mortgage on the property as security. The loan agreement provided that a final balloon payment for the unpaid balance of the loan was due on April 25, 2003. According to Bibbs, he did not expect to pay off the loan on its due date because he believed that Community Bank would allow him to "roll over" the unpaid balance into a new loan. Bibbs, Mason, and MJ Construction failed to pay off the loan on its due date, and Community Bank made demand for the final balloon payment. When the final payment went unpaid, Community Bank sued for

foreclosure on August 1, 2003. On August 25, 2003, Bibbs filed for Chapter 7 bankruptcy. On February 8, 2005, Mason also filed for Chapter 7 bankruptcy, and in doing so, he scheduled a potential lender-liability lawsuit against Community Bank as an asset of the estate. About four months later, Mason terminated his Chapter 7 bankruptcy and filed a Chapter 13 bankruptcy petition.

On August 8, 2005, Bibbs, Mason, and MJ Construction filed suit against Community Bank and alleged breach of the covenant of good faith, breach of fiduciary duty, fraudulent concealment, constructive fraud, conversion, unjust enrichment, and intentional infliction of emotional distress ("lender-liability lawsuit"). On August 30, 2005, Community Bank filed an answer in which it asserted that Bibbs, Mason, and MJ Construction lacked standing to bring this suit.

On February 13, 2007, Community Bank moved for summary judgment, arguing that the appellants lacked standing because Bibbs's and Mason's Chapter 7 bankruptcy trustees had the exclusive right to prosecute the action, and they were not parties plaintiff. On March 22, 2007, the appellants filed an amended complaint in which Bibbs's and Mason's bankruptcy trustees were added as plaintiffs. On that same date, Bibbs and Mason filed a response to Community Bank's motion for summary judgment in which they argued that they were the proper parties before the court but that "the claims have been, and continue to be pursued on behalf of the estate." Attached to their response to Community Bank's motion for summary judgment was a February 20, 2007 affidavit from James Dowden, Bibbs's bankruptcy trustee. Mr. Dowden's affidavit said that during his tenure as trustee he became "aware of [appellants'] assertion that they had a cause of action against Community Bank"; that appellants hired an attorney, James Penick, to pursue the claim on a contingent fee basis; that Mr. Dowden obtained the bankruptcy court's approval of the lawsuit (in September 2005, after the lawsuit had been filed) and recorded the suit as a potential asset of the estate on December 31, 2005; that appellants' claims were "being pursued on behalf of the Chapter 7 bankruptcy estate by Mr. Penick as special counsel to the Trustee," as was "the proper way of handling such litigation"; and that any funds obtained from a settlement or a verdict in favor of the appellants would be payable to the bankruptcy estate. Additionally, appellants argued that MJ Construction had standing to bring the lawsuit, even if Bibbs and Mason did not.

On April 12, 2007, Community Bank moved to dismiss the appellants' amended complaint because it was filed after the three-year statute of limitations had expired.[1] Community Bank asserted, in addition, that MJ Construction lacked standing because it was not a corporation in good standing at the time either the original complaint or the amended complaint was filed. This assertion was supported by a certificate from the Arkansas Secretary of State, showing that MJ Construction's corporate charter had been revoked on December 31, 2003, and was not reinstated until April 9, 2007.

On May 7, 2007, the circuit judge sent a letter to both parties stating that a hearing on Community Bank's summary-judgment motion regarding standing and motion to dismiss regarding the statute of limitations would not be scheduled until the parties had completed mediation. The next day, on May 8, 2007, the judge sent a second letter to the attorneys setting a hearing on the motions for May 21, 2007. On that same date, counsel for Community Bank sent a letter to appellants' counsel erroneously stating that the hearing had been scheduled for July 10, 2007.

On May 21, 2007, the circuit judge held a hearing on Community Bank's motions. Counsel for the appellants was not present. The circuit judge noted for the record that he had sent a letter fixing the date and time of the hearing to all parties.[2] Because of appellants' counsel's absence, the circuit judge stated that he would not hear oral argument from Community Bank's attorney and would instead decide the issues based on the pleadings and briefs of the parties. The circuit judge then ruled from the bench that he was granting Community Bank's motion for summary judgment because of appellants' lack of standing and was dismissing the suit as outside the limitations period.

On May 31, 2007, appellants moved for reconsideration, arguing that the circuit judge had erred by conducting the hearing without appellants' counsel being present and also arguing why appellants did not lack standing. On June 4, 2007, the circuit judge entered a written order memorializing his ruling from the bench and granting Community Bank's motion for summary judgment and motion to dismiss. In that order, the circuit judge found that

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[1] Appellants do not challenge the circuit judge's finding that the statute of limitations had run at the time the amended complaint was filed.

[2] Appellants do not deny receiving this letter.

neither Bibbs nor Mason had standing to file the original complaint on August 8, 2005, because both had filed for Chapter 7 bankruptcy prior to that date, and, thus, their bankruptcy trustees had the exclusive right to prosecute the cause of action against Community Bank and had not abandoned that right. The judge further concluded that the three-year statute of limitations had run by the time of the filing of the amended complaint and that the amended complaint did not relate back to the date of the filing of the original complaint because the original complaint was void *ab initio*. As a final point, he concluded that MJ Construction lacked standing at the time the original complaint was filed due to the revocation of its corporate charter. The circuit judge dismissed the original complaint and amended complaint with prejudice.

Appellants Bibbs and Mason appealed to the court of appeals, and the court of appeals affirmed. *Bibbs v. Community Bank*, 101 Ark. App. 462, 278 S.W.3d 564 (2008).[3] The appellants petitioned this court for review, which this court granted. When we grant review, we treat the appeal as if it were originally filed in this court. *Cedar Chem. Co. v. Knight*, 372 Ark. 233, 273 S.W.3d 473 (2008).

I. Appellants' Standing

For their first point on appeal, Bibbs and Mason claim that the circuit judge erred in finding that they lacked standing to file the original lender-liability complaint on August 8, 2005. They assert that their cause of action accrued after Bibbs filed bankruptcy on August 25, 2003 and that, because of this, his cause of action was not the "property of the estate," as defined in the Bankruptcy Code. Next, they contend that Mason had standing because he filed Chapter 13 bankruptcy four months after he filed for Chapter 7 in 2005, and under the Bankruptcy Code, a trustee is not granted the exclusive right to prosecute the debtor's cause of action in a Chapter 13 bankruptcy. As an additional point, Mason seeks to distinguish *Fields v. Byrd*, 96 Ark. App. 174, 239 S.W.3d 543 (2006), a case the circuit judge relied on in his ruling, because Mason scheduled his lender-liability suit against Community Bank as part of his Chapter 7 bankruptcy and did not conceal it as the

[3] MJ Construction did not challenge on appeal the circuit judge's standing ruling regarding its revoked charter.

debtor had done in *Fields*. Finally, Bibbs maintains he had standing because Mr. Dowden, his bankruptcy trustee, ratified the filing of the original complaint.

The question of standing is a matter of law for this court to decide, and this court reviews questions of law de novo. *Pulaski County v. Ark. Democrat-Gazette, Inc.*, 371 Ark. 217, 264 S.W.3d 465 (2007).

A debtor's commencement of a Chapter 7 bankruptcy creates an estate consisting of all of the debtor's legal and equitable interests in property. 11 U.S.C. § 541(a)(1) (2008). Once a bankruptcy trustee is appointed to administer the debtor's estate, the trustee has the exclusive right to prosecute causes of action that are the property of that estate. 11 U.S.C. §§ 323, 704(1). Causes of action that accrue prior to the filing of a petition for relief under the Bankruptcy Code are property of the estate. *See Bratton v. Mitchell, Williams, Selig, Jackson & Tucker*, 302 Ark. 308, 788 S.W.2d 955 (1990) (citing *Vreugdenhil v. Hoekstra*, 773 F.2d 213 (8th Cir. 1985)). A debtor lacks standing to maintain, on his or her own behalf, a suit belonging to the estate unless that cause of action has been abandoned by the trustee. *Id.*

a. Bibbs's standing.

We first address the appellants' contention that Bibbs's claim accrued after he filed for Chapter 7 bankruptcy. If true, his cause of action would not be the property of the bankruptcy estate and, thus, Bibbs would have standing to file his complaint against Community Bank on August 8, 2005.

The crux of Bibbs's lender-liability complaint is that Community Bank's actions concerning the repayment of the $375,000 loan forced him to declare bankruptcy. This necessarily implicates pre-bankruptcy conduct on Community Bank's part. Bibbs, moreover, admits as much in both his complaint and his deposition testimony. As one example, during his deposition, Bibbs testified: "It is my belief that the bank forced me into bankruptcy. If the bank would not have done all the things I complain of in my lawsuit, I would not have had to file bankruptcy."

[redacted] Bibbs's assertion that some of Community Bank's alleged misconduct occurred after he filed bankruptcy does not change this conclusion. It is well established that a cause of action accrues the moment the right to commence an action comes into being. *Quality Optical of Jonesboro, Inc. v. Trusty Optical, L.L.C.*, 365

Ark. 106, 225 S.W.3d 369 (2006). It is clear to this court that Bibbs's cause of action arose out of the alleged misconduct of Community Bank concerning its strict enforcement of the loan agreement's April 25, 2003 due date, which, by his own assertion, forced Bibbs into bankruptcy. In short, because his cause of action accrued before Bibbs's bankruptcy filing, the cause of action is the property of his bankruptcy estate. We hold that, as a result, Bibbs lacked standing to file the lender-liability lawsuit.

The appellants also contend that Bibbs had standing to sue because the filing of the suit against Community Bank was "ratified for administrative purposes" by his trustee, Mr. Dowden, as set forth in his affidavit, and through the filing of the amended complaint joining the trustees as plaintiffs on March 22, 2007. Appellants' authority for this point is the following language from *Bratton*: "In this case, there is no evidence that the bankruptcy trustee abandoned this claim or that the trustee joined in or *ratified* Bratton's filing of this complaint in circuit court. In fact, the evidence in the record indicates the contrary." 302 Ark. at 309, 788 S.W.2d at 956 (emphasis added). The appellants also cite Rule 17(a) of the Arkansas Rules of Civil Procedure, which reads in part that no action shall be dismissed until a reasonable time has been given for the real party in interest to ratify commencement of the action.

■ We first address ratification by the trustee under the Bankruptcy Code. As already noted, the Bankruptcy Code provides that the trustee has the exclusive right to prosecute lawsuits belonging to the estate in a Chapter 7 bankruptcy. *See* 11 U.S.C. §§ 323, 704(a)(1). The only exception exists in cases of abandonment by the trustee in a Chapter 7 bankruptcy after a potential claim has been scheduled as an asset. *See* 11 U.S.C. § 554; *Bratton, supra.* The appellants point to no provision in the Bankruptcy Code supporting ratification by the trustee in an amended complaint after an original complaint is filed by the debtor and the statute of limitations has passed. Hence, we hold that any subsequent ratification of Bibbs's lender-liability suit under these facts did not cure the standing deficiency under the Bankruptcy Code.

There is another reason why the ratification argument fails. This court has held that a complaint filed by a party without standing in a wrongful-death action is a nullity. *See Hubbard v. Nat'l Healthcare of Pocahontas, Inc.*, 371 Ark. 444, 267 S.W.3d 573 (2007) (wrongful death complaint filed by administratrix two weeks

before her appointment was a nullity because administratrix did not have standing to pursue the claim prior to appointment); *St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County*, 348 Ark. 197, 73 S.W.3d 584 (2002)(a survival complaint filed by patient's family was a nullity where the family lacked standing to pursue the survival action after administrator had been appointed). At the time the lawsuit against Community Bank was filed on August 8, 2005, Bibbs lacked standing under the Bankruptcy Code and the complaint, under the reasoning of *Hubbard* and *St. Paul Mercury Insurance Company*, was therefore a nullity with no legal force or effect. It is illogical to conclude that a trustee can ratify something that, as far as the law is concerned, is void and never existed.

We are mindful of the fact that Rule 17(a) of the Arkansas Rules of Civil Procedure, which provides for suits being prosecuted in the name of the real party in interest, contemplates ratification. Rule 17(a) provides in pertinent part:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest *until a reasonable time has been allowed after objection for ratification of commencement of the action* by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Ark. R. Civ. P. 17(a) (emphasis added). Yet, even if the original complaint was not deemed to be a nullity for lack of the debtors' standing, we disagree that Mr. Dowden, as trustee, could ratify Bibbs's original complaint after the fact and thereby legitimize his debtors' standing under these facts.

Because the Arkansas Rule of Civil Procedure 17(a) mirrors Federal Rule 17(a), we turn to the Federal Advisory Committee's notes for guidance. According to the Advisory Committee Note to Fed. R. Civ. P. 17, Rule 17(a) "should not be misunderstood or distorted. It is intended to prevent forfeiture *when determination of the proper party to sue is difficult or when an understandable mistake has been made.*" Fed. R. Civ. P. 17, Advisory Committee's Notes to the 1966 Amendments (emphasis added). Accordingly, most courts have applied this part of Rule 17(a) only when the plaintiff brought the action in his or her own name because determination of the real party in interest was difficult or when an understandable mistake was made. *See, e.g., Crowder v. Gordons Transps., Inc.*, 387

F.2d 413 (8th Cir. 1967) (plaintiff's mistake was "understandable and excusable" where case involved a conflicts-of-law question with respect to whether Arkansas or Missouri law applied, and each state's wrongful-death statute designated a different person as the real party in interest). *See also Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11 (2d Cir. 1997) (holding district court erred in failing to permit substitution of plaintiffs to relate back under Rule 15(c) and 17(a) where Advanced Magnetics was mistaken about the legal effect of a shareholder assignment). This court has recognized the "understandable mistake" requirement of Rule 17(a) by inference. *See Rhuland v. Fahr*, 356 Ark. 382, 392, 155 S.W.3d 2, 9 (2004) (Rules 15 and 17 were inapplicable where "no such understandable mistake occurred").

In the instant case, when the original complaint was filed on August 8, 2005, the real parties in interest were Bibbs's and Mason's bankruptcy trustees. We have held in this opinion that the Bankruptcy Code clearly provides that a trustee, and only a trustee, has standing to prosecute causes of action that are property of the Chapter 7 bankruptcy estate. 11 U.S.C. §§ 323, 701(1). The determination of the real party in interest was not difficult for the appellants in this case; nor was there an understandable or excusable mistake by Bibbs and Mason in this regard. *See Rhuland, supra* (not understandable mistake when wrongful-death statute specifically detailed who may bring suit). Accordingly, ratification by Bibbs's trustee did not cure Bibbs's standing deficiency under Rule 17(a) or breathe new life into his defunct pleading. We conclude for this additional reason that Bibbs clearly lacked standing at the time the original complaint was filed.

b. Mason's standing.

In the appellants' reply brief, they claim that the lender-liability lawsuit was abandoned to Mason, because Mason scheduled the lawsuit as an asset in his Chapter 7 filing on February 8, 2005, and the bankruptcy estate was closed on May 24, 2005, without the lawsuit being administered. They emphasize that, unless otherwise ordered by the court, any scheduled property that is not administered at the time of the closing of the estate is considered abandoned to the debtor. They direct this court to 11 U.S.C. § 554(c), which reads:

> (c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the

> time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

As the lender-liability lawsuit was abandoned to Mason, he contends he had standing to prosecute the litigation.

[redacted] We refuse to address this argument for two reasons. Our initial reason is that Mason makes the argument for the first time in his reply brief on appeal. This is too late. *See Maddox v. City of Fort Smith*, 346 Ark. 209, 56 S.W.3d 375 (2001) ("We do not consider arguments raised for the first time in a reply brief because the appellee is not given a chance to rebut the argument."). Secondly, though the circuit judge made a finding in his judgment of no abandonment, appellants did not argue section 554(c) to the circuit judge in either their brief opposing summary judgment or in their motion for reconsideration. *See Perry v. Baptist Health*, 368 Ark. 114, 243 S.W.3d 310 (2006) ("[W]e will not consider an argument raised for the first time on appeal."). The appellants' argument to the circuit judge in their response brief solely regarded judicial estoppel and did not address abandonment under section 554(c) and its effect on Mason's standing.

In their petition for review, appellants contend that they did not have the opportunity to argue the abandonment/standing point under section 554(c) before the circuit judge due to the circuit judge's decision to proceed with the summary-judgment hearing without their counsel being present. What occurred at the hearing, however, does not change the fact that appellants raised the abandonment argument for the first time in their reply brief on appeal, thus precluding Community Bank from responding. *See Maddox, supra.* As already mentioned, appellants could have raised the abandonment argument in their brief to the circuit judge in support of their response to the summary-judgment and dismissal motions or in their motion for reconsideration, and they failed to do so.[4]

We are aware that Mason reopened his Chapter 7 bankruptcy estate on July 25, 2006, which might suggest that any previous abandonment by Mason's trustee was revoked by the new

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[4] Appellants also argue on appeal that the circuit judge "may have" erroneously applied the doctrine of judicial estoppel. It is not apparent to this court that the circuit judge ever discussed the issue of judicial estoppel. Accordingly, we decline to address it.

filing. Courts are generally in agreement that unadministered assets that are abandoned to a debtor under section 554(c) are not automatically "reeled back into the estate" by reopening the case. *See, e.g., In re Menk*, 241 B.R. 896 (1999); 9E Am. Jur. 2d *Bankruptcy* § 3748, p. 23 (2006).

Nor do we agree that filing a Chapter 13 bankruptcy in 2005 four months after filing the original Chapter 7 bankruptcy gave Mason standing to prosecute a scheduled lender-liability suit on August 8, 2005. This, again, is in the nature of an abandonment argument under section 554(c), which was not made to the circuit judge or made to this court until the reply brief.

II. Relation Back of Amended Complaint

For their second point on appeal, Bibbs and Mason contend that the circuit judge erred in finding that their amended complaint did not relate back to the filing of their original complaint under Rule 15(c) of the Arkansas Rules of Civil Procedure. Community Bank responds that because Bibbs and Mason lacked standing to sue, their original complaint was a nullity and therefore the amended complaint adding the trustees as plaintiffs cannot relate back to a void complaint. They cite *Rhuland v. Fahr, supra.*

This court has held that for the relation-back doctrine to apply there must be valid pleadings to amend. *See St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County, supra.* Bibbs and Mason lacked standing when they filed their original complaint; thus, the original complaint was a nullity. *See Hubbard v. Nat'l Healthcare of Pocahontas*, 371 Ark. at 452, 267 S.W.3d at 578 ("[a]ppellant's complaint was a nullity because she did not have standing" at the time it was filed). Accordingly, when appellants filed their amended complaint in 2007, there was not a valid original complaint to amend and, thus, nothing to which the amended complaint could relate back.

Moreover, this court held in *St. Paul* that an amended complaint that substitutes out the original plaintiffs and replaces them with entirely new plaintiffs does not constitute an amendment to the original complaint but rather is the filing of a new lawsuit. 348 Ark. at 206, 73 S.W.3d at 589. Here, the appellants attempted to cure the deficiency of their original complaint by joining their bankruptcy trustees as parties plaintiff in their amended complaint. However, because the appellants were not

the real parties in interest at the time of either the filing of the original complaint or the filing of the amended complaint under Rule 17(a), as discussed above, the joinder of the bankruptcy trustees in the amended complaint had the effect of substituting entirely new plaintiffs. This was in the nature of filing a new action and is barred by the statute of limitations. We affirm the circuit judge on this point.

III. Appellants' Motion for Reconsideration

For their final point on appeal, Bibbs and Mason urge that the circuit judge erred by denying their motion for reconsideration following the summary-judgment and dismissal hearing when appellants' counsel was not present. Appellants urge that the circuit judge's decision to continue with the summary-judgment and dismissal hearing in the absence of appellants' counsel and despite conflicting correspondence from the circuit judge and opposing counsel regarding the hearing date constitutes reversible error.

We first note that this court has held that a lawyer and litigant must exercise reasonable diligence in keeping up with the progress of a case. *Francis v. Protective Life Ins. Co.*, 371 Ark. 285, 265 S.W.3d 117 (2007); *Arnold v. Camden News Publ'g Co.*, 353 Ark. 522, 110 S.W.3d 268 (2003). In a letter dated May 8, 2007, the circuit judge notified all counsel that the summary-judgment and dismissal hearing was scheduled for May 21, 2007. To be sure, Community Bank's counsel erroneously notified appellants' counsel that the hearing was set for July 10, 2007, which confused matters. But if any confusion arose from the circuit judge's conflicting orders or by an inconsistent date in opposing counsel's confirmation letter, appellants' counsel should have inquired to determine the correct date and time of the hearing from the circuit judge. Furthermore, at the hearing on May 21, 2007, the circuit judge refused to hear oral argument from Community Bank's lawyer on the motions due to the absence of appellants' counsel and stated that he would rely solely on the pleadings and the parties' briefs in making his decision. The judge concluded the hearing by orally granting summary judgment and dismissal in favor of Community Bank.

Appellants next filed a motion for reconsideration on May 31, 2007, in which they contested the holding of the hearing and raised their standing arguments. It was only after this motion that the circuit judge entered his order granting summary judgment and dismissal.

Although, admittedly, conducting a hearing without the presence of counsel for a party is an irregular and questionable procedure, the circuit judge took pains to assure that Community Bank would not receive an unfair advantage due to the absence of appellants' counsel. In addition to that, appellants' counsel had the opportunity to raise any pertinent arguments in the motion for reconsideration filed before the entry of the order.

As a final matter, appellants have not shown this court how they were specifically prejudiced by their counsel's absence at the hearing.[5] Rule 56 of the Arkansas Rules of Civil Procedure does not give the parties an automatic *right* to a summary-judgment hearing. It is discretionary with the circuit judge. Moreover, as we have noted, the circuit judge took steps to assure no unfair prejudice to appellants occurred. Without unfair prejudice, we are hard pressed to reverse the circuit judge's judgment. *See Villanueva v. CNA Ins. Co.*, 868 F.2d 684 (5th Cir. 1989) (though the court viewed with suspicion a summary-judgment conference which terminated the litigation without plaintiff's counsel being present, the record reveals no unfair prejudice to the plaintiff). Taking all the factors together, we conclude there was no abuse of discretion by the circuit judge in going forward with the hearing.

Affirmed.

[5] Appellants take issue with the circuit judge's statement that he had not read all the documents "exhaustively." Again, appellants have not illuminated this court on how this specifically resulted in prejudice to them. They also refer to "evidence" submitted at the hearing. The only "evidence" was a marked exhibit of the judge's letter setting the hearing date and Community Bank's counsel's reference to the revoked charter of MJ Construction Company. Again, we fail to see how this prejudiced the appellants.

Kyle JOHNSON *v.*
THE CINCINNATI INSURANCE COMPANY

08-327 289 S.W.3d 407

Supreme Court of Arkansas
Opinion delivered December 4, 2008

[Rehearing denied January 15, 2009.*]

Chaney Law Firm, P.A., by: *Donald P. Chaney, Jr.*, for appellant.

* BROWN, J., not participating.

Mixon Law Firm, by: *Donn Mixon*, for appellee.

ELANA CUNNINGHAM WILLS, Justice. This is the second appeal before our court in this case. *See The Cincinnati Ins. Co. v. Johnson*, 367 Ark. 468, 241 S.W.3d 264 (2006) (*Johnson I*).

Appellant Kyle Johnson was injured in a car accident in December 2001. The driver of the other car was insured by the appellee, The Cincinnati Insurance Company ("Cincinnati"). After a trial in November 2005, a Greene County jury rendered a verdict in Johnson's favor on November 23, 2005. On December 5, 2005, Johnson filed a motion for judgment notwithstanding the verdict and a motion for new trial, contending that the jury erred in its findings regarding his damages. The circuit court granted Johnson's motion for new trial in an order entered on January 5, 2006, finding that the amount of the jury's verdict was too small because the jury failed to award damages that Johnson had proven at trial.

Cincinnati appealed from the order granting Johnson's motion for new trial, arguing that the circuit court had lost jurisdiction to decide the motion on the thirtieth day after it was filed. This court agreed, holding that Johnson's motion had been deemed denied on the thirtieth day, or January 4, 2006. *Johnson I*, 367 Ark. at 471, 241 S.W.3d at 266 (reversing and dismissing).

After this court's decision in *Johnson I*, Johnson returned to the circuit court and filed, on December 19, 2006, a motion under Ark. R. Civ. P. 60(c)(4) to set aside the November 23, 2005, judgment. In his motion, Johnson argued that the reversal of the circuit court's order granting his motion for new trial had the effect of reinstating the "erroneous judgment that was entered in the first instance," and he alleged that the 2005 judgment "should be set aside based upon misrepresentation or fraud committed by [Cincinnati's] counsel in preparing an improper and erroneous form of judgment." Specifically, Johnson alleged that Cincinnati's counsel had prepared a judgment that did not conform to the law and the evidence, in that it "zeroed out" the jury's verdict awarding Johnson $12,537.60, in light of the $25,000.00 paid by the insurance carrier for the tortfeasor.

The circuit court held a hearing on November 5, 2007, and subsequently entered an order on November 9, 2007, denying Johnson's motion. The court first found that this court's mandate, issued on October 12, 2006, deprived it of jurisdiction. In addition, the court stated that, although fraud could be a reason to set

aside a judgment under Rule 60 after the expiration of ninety days, Johnson had failed to demonstrate the existence of constructive fraud. Johnson filed a timely notice of appeal on December 10, 2007.[1]

Johnson has appealed from the circuit court's denial of his motion to set aside a judgment pursuant to Ark. R. Civ. P. 60. This court has noted that the only limitation on the exercise of the power to set aside a judgment pursuant to Rule 60 is addressed to the sound discretion of the court. *See RLI Ins. Co. v. Coe*, 306 Ark. 337, 813 S.W.2d 783 (1991). *See also Watson v. Connors*, 372 Ark. 56, 270 S.W.3d 826 (2008) (it is within the discretion of the circuit court to determine whether it has jurisdiction under Rule 60 to set aside a judgment, and the question on appeal becomes whether there has been an abuse of that discretion). However, in a constructive fraud case, the court of appeals has noted that "we evaluate the circuit court's factual findings about the elements of constructive fraud for clear error." *Downum v. Downum*, 101 Ark. App. 243, 274 S.W.3d 349 (2008) (quoting *Knight v. Day*, 343 Ark. 402, 36 S.W.3d 300 (2001)).

In his first point on appeal, Johnson argues that the circuit court erred in determining that it lacked jurisdiction to take any further action on his motion to set aside the judgment after this court handed down the mandate in *Johnson I*. As mentioned above, the circuit court determined that this court's mandate "deprived [the circuit] court of jurisdiction to take any further action." On this specific issue, we conclude that the circuit court was wrong.

The mandate is the official notice of action of the appellate court, directed to the court below, advising that court of the action taken by the appellate court, and directing the lower court to have the appellate court's judgment duly recognized, obeyed, and executed. *Dolphin v. Wilson*, 335 Ark. 113, 118, 983 S.W.2d 113, 115 (1998) (citing 5 Am. Jur. 2d *Appellate Review* § 776). Under this rule, "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Id.* (citing *Briggs v. Pennsylvania R., Co.*, 334 U.S. 304 (1948)). Whatever is before the supreme court and disposed of in the exercise of its appellate jurisdiction must be considered settled, and the lower court must

[1] The thirty-day deadline for filing the notice of appeal fell on December 9, 2007, which was a Sunday; therefore, the December 10, 2008, filing was timely. *See* Ark. R. Civ. P. 6(a).

carry that judgment into execution according to its mandate. *Fulkerson v. Thompson*, 334 Ark. 317, 974 S.W.2d 451 (1998).

The question presented in the instant case is whether this court's mandate in *Johnson I* deprived the lower court of jurisdiction to take any further action on a Rule 60(c)(4) motion. Our mandate in *Johnson I*, reversing the order granting a new trial, states that "it is the decision of the Court that the case be reversed and dismissed for the reasons set out in the attached opinion." In that opinion, this court held that the circuit court had erred in granting Johnson's motion for a new trial because, in waiting until the thirty-first day to enter that order, the court lost jurisdiction to rule on the motion under Ark. R. Civ. P. 59(b). *Johnson I*, 367 Ark. at 471, 241 S.W.3d at 266. The court concluded its opinion with the following:

> Based upon the foregoing conclusions, we hold that *the circuit court was without jurisdiction to hold the hearing and to enter the order* on January 5, 2006, on Johnson's motion for new trial. *Accordingly, we lack jurisdiction to consider the issues*, and *we dismiss the appeal. See Murchison v. Safeco Ins. Co. of Illinois*, 367 Ark. 166, 238 S.W.3d 11 (2006).
>
> Reversed and dismissed.

Id. at 472-73, 241 S.W.3d at 267 (emphasis added).

This court has noted that the trial court should look beyond the words of reversal and look to the effect of the opinion in proceeding upon remand. *See Glover v. Woodhaven Homes, Inc.*, 346 Ark. 397, 57 S.W.3d 211 (2001) (quoting *Kneeland v. Amer. Loan & Trust Co.*, 138 U.S. 509 (1891)). Here, in the *Johnson I* opinion, this court specifically dismissed *only the appeal* based on our lack of jurisdiction, which in turn was premised on the circuit court's lack of jurisdiction to enter the order that it entered. Stated another way, this court's action in reversing and dismissing did not have the effect of completely dismissing *the entire proceedings in circuit court*; rather, we dismissed *the appeal.*

The practical effect of this court's opinion in *Johnson I* was to vacate the circuit court's order granting Johnson's motion for new trial; after this court reversed the lower court on that issue, it was as though the order granting the new trial never existed. *See Schofield v. Rankin*, 86 Ark. 86, 90, 109 S.W. 1161, 1163 (1908) ("The effect of the reversal is to annul, vacate, and set aside the

judgment or decree — to completely wipe it out as if it had never been in existence. Nothing remains of it; it is gone."); 5 Am. Jur. 2d *Appellate Review*, § 861 ("A complete reversal generally annuls the judgment below, and the case is put in the same posture in which it was before the judgment was entered.").

Accordingly, following this court's reversal of the circuit court's order granting Johnson's motion for new trial, the matter stood before the circuit court as though that order had never been entered. In other words, the parties stood in the same position as they were when the original judgment — the November 23, 2005, judgment — was entered. The circuit court was *not* deprived of jurisdiction to act on a Rule 60(c) motion. *Compare Foohs v. Bilby*, 95 Ark. 302, 129 S.W. 1104 (1910) (trial court retained jurisdiction under statutory precursor to Rule 60 after case was appealed and affirmed); *Davis v. Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987) (circuit court retained jurisdiction to modify its order under Rule 60(c)(4) even though the appellate court affirmed that order); *Garrett v. Allstate Ins. Co.*, 26 Ark. App. 199, 762 S.W.2d 3 (1988) (a trial court may modify or set aside its judgment, or vacate its judgment under Rule 60 to allow a new trial, even though the judgment has been affirmed on appeal). The circuit court was wrong in its conclusion that our mandate deprived it of jurisdiction to entertain a motion under Rule 60(c).

However, that is not the end of the matter. Johnson must still demonstrate that he had a basis for setting aside the November 23, 2005, order pursuant to Ark. R. Civ. P. 60. Johnson urges that the circuit court should have corrected the November 2005 order pursuant to Ark. R. Civ. P. 60(c)(4). That rule provides as follows:

> The court in which a judgment, other than a default judgment . . . 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:
>
> . . . .
>
> (4) For misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party.

Unless a party falls within this exception (or one of the other exceptions set out in Rule 60(c), which are not at issue in this case), a

court has no power to modify or set aside an order after the expiration of ninety days. *See O'Marra v. MacKool*, 361 Ark. 32, 38, 204 S.W.3d 49, 52 (2005) (citing *Blackwood v. Floyd*, 342 Ark. 498, 29 S.W.3d 694 (2000)).

Johnson contends that the November 2005 judgment was entered as a result of constructive fraud, and that, therefore, the circuit court should have set it aside. In support of his argument, he cites *Davis v. Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987). In *Davis*, after a bench trial, the circuit court sent a letter opinion to the parties' attorneys directing the appellant's attorney to prepare a precedent awarding his client, Rex Davis, a judgment of $12,836.14. Some time later, the attorney sent a precedent to the court that awarded Rex $24,761.14, explaining in a cover letter to the court that the additional money was intended to cover additional damages. The appellee, Pat Davis, did not receive a copy of this letter. Nonetheless, the circuit court signed the precedent and entered it on November 16, 1983. *Davis*, 291 Ark. at 474, 725 S.W.2d at 846.

Pat appealed, and the court of appeals affirmed the circuit court's judgment. Prior to the issuance of the mandate, however, Pat filed a motion in the circuit court asking the court to correct the judgment. The court, relying on Rule 60(c)(4), granted Pat's motion, entering an order correcting the judgment to reflect the original award of $12,836.14. Rex appealed, arguing a lack of jurisdiction, as discussed above, and that the court erred in correcting the judgment. *Id.* at 475, 725 S.W.2d at 846.

On appeal, this court held that, under Rule 60(c)(4), the circuit court could set aside the judgment upon finding that a fraud had been practiced by the party obtaining the judgment. Noting that a fraud can occur even in the "complete absence of any moral wrong or evil intention," the court held that Rex's attorney's actions in submitting a judgment that did not reflect the actual judgment of the court constituted fraud, stating that it was "obvious that the judgment of the trial court was intended to be in the amount of $12,836.14. Any change, absent the knowledge and consent of the trial court, would not be the judgment of the court." *Id.* at 477, 725 S.W.2d at 847.

Johnson argues that *Davis* is on all fours with his case, and that the trial court should have found that Cincinnati committed a constructive fraud on the court when it submitted the precedent "zeroing out" the damages to the court for entry. Cincinnati

responds that there was nothing fraudulent in its actions when it prepared a precedent because it sent the proposed order to both the court and opposing counsel.

Cincinnati urges that the more apposite case is *State Office of Child Support Enforcement v. Offutt*, 61 Ark. App. 207, 966 S.W.2d 275 (1998). In *Offutt*, the Office of Child Support Enforcement (OCSE) commenced an action to determine paternity of a child; the appellee, Jerry Offutt was subsequently determined to be the child's father. In November of 1995, OCSE's attorney prepared a precedent finding that Offutt was the child's father and establishing child support. OCSE mailed the precedent to the court and to Offutt's attorney, along with a letter by which Offutt's attorney was asked to notify the court within seven days if there was an objection to the precedent; OCSE also asked the court to sign and enter the order if it did not receive an objection from Offutt within seven days. Offutt received the letter and called the court on the seventh day, objecting to the precedent. However, the court entered the order anyway on November 29, 1995. *Offutt*, 61 Ark. App. at 209, 966 S.W.2d at 275-76.

Offutt later filed a motion for relief pursuant to Rule 60(b), and the circuit court eventually made an oral ruling that the November 29, 1995, order should be amended. However, the court did not enter a written order until several months later. *Id.* at 209, 966 S.W.2d at 276.

OCSE appealed, arguing that the circuit court lacked the authority to modify the November 29, 1995, order after the lapse of ninety days. *Id.* In response, Offutt argued that the court maintained its jurisdiction to act on the November 1995 order because counsel for OCSE had committed fraud. Offutt argued that the fraud consisted of OCSE's sending the court a precedent containing findings not made by the court and asking the court to sign the order if Offutt raised no objection within seven days. Offutt cited *Davis v. Davis*, *supra*, in support of this argument, but the court of appeals rejected his contention. Noting that the attorney in *Davis* never gave opposing counsel an opportunity to object to the precedent, *id.* at 212, 966 S.W.2d at 277, the court of appeals distinguished *Davis* as follows:

> Here, [OCSE's] attorney sent a copy of the precedent and transmittal letter to both the judge and [Offutt's] attorney. By requesting that the judge sign the precedent only if he did not receive an objection from opposing counsel within seven days, the

> judge was alerted to the fact that there might be an objection from [Offutt's] counsel as to the form or the content of the judgment. We do not interpret this action as an effort by [OCSE's] attorney to deceive either the judge or [Offutt's] attorney. In fact, we know that [Offutt's] attorney received the precedent and letter because she contacted the judge and voiced her objection to the precedent, but the judge signed it anyway. We do not consider the conduct of [OCSE's] attorney in this case to be in any way similar to the conduct of the attorney in *Davis* and certainly not fraudulent within the meaning of Rule 60(c)(4).

Id. at 212-13, 966 S.W.2d at 277.

The facts of the instant case are much more analogous to *Offutt* than they are to *Davis*. Here, Donn Mixon, counsel for Cincinnati, gave Johnson's attorney, Don Chaney, an opportunity to review the precedent prior to having the circuit court sign it, as evidenced by a letter sent by Chaney to Mixon on November 9, 2005.[2] Chaney wrote:

> Do you agree that because the jury was informed of the amount of the primary insurance policy limits of $25,000.00, that the jury's verdict in the total amount of $12,537.60 is all due and payable by Cincinnati Insurance Company? If so, then I trust that you will draft the precedent for a judgment accordingly. If you do not agree, then please let me know, and I will attempt to provide you with some legal authority on point.

Mixon responded by sending the court a letter, copied to Chaney, stating the following:

> Attached is a precedent for a judgment in this case. We believe it to be proper. I sent this to Don Chaney. He has not approved it, but he did let me know that he believes that Cincinnati Insurance should pay the $12,537.60 awarded by the jury. As you will recall, all of this was hammered out before the trial in chambers where it was determined that you would subtract the $25,000 from the tortfeasor and make any other adjustments that would be necessary in the final verdict. . . .

[2] Chaney also conceded at the hearing before the circuit court that he had received this letter.

> We believe ... our precedent is accurate and appropriate for the court's signature. If you desire anything further from us, please let me know.

[redacted] Here, as was the case in *Offutt*, there is simply no proof of fraud in this case, whether actual or constructive. This court noted in *Davis v. Davis, supra*, that constructive fraud is defined as a "breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declared fraudulent because of its tendency to deceive." *Davis*, 291 Ark. at 476, 725 S.W.2d at 847 (citing *Lane v. Rachel*, 239 Ark. 400, 389 S.W.2d 621 (1965)). Here, counsel for the insurance company gave Johnson's attorney a copy of the precedent to review before asking the court to enter it. Although Johnson may have disagreed with the contents of the precedent, that fact alone does not prove that Cincinnati engaged in fraudulent conduct in asking the court to enter it, especially where his objection was made known to the trial court. Thus, the trial court correctly determined that "the constructive fraud that the plaintiff asserts as necessary to afford the court authority to act simply does not exist under the facts of this case."

Johnson raises three other points on appeal, contending that the November 23, 2005, judgment was wrong and should have been set aside for various reasons. He contends that the judgment 1) erroneously offset Johnson's settlement with the tortfeasor from the verdict awarded by the jury; 2) wrongfully ordered medical benefits to be paid to Cincinnati, causing Johnson to not be "made whole" by the judgment; and 3) did not reduce the medical payment subrogation claim by the "one-third cost of collection attorney's fee payable to [Johnson's] attorney for procuring the settlement for policy limits."

[redacted] We decline to reach any of these arguments, as the circuit court did not rule on any of them. We will not consider arguments on appeal when a party has failed to obtain a ruling from the circuit court. *See, e.g., Beverly Enterprises-Arkansas, Inc. v. Thomas*, 370 Ark. 310, 251 S.W.3d 267 (2007); *Cox v. Miller*, 363 Ark. 54, 210 S.W.3d 842 (2005). Moreover, none of these issues would constitute grounds for setting aside a judgment after the expiration of more than ninety days under Ark. R. Civ. P. 60(c).

Affirmed.

BROWN, J., not participating.

Terrance Quartez JARRETT *v.* STATE of Arkansas

CR 08-1295 289 S.W.3d 421

Supreme Court of Arkansas
Opinion delivered December 4, 2008

John W. Settle, for appellant.

No response.

PER CURIAM. Terrance Quartez Jarrett, by his attorney, John W. Settle, has filed a motion for rule on clerk. The circuit court entered Jarrett's judgment and commitment order on July 8, 2008, and Jarrett filed his notice of appeal on July 9, 2008. The record in this matter was thus due to be filed by October 7, 2008. Because the record was not tendered to this court's clerk until November 5, 2008, it was untimely.

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

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

356 Ark. at 116, 146 S.W.3d at 891 (footnote omitted). While this court no longer requires an affidavit admitting fault before we will

consider the motion, an attorney should candidly admit fault where he or she has erred and is responsible for the failure to perfect the appeal. *See id.* When it is plain from the motion, affidavits, and record that relief is proper under either rule based on error or good reason, the relief will be granted. *See id.* If there is attorney error, a copy of the opinion will be forwarded to the Committee on Professional Conduct. *See id.*

[redacted] It is plain from Jarrett's motion that there was error on Mr. Settle's part. Pursuant to *McDonald v. State, supra,* we grant Jarrett's motion for rule on clerk and forward a copy of this opinion to the Committee on Professional Conduct.

Motion granted.

[redacted]

Billy Joe KELLEY *v.* STATE of Arkansas

CR 08-926 289 S.W.3d 421

Supreme Court of Arkansas
Opinion delivered December 4, 2008

[redacted]

William P. Luppen, for appellant.

No response.

PER CURIAM. Appellant Billy Joe Kelley appeals his conviction for rape and sentence of life imprisonment. Because

Kelley has submitted a brief without a proper abstract, which is in violation of Arkansas Supreme Court Rule 4-2 (2008), 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, in pertinent part:

> 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.

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."

In the present case, a jury trial was held February 5-6, 2008. Instead of abstracting the transcript of the testimony as required by Rule 4-2(a)(5), Kelley provides a verbatim transcript of the testimony, and the abstract is not in the first person. Because Kelley has failed to comply with our rule, we order Kelley to abstract the testimony and to file a substituted brief within fifteen days from the date of entry of this order.

Rebriefing ordered.

James Aaron MILLER *v.* STATE of Arkansas

CR 08-1297 289 S.W.3d 423

Supreme Court of Arkansas
Opinion delivered December 4, 2008

James W. Wyatt, for appellant.

No response.

PER CURIAM. Petitioner, James Aaron Miller, through his attorney, James W. Wyatt, has filed a petition for writ of certiorari to complete the record pursuant to Rule 3-5 of the Rules of the Supreme Court. Miller filed a certified partial record on November 5, 2008, and filed this petition the same day. We grant the petition.

Miller was convicted of capital murder and sentenced to death on April 7, 2008. After a timely notice of appeal was filed, Miller's attorney filed a motion on June 30, 2008, pursuant to Ark. R. App. P.–Civ. 5 to extend the time for filing the transcript. The motion asserted that the court reporter had contacted counsel to inform him that the transcript could not be completed before the record was due to be lodged on July 6, 2008. The State responded that it had no objection to Miller's motion. The circuit court thus entered an order on July 2, 2008, extending the time for lodging the record until November 6, 2008, seven months following the date of the judgment.

The court reporter has been unable to complete the record by the extended date, and Miller is requesting additional time by means of his timely certiorari petition. We grant the petition and direct that a writ of certiorari be issued to the Circuit

Court of Sebastian County to complete and file a certified supplemental record with our clerk within thirty days from the date of this per curiam. At that time, a briefing schedule will be set.

Dustin TUCK *v.* ARKANSAS DEPARTMENT of HUMAN SERVICES, Minor Child

08-1240 289 S.W.3d 420

Supreme Court of Arkansas
Opinion delivered December 4, 2008

Booth Law Firm, PLC, by: *Frank Booth*, for appellant.

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

PER CURIAM. Rule 2-4 of the Rules of the Arkansas Supreme Court require petitions for review to "briefly and distinctly state the basis upon which the case should be reviewed" and "may include citations to authority or references to statutes or constitutional provisions." Although subsection (b) of that rule prohibits briefs in support of review petitions, it allows petitioners to attach a copy of their petition for rehearing before the Court of Appeals. Rule 2-3 dictates the procedure and requirements of petitions for rehearing and allows a brief in support to be filed with a petition for rehearing.

Appellee, the Arkansas Department of Human Services, claimed in its petition for review that the Court of Appeals "made errors of fact and law and should be reversed." The petition

fails to note with particularity what it believes those errors to be and upon what grounds this court should grant review. Although Appellee attached its petition for rehearing, it is a nearly identical copy of the review petition and gives no additional argument or citation to authority. Appellee also attached its Brief in Support of Petition for Rehearing to its review petition, and it is in that document that Appellee makes its substantive argument regarding the errors it believes the appellate court made. Because Rule 2-4 prohibits this court from accepting briefs in support of petitions for review, we cannot consider the arguments made in the Brief in Support of the Petition for Rehearing.

For purposes of clarification to the Bar, this court will only consider the Petition for Review filed with this court pursuant to Rule 2-4 and, if attached to the review petition, the Petition for Rehearing to the Court of Appeals. It will not accept a brief in support of the review petition and will not consider a brief in support of the rehearing petition.

Appellee's petition for review is denied.

Jason Joeseth POWELL *v.* Davelynn Felkel LANE and Wendell Ray Lane

08-282 289 S.W.3d 440

Supreme Court of Arkansas
Opinion delivered December 11, 2008

Mary M. Rawlins, for appellant.

Bob Keeter, for appellees.

JIM HANNAH, Chief Justice. This is an appeal of an adoption decree granted to the appellees, Wendell Ray Lane and Davelynn Felkel Lane, permitting Wendell to adopt Davelynn's minor son, D.P., whom she conceived with appellant Jason Powell. The court of appeals reversed and remanded to the circuit court in a 5-4 decision. *See Powell v. Lane*, 101 Ark. App. 295, 275 S.W.3d 666 (2008). The Lanes petitioned this court for review, which we granted pursuant to Arkansas Supreme Court Rule 2-4 (2008). Because this appeal is before us on a petition for review, our jurisdiction of the case is pursuant to Arkansas Supreme Court Rule 1-2(e) (2008). Upon the grant of a petition for review, we consider the case as though it had been originally filed in this court. *See, e.g.*, *Tucker v. Office of Child Support Enforcement*, 368 Ark. 481, 247 S.W.3d 485 (2007). We affirm the circuit court's order granting the petition for adoption, and we reverse the court of appeals.

It is undisputed that on December 31, 1996, Davelynn and Jason went to the First Baptist Church in Pencil Bluff where they were married by Reverend Bruce Tidwell. The ceremony was traditional in that Jason stood at the head of the church and Davelynn walked down the aisle in a creme-colored dress. When Davelynn reached the front of the church, she and Jason exchanged marriage vows while family and friends witnessed the ceremony. Davelynn's mother was among those present. Dave-

lynn was pregnant with Jason's child at the time of the ceremony and later gave birth to a son, D.P., on July 9, 1997. She and Jason lived together as husband and wife, from the date of the ceremony until their separation in the spring of 2004, almost eight years later.

It is also undisputed that Davelynn and Powell obtained a marriage license before the ceremony. The marriage license was not signed by Reverend Tidwell and was never returned to the county clerk for filing. Davelynn and Jason have never obtained a divorce.

On June 9, 2004, Davelynn petitioned the Montgomery County Circuit Court to establish paternity of her son, D.P. Davelynn alleged that Jason was the natural father of D.P., a minor child who was born out of wedlock to her on July 9, 1997. In addition, she averred that she and Jason were not married to each other or any other persons at the time of the conception and birth of D.P. The petition and summons were served on Jason, but he failed to answer and a default judgment was entered on July 23, 2004. In the order, the circuit court found that Jason was the natural father of D.P., and that Davelynn and Jason were not married to each other or any other persons at the time of the conception and birth of D.P. The order set a visitation schedule, required Jason to pay child support in the amount of seventy-five dollars per week, and required Jason to pay one-half of D.P.'s medical expenses. Jason did not appeal the default order. Subsequently, Jason moved to set aside the default judgment, but that motion was denied.

Davelynn and Wendell were married on September 4, 2004. On March 28, 2006, they petitioned the Polk County Circuit Court for a decree allowing Wendell to adopt D.P. without the consent of Jason. Davelynn consented to the adoption and alleged that Jason had failed significantly without justifiable cause to communicate with or support D.P. for at least one year. Jason answered, denying the allegations and refusing to consent to the adoption.

On May 12, 2006, Jason filed a petition for divorce against Davelynn in Montgomery County Circuit Court in the same cause of action as the paternity action. Davelynn moved to dismiss the petition, asserting that the issue of the validity of the marriage had already been resolved. The cases were consolidated in the Polk County Circuit Court and heard on July 5, 2006.

At the hearing, Davelynn testified that she was pregnant at the time of the wedding. She stated that she and Jason were not

married; rather, she testified that they "went through a ceremony." Davelynn added: "You do lots of things of play acting that's not legal and it's my understanding that that wasn't legal." She claimed that, at the time, Jason did not want to be married because he felt "trapped," but that they had already gotten the marriage license, her grandfather was dying, and she was an overwhelmed pregnant teenager who did not know what to do. Davelynn testified that she and Jason never intended to file the license and that the preacher never saw the marriage license. In addition, Davelynn stated that she "made a very bad decision," and that she and Jason were never married.

Davelynn also provided testimony regarding her marriage to Wendell. She stated that they were married on September 4, 2004, in Branson, Missouri. She further stated that Jason had not paid child support since December 2004 and that he had not paid any portion of D.P.'s medical bills.

Jason testified that D.P. had been diagnosed with aseptic optic dysplasia with hypopanpituitarism. Jason stated that he was his son's "primary shot-giver" and "primary medication-giver" during the first eight years of his son's life. Jason admitted that he stopped paying support to Davelynn through the Child Support Clearinghouse, but he denied that he quit paying support, stating that, instead, he deposited payments into a fund that he was maintaining for D.P. Jason said that he stopped paying money to the clearinghouse because he knew that doing so would cause the Child Support Enforcement Office to bring him into court. Jason stated that he believed that once he was brought into court, he could resolve all of the other issues with Davelynn.

Jason's sister-in-law, Melissa Powell, testified that she witnessed the marriage ceremony in which Jason and Davelynn were married. She stated: "We had a wedding, they kissed, they went down the aisle, they said, I do. That's what I seen."

Wendell testified that he and Davelynn were married on September 4, 2004, and have one child together. He further testified that D.P. had resided with him and Davelynn since they were married. Wendell stated that he wanted to adopt D.P. because he loved him and because he felt like D.P. was his son. Wendell also testified that he and Davelynn had received no financial support for D.P. from Jason since their marriage.

The circuit court dismissed Jason's divorce petition. In doing so, the circuit court ruled that Davelynn and Jason were never married because they failed to have the preacher who

performed their marriage ceremony sign the marriage license and because they also failed to file the license with the county clerk.

The circuit court then granted the adoption petition of Davelynn and Wendell. In its order granting the petition, the circuit court found that Jason and Davelynn were not married at the time D.P. was conceived or at any time thereafter. The circuit court further concluded that, while there was much testimony and conflict over whether Jason had attempted to communicate with D.P., there was no dispute that, in excess of one year, Jason had failed significantly, without justifiable cause, to pay child support for D.P. Accordingly, the circuit court determined that Jason's consent to the adoption was not necessary. Jason filed a motion for reconsideration, which was denied by the circuit court. Jason appealed to the court of appeals, which reversed and remanded the circuit court. The court of appeals held that Davelynn and Jason were validly married and that the circuit court erred in finding otherwise. *See Powell*, 101 Ark. App. at 296, 275 S.W.3d at 667. Further, the court of appeals held: "In that the trial court's finding that [Jason] and Davelynn were never married was the determinating factor regarding the remaining issues, we reverse and remand all issues presented." *Id.*, 275 S.W.3d at 667. Davelynn and Wendell now petition for review.

The Validity of the Marriage

Jason first contends that the circuit court erred in concluding that he and Davelynn were not validly married. Davelynn claims that the issue of the validity of the marriage was decided in the circuit court's July 23, 2004 default order. She points out that Jason took no appeal from that order and that he did not raise the issue of the validity of the marriage until nearly two years after the entry of the order, in a petition for divorce. Accordingly, Davelynn contends that Jason's arguments regarding the validity of the marriage are barred by res judicata. For his part, Jason asserts that Davelynn's paternity complaint did not address the validity of the marriage and, therefore, the default order could not have resolved the issue.

Res judicata bars relitigation of a claim in a subsequent suit when five factors are present. These include: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies.

Moon v. Marquez, 338 Ark. 636, 999 S.W.2d 678 (1999). Furthermore, res judicata bars not only the relitigation of claims that were actually litigated in the first suit, but also those that could have been litigated. *Id.* The purpose of res judicata is to put an end to litigation by preventing a party who had one fair trial on a matter from relitigating the matter a second time. *Id.* This court has applied the doctrine of res judicata in the context of family law. *Id.*

While Davelynn couches her argument in terms of res judicata, it appears that she is asserting that Jason's challenge to the validity of the marriage is barred by collateral estoppel, or issue preclusion. Collateral estoppel requires four elements before a determination is conclusive in a subsequent proceeding: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. *State Office of Child Support Enforcement v. Willis*, 347 Ark. 6, 59 S.W.3d 438 (2001). The party against whom collateral estoppel is asserted must have been a party to the earlier action and must have had a full and fair opportunity to litigate the issue in that first proceeding. *See id.* Unlike res judicata, which acts to bar issues that merely could have been litigated in the first action, collateral estoppel requires actual litigation in the first instance. *Id.*

The default judgment states that Jason was properly served,[1] and that Davelynn and Jason "were not married to each other or any other persons at the time of the conception and birth." The paternity petition asserted that Jason and Davelynn "were not married to each other or any other persons at the time of the conception and birth" of D.P. Thus, Jason was on notice that the issue of the validity of this marriage was to be decided, and he had a full and fair opportunity to be heard. He chose not to be heard.

However, the dissent states that collateral estoppel does not apply to default judgments. In Arkansas, a default judgment is just as binding and enforceable as a judgment on the merits. *See State v. $258,035 U.S. Currency*, 352 Ark. 117, 98 S.W.3d 818 (2003). Nonetheless, the dissent asserts that collateral estoppel does not apply to default judgments because a default does not actually litigate the issues. The dissent errs in its definition of "actually

[1] The record shows that Jason was personally served.

litigated."[2] In the context of collateral estoppel, "actually litigated" means that the issue was raised in pleadings, or otherwise, that the defendant had a full and fair opportunity to be heard, and that a decision was rendered on the issue. For example, in *Bradley Ventures v. Farm Bureau Mutual Insurance Co. of Arkansas*, 371 Ark. 229, 237, 264 S.W.3d 485, 492 (2007), taking the guilty plea decided guilt to a charge of reckless burning, but taking the guilty plea did not decide the issue of Bradley's intent to commit arson with which he was originally charged. While this case does not concern a default judgment, it is similar in that it involved a plea that resolved the case without a full trial. To the argument of collateral estoppel, this court stated:

> 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.

Bradley, 371 Ark. at 234-35, 264 S.W.3d at 490. A guilty plea or a default judgment may satisfy the requirement of collateral estoppel where the issue was essential to the judgment and was properly raised and decided by the action. Both a guilty plea and a default judgment may provide a full and fair opportunity to heard, as in the present case. Jason chose not to avail himself of the opportunity to be heard. A default judgment determines the parties' rights just as any conventional judgment or decree. *See Meisch v. Brady*, 270 Ark. 652, 606 S.W.2d 112 (1980).

However, as the dissent notes, some courts in foreign jurisdictions hold that default judgments are not subject to collateral estoppel because default judgments do not arise from actual

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[2] It appears that the confusion over the meaning of "actually litigated" may arise from the distinction between claim preclusion under res judicata and issue preclusion, or collateral estoppel. Under claim preclusion or res judicata, the entire claim is precluded, including any and all issues that were or might have been raised; however, under issue preclusion, or collateral estoppel, only those issues that were directly and necessarily adjudicated (actually litigated) are precluded. *See Mason v. State*, 361 Ark. 357, 206 S.W.3d 869 (2005). From this distinction comes the requirement under collateral estoppel that the issue to be precluded must have been "actually litigated." Thus, "actually litigated" has nothing to do with whether the judgment was obtained by default, summary adjudication, trial, or otherwise; rather, the question is whether the issue to be precluded was adjudicated in the judgment at issue.

litigation. *But see, e.g.*, *Gottlieb v. Kest*, 46 Cal. Rptr. 3d 7, 34 (Cal. Ct. App. 2006) ("California, on the other hand, accords collateral estoppel effect to default judgments, at least where the judgment contains an express finding on the allegations.").[3] The courts holding that collateral estoppel does not apply to default judgments also err, as the dissent does, in the definition of "actually litigated." The citation of an Iowa case serves as an example of how the error arises. In *Blea v. Sandoval*, 761 P.2d 432, 435 (N.M. Ct. App. 1988), cited by the dissent, the New Mexico Supreme Court relied, among other cases, on *Lynch v. Lynch*, 94 N.W.2d 105 (Iowa 1959), for the proposition that a default judgment has no collateral estoppel effect. In *Lynch*, the Iowa Supreme Court stated, "Collateral estoppel is *usually* not available in default cases." 94 N.W.2d at 108 (emphasis added). This appears to support the dissent's position; however, upon further analysis, it is clear that *Lynch* does not hold that all default judgments fail to satisfy the requirements of collateral estoppel. In making the statement about collateral estoppel not usually applying to default judgments, the Iowa Supreme Court cited to *Matson v. Poncin*, 132 N.W. 970 (Iowa 1911). *Matson* does not state that collateral estoppel does not apply to default judgments. Rather, there we find that "it must appear that the particular matter was considered and passed on in the former suit, or the adjudication will not operate as a bar to subsequent action." *Matson*, 132 N.W. at 972. The court in *Matson*

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[3] As the dissent notes in citing *In re Cantrell*, 329 F.3d 1119 (9th Cir. 2003), California does not follow the courts that hold there is a blanket rule against applying collateral estoppel to default judgments. This dates back some time as the authority cited by the court in *Cantrell* indicates. "The fact that the judgment was secured by default does not warrant the application of a special rule. 'A default judgment is an estoppel as to all issues necessarily litigated therein and determined thereby exactly like any other judgment.' " *In re Harmon*, 250 F.3d 1240, 1246 (2001) (quoting *Horton v. Horton*, 116 P.2d 605, 608 (Cal. 1941)). The complete quote, which is found in *Harvey v. Griffiths*, 23 P.2d 532, 534 (Cal. Ct. App. 1933), is as follows:

> It is immaterial that the judgment which is assailed was procured by default. The defendants in that action had an opportunity to appear and protect their interest. They deliberately waived the right to their day in court by failing to appear and answer the complaint. A default judgment is an estoppel as to all issues necessarily litigated therein and determined thereby exactly like any other judgment provided the court acquired jurisdiction of the parties and subject-matter involved in the suit.

Harvey, 23 P.2d at 534 (citing 3 A.C. Freeman, *A Treatise of the Law of Judgments* § 1296, at 2690 (5th ed. 1925)).

went on to state that "a matter, not embraced in the pleadings, and which was not necessarily determined in entering judgment could not have been directly in issue." *Id.* Thus, the phrase "collateral estoppel is usually not available in default cases," really meant that collateral estoppel is not available unless the matter was raised in the pleadings, or otherwise, and directly decided. Default judgments may or may not satisfy the requirements of collateral estoppel. The question must be considered on a case-by-case basis.

The issue of collateral estoppel and default judgments was also discussed in *Lane v. Farmers Union Insurance*, 989 P.2d 309 (Mont. 1999) (also cited by the dissent). There, the court considered the question of whether a default judgment served as a final judgment on the merits. To decide this, the court concluded it had to determine whether the issue was actually litigated and stated a test:

> This analysis requires two things: first, that the issue was effectively raised in the pleadings, or through development of the evidence, and argument at trial or on motion; and, second, that the losing party had a full and fair opportunity procedurally, substantively, and evidentially to contest the issue in a prior proceeding.

Lane, 989 P.2d at 317. Again, as in *Lynch*, *supra*, the question is whether the issue was properly raised and whether there was a full and fair opportunity to be heard.

Other courts have held that the requirement of actual litigation was met in a default judgment:

> A judgment taken by default is conclusive by way of estoppel in respect to all such matters and facts as are well pleaded and properly raised, and material to the case made by declaration or other pleadings, and such issues cannot be relitigated in any subsequent action between the parties and their privies.[4]

In re Bursack, 65 F.3d 51, 54 (6th Cir. 1995) (quoting *Lawhorn v. Wellford*, 168 S.W.2d 790, 792 (Tenn. 1943)). Still other jurisdictions

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[4] This language appears to have originated in 1 Henry Campbell Black, *A Treatise on the Law of Judgments* § 87, at 126-27 (1891), where the above-quoted language is found. Black goes on to state that "while a default judgment is conclusive of all that is properly alleged in the complaint, it is conclusive of nothing more, and as a general rule it binds the defendant only in the character in which he is sued." *Id.*

bear out this conclusion that "actually litigated" means notice and a full and fair opportunity to be heard rather than litigation where a matter is decided only after development and introduction of evidence by both sides. A discussion in *Overseas Motors, Inc. v. Import Motors, Ltd.*, 375 F. Supp. 499 (D.C. Mich. 1974), is helpful:

> Default Judgment – Collateral estoppel applies only to those issues which were 'actually' or 'fully litigated' in the prior action. However, this rule does not refer to the quality or quantity of argument or evidence addressed to an issue. It requires only two things: first, that the issue has been effectively raised in the prior action, either in the pleadings or through development of the evidence and argument at trial or on motion; and second, that the losing party has had 'a fair opportunity procedurally, substantively, and evidentially' to contest the issue. The general rule therefore is that subject to these restrictions default judgments do constitute res judicata for purposes of both claim preclusion and issue preclusion (collateral estoppel).

Overseas Motors, Inc., 375 Supp. at 516, *quoted in In re Bush*, 62 F.3d 1319, 1323 (11th Cir. 1995); *In re Houston*, 305 B.R. 111, 118 (Bankr. M.D. Fla. 2003); *In re Foster*, 280 B.R. 193, 205 (Bankr. S.D. Ohio 2002).

In the present case, the issue of the validity of the marriage was decided in the default judgment after personal notice and a full and fair opportunity to be heard. The determination of Davelynn's marital status was essential to the judgment in the paternity action. Davelynn asserted in the paternity action that she was not married at the time of D.P.'s conception and birth. Jason did not offer any evidence to the contrary, although he had the opportunity to do so. The circuit court declared that Davelynn was not married to Jason at the time of D.P.'s conception and birth. Thus, the issue of marital status was "actually litigated." The decision of paternity was conclusive, and Jason is bound by that decision. Collateral estoppel applies in this case. To hold otherwise would undermine the finality of judgments. There is no bright-line rule. Each judgment, taken by default, or otherwise, must be examined to determine what was finally decided and whether it meets the requirements of collateral estoppel.

[redacted] In connection with his argument that his marriage to Davelynn was valid, Jason asserts that the adoption should be void because no home study was conducted of Davelynn and Wendell's home. Arkansas Code Annotated section 9-9-212(b)(1)(A) (Supp.

2005) states: "Before placement of the child in the home of the petitioner, a home study shall be conducted by any child welfare agency licensed under the Child Welfare Agency Licensing Act, § 9-28-401 et seq., or any licensed certified social worker." Pursuant to Arkansas Code Annotated section 9-9-212(c), "[t]he court may also waive the requirement for a home study when a stepparent is the petitioner." Jason asserts that because he and Davelynn never obtained a divorce, Davelynn's marriage to Wendell is void; therefore, Wendell is not D.P.'s stepparent, and a home study could not be waived.

[redacted] There is a longstanding presumption against deliberate bigamy, *Bruno v. Bruno*, 221 Ark. 759, 256 S.W.2d 341 (1953), and there is a common law presumption of the validity of the second marriage, *Cole v. Cole*, 249 Ark. 824, 462 S.W.2d 213 (1971). The burden of disproving the validity of a marriage is on the one attacking it. *Bruno, supra.* Here, the only argument advanced by Jason is that the second marriage is void because he and Davelynn were still validly married, an argument that he is collaterally estopped from asserting. Jason has failed to overcome the presumption of the validity of the marriage between Davelynn and Wendell. It follows that he has failed to prove that Wendell was not D.P.'s stepparent at the time of the adoption and that a home study was required in this case.

Consent to Adoption

Jason contends that the circuit court erred in granting the petition for adoption because there was insufficient evidence that he had failed significantly without justifiable cause to communicate with D.P. and to support D.P. Adoption statutes are strictly construed, and a person who wishes to adopt a child must prove that consent is unnecessary by clear and convincing evidence. *In re Adoption of A.M.C.*, 368 Ark. 369, 246 S.W.3d 426 (2007). A circuit court's finding that consent is unnecessary because of a failure to support or communicate with the child will not be reversed unless clearly erroneous. *Id.*

Arkansas Code Annotated section 9-9-206(a)(2) (Supp. 2005) provides in relevant part:

> (a) Unless consent is not required under § 9-9-207, a petition to adopt a minor may be granted only if written consent to a particular adoption has been executed by:

> (2) The father of the minor if the father was married to the mother at the time the minor was conceived or at any time thereafter . . . .

Arkansas Code Annotated section 9-9-207(a)(2) (Supp. 2005) provides:

> (a) Consent to adoption is not required of:
>
> (2) a parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree[.]

The circuit court concluded that, while there was much testimony and conflict over whether Jason had attempted to communicate with D.P., there was no dispute that the last child support was paid in December 2004. Therefore, the circuit court found that consent was not necessary. The failure to pay child support, standing alone, justifies the finding that consent is unnecessary. At the July 5, 2006 hearing, Jason admitted that he had "quit paying child support to [Davelynn]." He claimed that he had child support "sitting over here in a fund." The record reveals that Jason's last payment of child support to the clearinghouse was recorded on December 6, 2004. There was no evidence that he had otherwise paid child support. Thus, it is clear that Jason failed to pay support in excess of one year. Failure to pay support without justifiable cause means a failure that is voluntary, willful, arbitrary, and without adequate excuse. *See In re Adoption of K.F.H. & K.F.H.*, 311 Ark. 416, 844 S.W.2d 343 (1993) (citing *Bemis v. Hare*, 19 Ark. App. 198, 718 S.W.2d 481 (1986); *Roberts v. Swim*, 268 Ark. 917, 597 S.W.2d 840 (Ark. App. 1980)). Jason voluntarily, willfully, arbitrarily, and without adequate excuse failed to pay child support in excess of one year. Jason's reason for not paying support — that it was an attempt to get Davelynn back into court — is not justifiable cause for failing to support his child. The circuit court did not err in finding that consent to the adoption was unnecessary because Jason failed to pay child support in excess of one year.

Opportunity to Cure

Jason contends that the circuit court erred in granting the adoption and terminating his parental rights under the provisions of Arkansas Code Annotated section 9-9-207 (Supp. 2005) be-

cause he was not given the opportunity to cure as provided by Arkansas Code Annotated section 9-9-220(c)(1) (Supp. 2005), which provides:

> In any addition to any other proceeding provided by law, the relationship of parent and child may be terminated by a court order issued under this subchapter on any ground provided by other law for termination of the relationship, or on the following grounds:
>
> (1) Abandonment.
>
> (A) A child support order shall provide notice to the non-custodial parent that failure to pay child support or to visit the child for at least one (1) year shall provide the custodial parent with the right to initiate proceedings to terminate the parental rights of the non-custodial parent.
>
> (B) If the notification clause required by subdivision (c)(1)(A) of this section is not in the child support order, the custodial parent, prior to termination of parental rights, shall notify the non-custodial parent that he or she intends to petition the court to terminate parental rights.
>
> (C)(i) The non-custodial parent shall have three (3) months from the filing of the petition to pay a substantial amount of past due payments owed and to establish a relationship with his or her child or children.
>
> (ii) Once the requirements under subdivision (c)(1)(C)(i) of this section are met, the custodial parent shall not be permitted to proceed with the adoption nor the termination of parental rights of the non-custodial parent.
>
> (iii) The court may terminate parental rights of the non-custodial parent upon a showing that:
>
> (a) Child support payments have not been made for one (1) year or the non-custodial parent has not visited the child in the preceding year and the non-custodial parent has not fulfilled the requirements of subdivision (c)(1)(C)(i) of this section; and
>
> (b) It would be in the best interest of the child to terminate the parental relationship.

The record reveals that Jason had the opportunity to "cure" his failure to pay child support, pursuant to section 9-9-220(c)(1)(C), but he chose not to do so. The petition in this case was filed on March 28, 2006. Under section 9-9-220(c)(1)(C), Jason had three months from that date, or until June 28, 2006, to pay a substantial amount of past due payments owed and to establish a relationship with his child. No payments were made. Although Jason contended, at the hearing on July 5, 2006, that he paid the funds into a separate account, he never deposited those funds into the registry of the court nor did he pay any of those funds to the mother. Even after receiving notice that an adoption petition was filed, he still refused to comply with the court order regarding child support. By his own actions, Jason did nothing to enforce any right he might have had to "cure" his failure to pay child support.

In sum, the circuit court found that Jason's consent was not necessary for the adoption and that it would be in D.P.'s best interest to grant the petition for adoption. We recognize that the circuit court did not conclude, as we do, that Jason is collaterally estopped from challenging the validity of the marriage. It is axiomatic that this court can affirm a circuit court if the right result is reached even if it is for a different reason. *See, e.g.*, *Alphin v. Alphin*, 364 Ark. 332, 219 S.W.3d 160 (2005). We affirm the circuit court's granting of the petition for adoption.

Court of appeals reversed; circuit court affirmed.

BROWN and WILLS, JJ., dissent.

ELANA CUNNINGHAM WILLS, Justice, dissenting. Because I do not agree that the default judgment entered in the paternity action has preclusive effect under the doctrine of collateral estoppel, I respectfully dissent.

As the majority points out, one required element of collateral estoppel is that the issue sought to be precluded must have been "actually litigated." "The question of whether an issue has been previously litigated is interpreted very narrowly for purposes of collateral estoppel." *In re Estate of Goston v. Ford Motor Co.*, 320 Ark. 699, 705, 898 S.W.2d 471, 473 (1995) (citing *Smith v. Roane*, 284 Ark. 568, 683 S.W.2d 935 (1983)). This court recently held that "actually litigated" means "actually litigated." *Bradley Ventures v. Farm Bureau*, 371 Ark. 229, 237, 264 S.W.3d 485, 492 (2007)

(guilty plea in a criminal case is not equivalent to a criminal conviction that has been "actually litigated"). Similarly, in *State Office of Child Support Enforcement v. Willis*, 347 Ark. 6, 16, 59 S.W.3d 438, 445 (2001), we held that where the trial judge stated in a divorce decree that "the parties hereby have one (1) child," but neither party put paternity at issue and no adversary presentations of evidence on this point were made, the court's finding of paternity "was not the result of litigation." By stating that the matter must actually be litigated, we "emphasize[d] the necessity for trying the issue sought to be estopped." *Willis*, 347 Ark. at 16, 59 S.W.3d at 445. This court has never before held that a default judgment satisfies the "actually litigated" prong of the collateral estoppel doctrine. We have held default judgments conclusive for purposes of the related doctrine of res judicata, *see, e.g.*, *Bruns Foods of Morrilton, Inc. v. Hawkins*, 328 Ark. 416, 944 S.W.2d 509 (1997); however, the doctrine of res judicata does not require that the matter have been "actually litigated."

There is some disagreement among the courts of our sister states on the question of the preclusive effect of default judgments for purposes of collateral estoppel. The "majority view" has been described as a finding that, with default judgments, nothing is "actually litigated." *Gottlieb v. Kest*, 46 Cal. Rptr. 3d 7 (Cal. Ct. App. 2006); *see also Lane v. Farmers Union Ins.*, 989 P.2d 309 (Mont. 1999) (acknowledging the "general rule" that a default judgement carries no collateral estoppel effect). The courts adhering to this view often cite the Restatement (Second) of Judgments to this effect. The case of *Blea v. Sandoval*, 761 P.2d 432, 435-36 (N.M. Ct. App. 1988), is illustrative:

> There is ample authority for the proposition that a default judgement has no collateral estoppel effect. *See* Restatement (Second) of Judgments § 27e, at 257 (1982); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 461 U.S. 958, 103 S.Ct. 2430, 77 L.Ed.2d 1317 (1983); *In re McMillan*, 579 F.2d 289 (3d Cir. 1978); *Lynch v. Lynch*, 250 Iowa 407, 94 N.W.2d 105 (1959). The Restatement formulation and the foregoing cases recognize that default judgments do have res judicata effect, but distinguish collateral estoppel from res judicata. The basis of the distinction is the doctrine that res judicata bars consideration, in a subsequent suit, of all matters that could properly have been raised in the prior case, while collateral estoppel bars consideration only of issues actually litigated and determined by a valid and final judgment . . . . The Restatement and the foregoing federal cases recognize

> that in a default judgment, the issues are not actually litigated. The Restatement also states that the policy of preventing endless litigation does not apply as strongly in the collateral estoppel context as it does when parties are repeatedly attempting to relitigate the same cause of action. Hence, while it may be proper to accord res judicata effect to a default judgment, it is not appropriate to give such a judgment collateral estoppel effect.

Examples of cases adhering to the general rule are *Lee ex rel. Lee v. United States*, 124 F.3d 1291 (Fed. Cir. 1997); *In re McMillan*, 579 F.2d 289 (3d Cir. 1978); *State ex rel. Department of Economic Security v. Powers*, 908 P.2d 49 (Ariz. Ct. App. 1995); *Burns v. A Cash Construction Lien Bond*, 8 P.3d 795 (Mont. 2000); *Lane, supra*; *McNair v. McNair*, 856 A.2d 5 (N.H. 2004); *Slowinski v. Valley National Bank*, 624 A.2d 85 (N.J. Super. Ct. App. Div. 1993); *Chambers v. City of New York*, 764 N.Y.S.2d 708 (N.Y. App. Div. 2003); *Martin v. Poole*, 336 A.2d 363 (Pa. Super. Ct. 1975); *McGill v. Southwark Realty Co.*, 828 A.2d 430 (Pa. Cmmw. Ct. 2003); *State v. Bacote*, 503 S.E.2d 161 (S.C. 1998); *Horton v. Morrison*, 448 S.E.2d 629 (Va. 1994); *Christian v. Sizemore*, 407 S.E.2d 715 (W. Va. 1991); *see also* 50 C.J.S. *Judgment* § 797 ("Although a party against whom a default judgment is entered certainly had an opportunity to litigate, most courts have concluded that an opportunity to litigate should not be given the same effect as actual litigation, unless the application of the estoppel to some subsequent proceeding was forseeable when the default was entered."); Note, *Collateral Estoppel in Default Judgments: The Case for Abolition*, 70 Colum. L. Rev. 522 (1970).[1]

Some courts have carved out limited exceptions to the general rule, "where the party against whom collateral estoppel is sought to be invoked has appeared in the prior action or proceeding and has, by deliberate action, refused to defend or litigate the

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[1] As indicated above, there are some states, including California and Tennessee, that adhere to a different minority rule. The majority cites the decisions of these states. *See, e.g., Gottlieb, supra*; *Lawhorn v. Wellford*, 168 S.W.2d 790 (Tenn. 1943). The two Iowa cases cited by the majority are distinguishable, however. *Lynch v. Lynch*, 94 N.W.2d 105 (Iowa 1959), which stated that collateral estoppel is usually not available in default cases, turned upon the application of res judicata rather than collateral estoppel, and the court refused to apply the doctrine of collateral estoppel. *Matson v. Poncin*, 132 N.W. 970 (Iowa 1911), did not involve a default judgment and the issue was whether the court in the previous suit had made a finding on the particular issue sought to be estopped. These Iowa rulings do not clearly depart from the general rule that a default judgment carries no collateral estoppel effect.

charge or allegation that is the subject of the preclusion request." *In re Abady*, 800 N.Y.S.2d 651 (N.Y. App. Div. 2005); *accord Treglia v. MacDonald*, 717 N.E.2d 249 (Mass. 1999) ("We can, for example, envision circumstances in which a litigant may so utilize our court system in pretrial procedures, but nonetheless be defaulted for some reason, that the principle and rationale behind collateral estoppel would apply.") (citing *In re Gober*, 100 F.2d 1195 (5th Cir. 1996) (default judgments issued as discovery sanctions); *In re Bush*, 62 F.3d 1319 (11th Cir. 1995) (fraud)); *see also In re Docteroff*, 133 F.3d 210 (3d Cir. 1997); *In re Bursack*, 65 F.3d 51 (6th Cir. 1995); *Int'l 800 Telecom Corp. v. Kramer*, 591 N.Y.S.2d 313 (N.Y. Super. Ct. 1992). We have no such circumstances here.[2]

Here, the trial court correctly ruled in its July 24, 2006 order that the default judgment "was not, and could not, resolve questions of marital status." The majority concludes that the issue was "actually litigated" because: (1) the petition for declaration of paternity included the bald and disingenuous assertion that the parties "were not married to each other . . . at the time of the conception and birth"; and (2) Jason had a full and fair opportunity to be heard on the issue of the validity of the marriage after he was served with the paternity suit, and chose not to avail himself of the opportunity. This recitation of facts does little more than *restate* the ordinary factors creating a default judgment, albeit one in which the defendant received actual notice. The doctrine of collateral estoppel is normally inapplicable to such judgments under the general rule. Instead, the majority's holding is akin to the position adopted by California, as described by the Ninth Circuit Court of Appeals in *In re Cantrell*, 329 F.3d 1119, 1124 (9th Cir. 2002):

> The mere fact that "judgment was secured by default does not warrant the application of a special rule." California law does, however, place two limitations on this general principle. The first is that collateral estoppel applies only if the defendant "has been personally served with summons or has actual knowledge of the existence of this litigation." Collateral estoppel, therefore, only

[2] Although our court of appeals has applied the doctrine of collateral estoppel in one case involving a default judgment, *Reyes v. Jackson*, 43 Ark. App. 142, 861 S.W.2d 554 (1993), it did so without the depth of analysis that the weight of authority or matters addressed above command. The application of collateral estoppel to a judgment by default should be not decreed so lightly, either by the court of appeals or by the majority in this case.

> applies to a default judgment to the extent that the defendant has actual notice of the proceedings and a "full and fair opportunity to litigate."

(Internal citations omitted.)[3] *But see* Walter W. Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 San Diego L. Rev. 509, 556 (1998) (suggesting that if the California Supreme Court really adheres to the four-factor test of the second Restatement of Judgments, it "should disapprove of those decisions that have extended collateral estoppel to default judgments"). I do not agree that this court should adopt this minority position, especially without more analysis as to its desirability or particular applicability to the facts of this case.[4]

The majority opinion repeatedly relies on the fact that Jason had a "full and fair opportunity" to be heard on the existence or validity of his marriage. I disagree that compliance with this requirement satisfies the "actually litigated" prong of collateral estoppel under Arkansas law. The requirement of a "full and fair opportunity" to litigate "apparently developed as a due process safeguard around the time the mutuality requirement was dropped in *Parklane Hoisery Co. v. Shore*, 439 U.S. 322 (1979)." *Falk v. Falk*, 88 B.R. 957, 962 n.5 (Bankr. D. Minn. 1988). The requirement of mutuality of estoppel has been eliminated in most jurisdictions, including Arkansas. *Id.*; *see also Willis*, *supra*; Mary H. Moore, *Arkansas' Position Regarding Defensive Collateral Estoppel and the Mutuality Doctrine*, 47 Ark. L. Rev. 701 (1994). Strangers to the first decree may assert collateral estoppel as long as the person against whom it is asserted had a "full and fair opportunity to litigate." This is necessary to satisfy due process concerns. *See Parklane Hoisery*, *supra*. However, this requirement does not obviate the "actually litigated" prong of collateral estoppel in Arkansas. *See Willis*, *supra*.

As noted by the court in *Falk*, *supra*, 88 B.R. at 962, "[t]he demise of the mutuality doctrine and the development of the full and fair opportunity to litigate concept have lead [sic] to some

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[3] The second factor that California requires is that there be an express finding on the point at issue.

[4] Even among the jurisdictions that apply the minority view, it does not appear that any jurisdiction has directly held that a default custody or paternity judgment, where the lack of a valid marriage is indicated, can preclude the parties from subsequently litigating the validity of the marriage under the collateral estoppel doctrine.

confusion with respect to the elements necessary to successfully assert collateral estoppel." The court explained as follows:

> Some courts use the traditional elements based on the Restatement of Judgments: (1) The issue sought to be precluded must be the same as that involved in the prior litigation; (2) That issue must have been actually litigated; (3) It must have been determined by a valid and final judgment; and (4) The determination must have been essential to the judgment. Other courts, however, apply somewhat different elements: (1) The issue was identical to one in a prior adjudication; (2) There was a final judgment on the merits; (3) The estopped party was a party or in privity with a party to the prior adjudication; and (4) The estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Falk, 88 B.R. at 962 (citations omitted).[5]

We have not, until today, adopted the latter view. Instead, we have previously adhered to the traditional Restatement elements, including that the matter must have been "actually litigated." *See Bradley Ventures, supra.* After the demise of mutuality, the full and fair opportunity to litigate represents the bare minimum that must be afforded in light of due process concerns. I would not depart from our historical "actually litigated" test in this regard. As noted in the Restatement (Second) of Judgments § 27 cmt. e (1982), when approaching difficult questions regarding the "actually litigated" requirement, "policy considerations . . . weigh strongly in favor of nonpreclusion, and it is in the interest of predictability and simplicity for such a result to obtain uniformly," These interests are not fostered by a "case-by-case" approach favored by the majority.

The majority also relies upon the presumption of the validity of a second marriage and states that Jason "failed to overcome the presumption of the validity of the marriage between Davelynn and Wendell." The majority concludes that the "only argument advanced by Jason is that the second marriage is void because he and Davelynn were still validly married, an argument which he is collaterally estopped from asserting." As set out above, I disagree that the doctrine of collateral estoppel is applicable on these facts. In addition, the presumption of the legal validity of a second

[5] The latter view is the law of Montana. *See Lane, supra* (discussed by the majority).

marriage is just that, a presumption, which may be overcome with positive proof. *Watson v. Palmer*, 219 Ark. 178, 240 S.W.2d 875 (1951) (The "presumption is a rebuttable one, and may be overcome with sufficient proof . . . and must give way to reality when facts opposing the presumption are presented." (quoting *Gray v. Gray*, 199 Ark 152, 133 S.W.2d 874 (1939)). We have held that the presumption of the validity of the second marriage can be overcome with proof that the parties to the first ceremonial marriage never obtained a divorce. *See, e.g.*, *Cole v. Cole*, 249 Ark. 824, 462 S.W.2d 213 (1971). The presumption is not as strong where there has not been a considerable lapse of time between the two marriages, *Bruno v. Bruno*, 221 Ark. 759, 256 S.W.2d 341 (1953). Here, it appears from the record that Davelynn and Wendell were married approximately two years after Davelynn's separation from Jason, and the trial court dismissed Jason's divorce petition in its July 24, 2006 order, even though it held that it was "clear that the parties did participate in a marriage ceremony."

No matter how lightly or irreverently Davelynn claims to have entered the union, the facts show that she procured, or participated in the procurement of: (1) a license; (2) a minister; (3) a "creme-colored" dress; and thereafter marched down the aisle in front of family and friends and said "I do." In my judgment, this is sufficient to meet the test for "solemnization" under Arkansas law and to overcome the presumed validity of the second marriage. The fact that the minister did not sign the license or return it is not fatal to the validity of the marriage, and the trial judge erred in so holding. *See Fryar v. Roberts*, 346 Ark. 432, 57 S.W.3d 727 (2001).[6] Because the potential adoptive parents in this instance could not have been validly married, I would reverse the trial court's grant of the adoption petition and remand for further proceedings. *Bruno*, 221 Ark. at 762, 256 S.W.2d at 343 (ceremonial marriage to a person who has previously been married and who never obtained a divorce is void). As the court of appeals noted, the trial judge's decision was based upon the erroneous conclusion that Davelynn and Jason were never validly married.

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[6] Additionally, Davelynn and Jason lived together as husband and wife for over eight years after their ceremonial marriage and birth of their son. In *Allen v. Wallis*, 279 Ark. 149, 152, 650 S.W.2d 225, 227 (1983), this court stated that "[w]here there is cohabitation apparently matrimonial, a strong presumption of marriage arises which increases with the passage of time, during which the parties lived together as husband and wife, especially where the legitimacy of a child is concerned."

The doctrine of collateral estoppel should not be expanded, and the presumption of the validity of a second marriage given conclusive effect, in order to resolve a case in which the Arkansas law governing marriage is on one side, and the perceived equities are on the other. Accordingly, I respectfully dissent.

BROWN, J., joins this dissent.

James A. BRYANT and Carol Sue Bryant, as Trustees of the Bryant Family Revocable Trust, and James P. Bryant *v.* J.W. HENDRIX, Mark Treadwell, and Shawn Treadwell

08-828 289 S.W.3d 402

Supreme Court of Arkansas
Opinion delivered December 11, 2008

Davis Law Firm, by: *Steven B. Davis*, for appellants.

Patterson Law Firm, P.A., by: *Jerry D. Patterson*, for appellee J.W. Hendrix.

Kent Tester, P.A., by: *Kent Tester*, for appellees Mark Treadwell and Shawn Treadwell.

DONALD L. CORBIN, Justice. Appellants, James A. Bryant and Carol Sue Bryant, as trustees of a revocable family trust, and their son James P. Bryant, appeal the order of the Searcy County Circuit Court granting summary judgment to Appellees, J.W. Hendrix, Mark Treadwell, and Shawn Treadwell. For reversal, Appellants contend the circuit court erred as a matter of law in ruling that the statute of limitations had run on their claims for trespass and encroachment stemming from the removal of timber on adjoining property. Specifically, Appellants contend that the provisions of Ark. R. Civ. P. 15(c) governing relation back of amendments in pleadings applies to substitutions of plaintiffs as well as defendants and that this court's decisions on this issue in wrongful-death cases should not be extended to apply to this case. The questions presented in this appeal require interpretation of court rules and clarification of the law.

Accordingly, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(5) and (6). We find no error and affirm.

James A. Bryant and Carol Sue Bryant filed a complaint in Searcy County Circuit Court on September 13, 2002, seeking treble damages for trespass and removal of timber pursuant to Ark. Code Ann. § 18-60-102 (1987). The complaint alleged that they owned real property[1] adjoining that owned by J.W. Hendrix and that, pursuant to an agreed settlement in a previous case, the Bryants and Hendrix walked the boundary lines of their properties and located the corners of their land. The complaint further alleged that on or about September 1, 2002, Mark Treadwell and Shawn Treadwell acted pursuant to Hendrix's direction and removed the existing boundary fence between the properties and trespassed upon the Bryants' property to a distance of about 100 feet and removed timber therefrom, including a black cherry tree more than 100 years old. In addition to seeking treble damages under section 18-60-102, the complaint also sought punitive damages, alleging the trespass was intentional. This complaint was voluntarily dismissed without prejudice on September 7, 2005.

James A. and Carol Sue Bryant then refiled their lawsuit by filing an amended complaint on August 8, 2006. The amended complaint noted that the boundary line between the Bryants and Hendrix had been established by a survey. James A. and Carol Sue Bryant amended their complaint again on December 15, 2006; this complaint was entitled "Third Amended Complaint" and added as party plaintiff their son, James P. Bryant, as the owner of some of the real property in question. The third amended complaint also alleged the value of timber wrongfully removed to be $5,368 and the cost of clearing debris left on their land to be $7,000. The complaint was amended for a fourth time on November 28, 2007, to reflect that James A. and Carol Sue Bryant were owners of the property as trustees of the Bryant Family Revocable Trust. The fourth amended complaint also alleged for the first time that piles of deadfall and timber slash remaining on their land constituted a continuing trespass and that Appellees had erected a fence along the southern and western edge of the Bryants' property, which was alleged to be an encroachment and continuing trespass.

[1] As it turns out, they were not the owners of the land in question, as they had previously transferred ownership to a revocable family trust they created in April 2001.

At the hearing on the Treadwells' motion for summary judgment,[2] Appellees stated that their motion was based on the fact that the plaintiffs named in the original complaint filed September 13, 2002, James A. and Carol Sue Bryant, did not own the property in question because it had been placed in the family trust in April 2001. Appellees cited the trial court to *Rhuland v. Fahr*, 356 Ark. 382, 155 S.W.3d 2 (2004), and argued that the statute of limitations had run in the present case because, according to *Rhuland*, whenever an amendment to a complaint substitutes a new plaintiff, such amendment is a new cause of action and does not relate back to the original complaint. Appellants responded that *Rhuland* should not be applied to the present case for trespass and encroachment because it was a wrongful-death case. Appellants maintained that the applicable law was the doctrine of relation back of amended pleadings as found in Ark. R. Civ. P. 15(c).

The circuit court issued a letter opinion filed February 7, 2008, and entered an order on April 29, 2008, granting Appellees' motion for summary judgment on all claims. The order stated that the statute of limitations barred all claims and that the doctrine of relation back did not apply to the substitution of plaintiffs. This appeal followed.

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 entitled to judgment as a matter of law. *Anglin v. Johnson Reg'l Med. Ctr.*, 375 Ark. 10, 289 S.W.3d 28 (2008). On appeal, Appellants do not contend there are disputed issues of fact; rather, they argue the circuit court erred as a matter of law in granting summary judgment on the basis of the statute of limitations.

For reversal of the summary judgment, Appellants contend that the amendment of their complaint in December 2006 to add James P. Bryant as a plaintiff and again in November 2007 to substitute James A. and Carol Sue Bryant as trustees of the family trust should relate back to their original complaint, which was filed in September 2002, well within the three-year limitations period of the alleged trespass, which also occurred in September 2002. Appellants rely on Rule 15(c), which provides as follows:

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[2] Hendrix joined in the motion for purposes of obtaining an appealable order pursuant to Ark. R. Civ. P. 54(b). Hereinafter, Hendrix and the Treadwells are collectively referred to as "Appellees."

(c) *Relation Back of Amendments.* An amendment of a pleading relates back to the date of the original pleading when:

(1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(2) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (1) is satisfied and, within the period provided by Rule 4(i) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Here, Appellants maintain that Appellees are not prejudiced by the substitution of the proper plaintiffs because the original complaint was timely filed, and Appellees had notice of the complaint. Appellants contend that the conduct asserted in the amended complaint arises out of the same conduct asserted in the original complaint, and therefore Rule 15 should operate to allow relation back in this case. Appellants also point out that under Rule 17 of the Arkansas Rules of Civil Procedure, if Appellees had moved to dismiss the case for failure to be prosecuted in the name of the real party in interest, Appellants would have been allowed a reasonable time to substitute the real party in interest. However, as discussed later herein, Appellants overlook the mistaken-identity requirement of Rule 15(c)(2)(B).

[redacted] We observe that our Rule 15(c) is expressly written in terms of amendments or changes to the "party against whom a claim is asserted[.]" Appellants ask us to hold that the rule should be applied to allow amendments or changes to plaintiffs as well. We decline to so hold.

The issue of substitution of plaintiffs has recently been presented to this court in the context of claims for wrongful death and survival. *See, e.g., Rhuland v. Fahr*, 356 Ark. 382, 155 S.W.3d 2; *see also St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County*, 348 Ark. 197, 73 S.W.3d 584 (2002). Very recently, we cited these cases with approval in the context of a bankruptcy estate. *Bibbs v. Cmty. Bank of Benton*, 375 Ark. 150, 289 S.W.3d 393

(2008). *Bibbs* involved plaintiffs who filed suit asserting a claim that was part of their bankruptcy estate. The plaintiffs originally filed suit as individuals, but then after the statute of limitations had run, amended the complaint to add the bankruptcy trustee as plaintiff. *Bibbs* observed that for the relation-back doctrine to apply, there must be valid pleadings to amend in the first place, and there was not a valid complaint in the first place because the original plaintiffs lacked standing and were not the real party in interest, rather the bankruptcy trustee was. *Bibbs* also cited *St. Paul*, one of the wrongful-death cases cited previously herein, and stated that an amended complaint that substitutes the original plaintiffs and replaces them with entirely new plaintiffs does not constitute an amendment to the original complaint but rather is the filing of a new lawsuit. *See Bibbs*, 375 Ark. 150, 289 S.W.3d 393.

Although the most recent cases on this subject decided by this court involved statutes mandating a suit be maintained by a specific party as plaintiff, the law in this state concerning the substitution of other types of plaintiffs has been well settled for decades. In *Ark-Homa Foods, Inc. v. Ward*, 251 Ark. 662, 473 S.W.2d 910 (1971), this court cited *Floyd Plant Food Co. v. Moore*, 197 Ark. 259, 122 S.W.2d 463 (1938), and *American Railway Express Co. v. Reeves*, 173 Ark. 273, 292 S.W. 109 (1927), and stated "[t]hose cases stand for the proposition so well put by 8 A.L.R. 2d 57 (1949)":

> It is well settled that where an action is brought in the name of a non-existing plaintiff, an amendment of complaint by substituting the proper party to the action as plaintiff will be regarded as the institution of a new action as regards the statute of limitations.

Ark-Homa Foods, 251 Ark. at 664, 473 S.W.2d at 911. The same principle applies to plaintiffs who are existent, but lack standing and are not the real party in interest. *See Bibbs*, 375 Ark. 150, 289 S.W.3d 393. When discussing this issue over eighty years ago in the context of different names of corporations who were plaintiffs, this court observed:

> It is a matter of extreme doubt that the St. Louis S.W. R. Co. could maintain a suit in the name of the Cotton Belt Railroad Company, though the two names designate only one person. It would not be a matter of mistake if it filed a suit under such name or style, because it must recognize its own corporate existence and corporate name. There is a difference in being made a defendant under one or two or

> more names by which a person or corporation might be known and in suing and attempting to maintain litigation under such an appellation which it, itself, knew was not correct.

Floyd Plant Food, 197 Ark. at 265, 122 S.W.2d at 465-66.

[redacted] In the present case, the original complaint and subsequent amendments all related to the same conduct alleged as a trespass. Appellees were on notice they would need to defend the trespass action. It is not, however, understandable that the Bryants or their counsel could be mistaken about the differing and distinct identities of the Bryants as individual landowners, their son as landowner, and their family trust as landowners. The Bryants transferred some of their land to their son in 1986. They created their family trust roughly one and one-half years prior to filing their first complaint in this case. It is not a matter of mistake, because the Bryants and their counsel must have recognized the existence of their family trust and their deed to their son. We therefore conclude on the facts here presented according to the long-standing law of this state that the substitution of plaintiffs in subsequent pleadings does not relate back to the date of the original complaint.

We are aware that Appellants cite us to the corresponding Rule 15 of the Federal Rules of Civil Procedure and authority applying that rule. *See Plubell v. Merck & Co.*, 434 F.3d 1070 (8th Cir. 2006); *see also Crowder v. Gordons Transps., Inc.*, 387 F.2d 413 (8th Cir. 1967). An analysis of these federal authorities would prolong this discussion needlessly, given the long-standing law of this state to the contrary.

[redacted] Appellants contend that even if their claim for trespass is barred as untimely, they have also alleged a continuing trespass and encroachment from the piles of debris left on their land as well as the erection of a new fence. Appellants contend there is a seven-year statute of limitations applicable to these claims. Ark. Code Ann. § 18-61-102 (Repl. 2003). Appellants have not cited us to any authority that this statute applies to the facts of this case, and it is not apparent to us that it does. Moreover, although the circuit court granted summary judgment on "all claims," there was no ruling in either the court's letter opinion or the order regarding this statute. Accordingly, this issue is not preserved for our appellate review. We do not review on appeal matters on which

the trial court did not rule, and the party raising the point on appeal has the burden to obtain the ruling. *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999).

The order granting summary judgment is affirmed.

IMBER, J., not participating.

David GATZKE, Wade Abernathy, Greg Gladden, Michael Lester, Richard Day, Wayne Harlan, and Chad Fite *v.* Richard WEISS, Anne Laidlaw, B. Alan Sugg, Lu Hardin, Robert Potts, and May Construction Company, et al.

08-415 289 S.W.3d 455

Supreme Court of Arkansas
Opinion delivered December 11, 2008

Hope, Fuqua & Campbell, P.A., by: *Ronald A. Hope*, *David M. Fuqua*, and *Patrick L. Spivey*, for appellants.

Friday, Eldredge & Clark, LLP, by: *Jeffrey H. Moore*, for appellees CDI Contractors, LLC; DEL-JEN, Inc.; and Nabholz Construction Corp.

Dustin McDaniel, Att'y Gen.; *Justin Allen*, Chief Deputy Att'y Gen., by: *Lori Freno*, Sr. Ass't Att'y Gen., for appellees Richard Weiss and Anne Laidlaw.

Tom Courtway, General Counsel, University of Central Arkansas, for appellee Lu Hardin.

Jeffrey A. Bell, Sr. Assoc. General Counsel, University of Arkansas, for appellee B. Alan Sugg.

Lucinda McDaniel, University Counsel, Arkansas State University System, for appellee Robert Potts.

ROBERT L. BROWN, Justice. On March 23, 2007, the appellants, David Gatzke and others (hereinafter "Gatzke"), as taxpayers of Arkansas, sued appellees, Richard Weiss, Director of the Arkansas Department of Finance and Administration; Anne Laidlaw, interim director of the Arkansas Building Authority; and certain public university officials. Gatzke alleged that Act 961 of 1997, codified at Arkansas Code Annotated section 19-4-1413, and Act 1626 of 2001, codified at Arkansas Code Annotated section 19-4-1415, (hereinafter "the Acts") violate article 19, section 16 of the Arkansas Constitution because they allow for state construction projects to be entered into without competitive bidding.

Gatzke also contended in the complaint that the construction contracts entered into pursuant to the Acts were illegal and constituted an illegal exaction under article 16, section 13 of the Arkansas Constitution. Gatzke prayed for a declaratory judgment, declaring that the Acts are unconstitutional and that the executed contracts constituted illegal exactions. Gatzke also prayed to enjoin the State from entering into any contracts pursuant to the Acts, from prospectively honoring the terms of any existing contracts entered into pursuant to the Acts, and from making expenditures in the future pursuant to the Acts. On August 31, 2007, Gatzke filed an amended complaint, following an order by the circuit judge to add certain necessary parties. The amended complaint named various private building contractors and included the same allegations and prayer that the Acts be declared unconstitutional.[1]

Weiss moved to dismiss the amended complaint on grounds that article 19, section 16 of the Arkansas Constitution applies only to county-funded contracts. Following a hearing on the motion, the circuit judge treated the motion as one for summary judgment and found that the Acts were constitutional because article 19, section 16 "applies only to county construction projects." He

[1] Gatzke named the following seventeen defendants: Richard Weiss, Director of the Arkansas Department of Finance and Administration; Anne Laidlaw, Interim Director of the Arkansas Building Authority; B. Alan Sugg, President of the University of Arkansas System; Lu Hardin, President of the University of Central Arkansas; Robert Potts, Chancellor of Arkansas State University; Nabholz Construction Corporation; CDI Contractors, Inc.; Flintco, Inc.; Baldwin & Shell Construction Company; May Construction Company, Inc.; James H. Taylor & Sons Construction Company, Inc.; F & F Construction Company, Inc.; DEL-JEN, Inc.; KINCO Constructors, LLC; CDI Contractors, LLC; KAJ Construction, Inc.; and Studio Werk, PLLC. All named defendants will be referred to collectively as "Weiss."

concluded in his order: "It is therefore ordered that summary judgment be granted in favor of all defendants, and that the plaintiffs' amended complaint be dismissed with prejudice in its entirety."[2]

This dispute revolves around whether article 19, section 16, of the Arkansas Constitution requires competitive bidding on all public contracts in Arkansas, including state contracts, as argued by Gatzke, or whether it applies only to county contracts, as found by the circuit judge and asserted by Weiss. The Acts provide for letting state contracts without competitive bidding in some circumstances. Act 961 of 1997, codified at Arkansas Code Annotated section 9-4-1413, exempts from general statutory bidding requirements public higher education construction projects if they exceed $5,000,000 and 80% of the estimated project cost (excluding the cost of land) is privately funded. Act 1626 of 2001, codified at Arkansas Code Annotated section 19-4-1415, exempts from general statutory bidding requirements state agency construction projects that exceed $5,000,000 (excluding the cost of land), regardless of the source of project funds. The Acts both require that certain procedures be followed for a contract to be awarded under the exemptions.

In reviewing the constitutionality of statutes, this court presumes that a statute was framed in accordance with the constitution. *See Reinert v. State*, 348 Ark. 1, 71 S.W.3d 52 (2002). The burden is on the challenger of the statute to prove that it is unconstitutional, and this court will not invalidate a statute for repugnance to the constitution unless the two are in clear and unmistakable conflict. *Id.*

This court reviews a circuit court's interpretation of a constitutional provision de novo. *See City of Fayetteville v. Wash. Cty.*, 369 Ark. 455, 255 S.W.3d 844 (2007). We are not bound by a circuit court's decision, but in the absence of a showing that the

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[2] What apparently converted this matter from a dismissal under Rule 12(b)(6) to summary judgment was the attachment of an affidavit from Rebecca Burns-Hoffman, a forensic linguist, who interpreted the meaning of article 19, section 16 in that affidavit. The judge made no reference to this affidavit at the hearing or in his order. We agree with Weiss, nonetheless, that a forensic linguist may not testify to her conclusions related to constitutional interpretation under the guise of Arkansas Rule of Evidence 702. As the United States Court of Appeals for the D.C. Circuit has said: "Each courtroom comes equipped with a 'legal expert' called a judge." *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997).

trial court erred in its interpretation of the law, that interpretation will be accepted on appeal. *Id.* Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning. *Id.* Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision. *Id.* Furthermore, when engaging in constitutional construction and interpretation, this court looks to the history of the constitutional provision. *See Foster v. Jefferson Cty. Quorum Ct.*, 321 Ark. 116, 901 S.W.2d (1995). The Arkansas Constitution must be considered as whole, and every provision must be read in light of other provisions relating to the same subject matter. *Id.*

We turn then to article 19, section 16, which reads:

> All contracts for erecting or repairing public buildings or bridges in any county, or for materials therefor; or, for providing for the care and keeping of paupers, where there are no alms-houses, shall be given to the lowest responsible bidder, under such regulations as may be provided by law.

Gatzke contends that the term "all contracts" evidences the framers' and voters' intent that the provision apply to all government contracts, including state contracts, and that the words "in any county" refer to the physical location of the public buildings or bridges. Because of this, he contends the Acts are unconstitutional.

We conclude that the plain meaning of article 19, section 16 restricts its application to county contracts. There is, first, the fact that the words "in any county" would lack any significance unless they restrict the provision relating to public buildings and bridges to county-funded contracts. It is beyond dispute that absent an explicit restriction, sections of the Arkansas Constitution have statewide application. *See, e.g.*, Ark. Const. preamble ("We, the people of the *State* of Arkansas, . . . do ordain and establish this Constitution.") (emphasis added). In drafting and adopting the words "in any county," the framers and voters of Arkansas clearly intended to limit the lowest-responsible-bidder restriction to county contracts. This court will interpret a constitutional provision so that each word carries meaning. *See, e.g.*, *Merritt v. Jones*, 259 Ark. 380, 387, 533 S.W.2d 497, 500-01 (1976) (every word should be expounded in its plain, obvious and common acceptation). The circuit judge was correct in finding

that "the 'in any county' phrase does not add anything, except . . . to limit 'all contracts' to 'county contracts.' "

In addition to the plain language of article 19, section 16, the historical context of the section, and its meaning in relation to the Arkansas Constitution as a whole, support the circuit judge's reading. Weiss rightly points out that at the time article 19, section 16 was adopted by a vote of the people in 1874, it was immediately preceded by section 15.[3] At that time, the two sections read:

> Sec. 15. All stationery, printing, paper, fuel, for the use of the General Assembly and other departments of government, shall be furnished, and the printing, binding and distributing of the laws, journals, department reports, and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees, shall be performed under contract, to be given to the lowest responsible bidder, below such maximum price and under such regulations as shall be prescribed by law. No member or officer of any department of the government shall in any way be interested in such contracts, and all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer.
>
> Sec. 16. All contracts for erecting or repairing public buildings or bridges in any county, or for materials therefor; or, for providing for the care and keeping of paupers, where there are no alms houses, shall be given to the lowest responsible bidder, under such regulations as may be provided by law.

Ark. Const. art. 19, § 15, *repealed by* Ark. Const. amend. 54, § 2; art. 19, § 16.

Again, placing article 19, section 16 in context and reading it in conjunction with the Arkansas Constitution as a whole, it is clear to this court that the framers of the constitution and the people of this state knew how to distinguish between state contracts and county contracts. If Gatzke's interpretation were correct, there would have been no need for section 15 because section 16 would have applied to all contracts, including those state contracts for building repairs referenced in section 15. That is not a reasonable interpretation. We decline to hold that portions of section 15 were superfluous and unnecessary for adoption.

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[3] In 1974, article 19, section 15 was repealed by amendment 54.

Though not decisive in itself, we are also aware that significant public functions in 1874 were performed by the counties and not the state. *See, e.g.*, Mansfield Digest of Statutes 1884, §§ 1089-1139 (county buildings), including the courthouse, jail, and poorhouse. It is especially important that the superintendence of all paupers, included specifically within article 19, section 16, was a county function in 1874. *See id.* § 1108. It would be myopic for this court to cast a blind eye to the historical context in which article 19, sections 15 and 16 were passed.

There is, too, the fact that our case law lends support to Weiss's interpretation. All but one of the cases in which this court has interpreted and applied article 19, section 16 involved county contracts. *See Carroll Cty. v. Reeves Constr. Co.*, 154 Ark. 434, 242 S.W. 821 (1922) (regarding county bridge contracts); *Ross Drainage Dist. v. Clark Cty.*, 153 Ark. 175, 239 S.W. 740 (1922) (whether a county was obligated to pay on a bridge contract); *Shackelford v. Campbell*, 110 Ark. 355, 161 S.W. 1019 (1913) (whether a county court could amend a contract previously entered into pursuant to the constitution and statute); *Watkins v. Stough*, 103 Ark. 468, 147 S.W. 443 (1912) (regarding county bridge projects); and *Fones Hardware Co. v. Erb*, 54 Ark. 645, 17 S.W. 7 (1891) (petition to enjoin a county from constructing a bridge). None of our cases interpreting article 19, section 16 have specifically dealt with state contracts.

The one case from this court discussing section 16 and not dealing with a county-funded construction project is *Wimberly v. Road Improvement District No. 7*, 161 Ark. 79, 255 S.W. 556 (1923).[4] In *Wimberly*, the plaintiffs brought suit to enjoin a road improvement district from building a bridge within the district without letting the project for competitive public bidding. The plaintiffs argued specifically that the State law under which the improvement district had acted was in conflict with section 16 because it did not include a provision for the construction of bridges within the district to be let to the lowest responsible bidder. The trial judge upheld the validity of the act involved but enjoined the

[4] We are aware that Weiss maintains that improvement districts are, in fact, agents of the State. However, this court has not reached that precise issue in the context of article 19, section 16.

commissioners of the district from making the improvements without advertising for bids because he found it was contrary to public policy.

On appeal, this court reversed in part and, in doing so, noted that the bridge in question was built incident to the improvement district and was not, therefore, built with county funds. In holding that the law did not violate section 16, this court said that "[t]he section of the Constitution referred to is a limitation upon the expenditure of *county funds* for bridges, etc., *in any county*, and was not intended as an inhibition against districts building projects incident to the main improvement, by private contract." *Id.* (emphasis added). Gatzke never explains why the *Wimberly* court's pronouncement that section 16 is a limitation upon the expenditure of *county* funds is not precedent for the instant case.

Gatzke also maintains that article 19, section 16 must be amended for it to apply only to county contracts. He cites to decisions from this court with regard to article 19, section 15 in support of that argument. *See Gray v. Gaddy*, 256 Ark. 767, 510 S.W.2d 269 (1974), and *Erxleben v. Horton Printing Co.*, 283 Ark. 272, 675 S.W.2d 638 (1984). In *Gray*, this court addressed Act 452 of 1973, which purported to clarify the contracts under section 15 that had to be submitted for competitive bidding. We held that the act was unconstitutional because section 15 applied to all contracts for stationery, printing, paper, and fuel. Since section 15 was all inclusive and not unambiguous to begin with, we held that the General Assembly lacked the authority to modify its terms.

In 1974, the people of Arkansas passed amendment 54 to the Arkansas Constitution, which repealed article 19, section 15 and replaced it with amendment 54, section 1. Amendment 54, section 1 requires that the "printing, stationery, and supplies *purchased by* the General Assembly and other departments of government shall be under contracts given to the lowest responsible bidder . . . ." Ark. Const. amend 54, § 1. Ten years later, taxpayers sued alleging that the Arkansas Office of State Purchasing violated this provision by sending printing contracts to the Arkansas Department of Correction Prison Industries without submitting them to public bidding. *See Erxleben*, 283 Ark. 272, 675 S.W.2d 638. This court interpreted the language of amendment 54 and held that "purchased by" did not mean a bookkeeping entry transferring money from one state account to another as occurred when the State entered into contracts with the Department of Correction. We held that amendment 54 requires competitive bidding for printing

purchased from commercial printers but permits the State to produce its own printing without submitting a bid.

Gatzke urges that the term "all contracts" in section 16 should be governed by this court's decision in *Gray*. This argument is without merit because the original language of section 15 is considerably different from that of section 16. The term "all contracts" in section 16 is expressly limited by the words "in any county." As a result, the plain language of the section already restricts its applicability to county contracts, and an amendment is not necessary. *Gray* and *Erxleben* are not relevant to deciding this case.

Nor do we agree that the *Fones* case supports Gatzke's interpretation. *See Fones*, 54 Ark. 645. Though *Fones* includes wording about the desirability of the competitive bidding process for public construction contracts, it did not purport to interpret article 19, section 16 to include state contracts. Moreover, the *Fones* case itself involved a county contract, as already noted in this opinion.

Gatzke asserts, as a final point, that the preposition "in" should have been "by" in order for section 16 to apply only to county contracts. Gatzke also contends that section 16 is written in the passive voice, which further indicates that the intent was for it to apply to all contracts. These arguments are conclusory, and Gatzke cites no authority in support of them. This court has long held that it will not address arguments unless they are sufficiently developed and include citation to authority. *See, e.g., Cole v. Laws*, 349 Ark. 177, 183, 76 S.W.3d 878, 881 (2002). Gatzke's arguments regarding the structure of the language in article 19, section 16 are unpersuasive to this court.

We hold that there was no error by the circuit judge in interpreting article 19, section 16 to apply only to county construction contracts and in declaring the Acts constitutional. We affirm the order of summary judgment.

Affirmed.

WILLS, J., not participating.

DAIMLERCHRYSLER CORPORATION *v.*
Gaylord SMELSER

07-1006 289 S.W.3d 466

Supreme Court of Arkansas
Opinion delivered December 11, 2008

[redacted]

Barrett & Deacon, A Professional Association, by: *Kevin W. Cole* and *Brandon J. Harrison*, for appellant.

James M. Pratt, Jr., P.A., by: *James M. Pratt*; and *Brian G. Brooks, Attorney at Law, PLLC*, by: *Brian G. Brooks*, for appellee.

ANNABELLE CLINTON IMBER, Justice. Appellant DaimlerChrysler Corporation appeals from a judgment entered against it in the Circuit Court of Columbia County for violation of the Arkansas New Motor Vehicle Quality Assurance Act ("Arkansas Lemon Law"), codified at Ark. Code Ann. §§ 4-90-401 to -417 (Repl. 2001). The judgment awarded Appellee Gaylord Smelser the sum of $41,489.26, plus attorney's fees, copy costs, and mileage expenses. Appellant raises two points of error on appeal: 1) the circuit court erred in declining to enforce a settlement agreement negotiated by the parties' attorneys; and 2) the circuit court erred in allowing Appellee to recover copy costs and mileage expenses under Ark. Code Ann. § 4-90-415(c). Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(a)(5) and (b)(1) (2008). We find no error and affirm.

On July 14, 2003, Appellee Gaylord Smelser bought a 2003 Dodge 4WD-diesel truck manufactured by DaimlerChrysler Corporation from a Chrysler dealership in Camden, Arkansas. Almost immediately, he began having problems with the vehicle's transmission. Beginning in early August 2003, Appellee took the vehicle back to the Camden dealership for repair. Over the course of the next eight months, the vehicle was returned to the dealership a total of six times, but the transmission problem persisted. Appellee, with help from his daughter-in-law, Erin Smelser, then sent two letters to DaimlerChrysler's customer assistance center. In the first letter dated May 13, 2004, he demanded a repair within ten days under the Arkansas Lemon Law. Ark. Code Ann. § 4-90-406(a)(2) (Repl. 2001). After Appellant failed to respond, Appellee sent a second letter on June 25, 2004, demanding a replacement vehicle or a refund pursuant to Ark. Code Ann. § 4-90-406(b). When Appellant failed to respond to the second letter, Appellee hired attorney David P. Price to represent him.

A complaint was filed against Appellant in the Circuit Court of Columbia County on October 28, 2004. The complaint alleged claims for breach of implied warranty of merchantability and implied warranty of fitness for a particular purpose and for violation of the Arkansas Lemon Law. One year later, on September 23, 2005, Appellant filed a motion for summary judgment or, in the alternative, motion to enforce settlement, alleging that a settlement had been reached on April 6, 2005, between the parties' attorneys. In his reply to the summary-judgment motion, Appellee disputed the validity of any alleged settlement, claiming that his former attorney lacked authority to settle the matter. The circuit court declined to grant the motion to enforce settlement on the pleadings; instead, at a hearing in January 2007, the court heard testimony concerning the alleged settlement. Shortly thereafter, the circuit court denied Appellant's summary-judgment motion, finding that "there was not a settlement of the matter."

In the meantime, Appellee had hired his current attorney, James M. Pratt, Jr., after Mr. Price withdrew as counsel in July 2005. Appellee eventually nonsuited the two warranty claims, and the case went to trial in May 2007 on the remaining claim for violation of the Arkansas Lemon Law. Following a jury verdict in favor of Appellee, the circuit court entered its judgment on June 11, 2007, awarding Appellee the sum of $41,489.26. In a separate order entered on July 18, 2007, the court awarded Appellee attorney's fees and costs in the amounts of $11,100.00 and $197.50, respectively, pursuant to Ark. Code Ann. § 4-90-415(c). Appellant filed timely notices of appeal.

In its first point on appeal, Appellant argues that the circuit court erred in finding that there was no settlement of the matter between the attorneys. Appellant further suggests that the circuit court should have declared a settlement on the terms it deemed reasonably certain based on the proof. Appellee, on the other hand, contends there was no settlement agreement because the conflicting evidence shows there was no meeting of minds on a material term.

Courts will enforce contracts of settlement if they are not in contravention of law. *McCoy Farms, Inc. v. J & M McKee*, 263 Ark. 20, 563 S.W.2d 409 (1978), *reh'g denied* April 17, 1978. The essential elements of a contract include (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligations. *Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513 (2003). We keep in mind two legal principles when

deciding whether a valid contract was entered into: (1) a court cannot make a contract for the parties but can only construe and enforce the contract that they have made; and if there is no meeting of the minds, there is no contract; and (2) it is well settled that in order to make a contract there must be a meeting of the minds as to all terms, using objective indicators. *Alltel Corp. v. Sumner*, 360 Ark. 573, 203 S.W.3d 77 (2005). Both parties must manifest assent to the particular terms of the contract. *Id.* Moreover, the terms of a contract cannot be so vague as to be unenforceable. *City of Dardanelle v. City of Russellville*, 372 Ark. 486, 277 S.W.3d 562 (2008). The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. *Id.*

In the instant case, Appellant has the burden of proving the existence of a contract. *See Thompson v. Potlatch Corp.*, 326 Ark. 244, 930 S.W.2d 355 (1996). Whether or not there was a meeting of the minds is an issue of fact, and we do not reverse a trial court's fact-finding unless it is clearly erroneous. *Sanford v. Sanford*, 355 Ark. 274, 137 S.W.3d 391 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* We view the evidence in a light most favorable to the appellee, resolving all inferences in favor of the appellee. *Id.* Disputed facts and determinations of the credibility of witnesses are within the province of the factfinder. *Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 974 S.W.2d 464 (1998).

Appellant asserts that the parties' attorneys reached a settlement agreement. In support of that assertion, Appellant points to a letter faxed by Appellant's attorney to Appellee's former attorney, David P. Price, on April 6, 2005. The letter states in pertinent part as follows:

> This letter confirms that we have settled this case premised upon the following:
>
> 1. $1,000.00 payable to you and your client to be applied toward fees and expenses;
>
> 2. Repair of the subject vehicle in accordance with the vehicle inspection conducted by the DaimlerChrysler field representative; this repair will be arranged through your office and will be completed at your local DaimlerChrysler dealership; and

3. In return, your client will execute a Release in favor of DaimlerChrysler.

On the same day, Appellant's attorney faxed a letter to the circuit court's case coordinator informing the court that the case had been settled and requesting that the trial scheduled for April 12, 2005, be canceled. Shortly thereafter, on April 15, 2005, Mr. Price informed Appellant's attorney that Appellee refused to accept the terms of settlement set forth in the April 6, 2005 letter. On May 10, 2005, Appellant's attorney sent Mr. Price a release and settlement agreement and consent order of dismissal, but Appellee never signed the documents.

During the hearing on Appellant's motion to enforce the settlement, Mr. Price testified that Appellee instructed him to initiate negotiations on a possible settlement. According to Mr. Price, he relayed the terms of the settlement to his client on April 6, 2005, and Appellee told him to "go ahead" with the settlement. Mr. Price admitted that he never sent Appellee the confirmation letter drafted by Appellant's attorney and that, during their meeting on April 15, 2005, Appellee denied ever authorizing the settlement. Mr. Price also testified to his understanding that the settlement would include a "lifetime warranty" for the vehicle. Mr. Price acknowledged, however, that he did not read or object to the terms contained in the confirmation letter. Appellee testified that Mr. Price never communicated with him about the settlement offer. In fact, when he called Mr. Price's office on April 11, 2005, Appellee still thought the case was going to trial on April 12, 2005. In sum, Appellee testified that he never authorized or agreed to the alleged settlement terms. His testimony was corroborated by Erin Smelser, Appellee's daughter-in-law.

As stated earlier, the April 6, 2005 confirmation letter drafted by Appellant's attorney provides for the "[r]epair of the subject vehicle in accordance with the vehicle inspection conducted by the DaimlerChrysler field representative; this repair will be arranged through your office and will be completed at your local DaimlerChrysler dealership." There is no reference in the letter to a "lifetime warranty," or any time period during which Appellant would be responsible for the repair. Appellee's former attorney, however, testified without objection that it was his understanding the "[t]ransmission was supposed to be fixed. . . . if there was going to be any problems with the transmission that was supposed to be taken care of for the duration of Mr. Smelser's

ownership of the vehicle." In other words, according to Mr. Price, the settlement included a "lifetime warranty." Once again, where there is conflicting testimony, the credibility of witnesses is for the trial judge to determine, and the court defers to the superior position of the trial judge in matters of credibility. *Koster v. State*, 374 Ark. 74, 286 S.W.3d 152 (2008). Based upon our review of the record in the instant case, we cannot say that the circuit court clearly erred in finding that there was no settlement of the matter. In view of our affirmance for the reasons stated above, we need not address the issue of whether Appellee's attorney lacked authority to settle the case.

The circuit court ruled, pursuant to Ark. Code Ann. § 4-90-415(c), that Appellee was entitled to recover copy costs and mileage expenses in the amount of $197.50. For his second point on appeal, Appellant challenges the circuit court's ruling, citing Rule 54(d) of the Arkansas Rules of Civil Procedure. According to Appellant, Rule 54(d) delineates what costs a prevailing party may recover, and copy costs and mileage expenses are not expressly permitted by the rule. Appellant further posits three reasons why section 4-90-415(c) should not be broadly construed to include mileage expenses or copy costs: (1) statutes providing for costs are strictly construed against the party seeking the award; (2) if the statute is broadly construed, requests for all types of travel and other expenses related to witnesses, attorneys, and paralegals will pour forth; and (3) it is unfair to construe the statute broadly since only "a consumer" can be a prevailing party under the statute.

Appellee, on the other hand, points out that, even assuming "costs" is a term of art under Rule 54(d), section 4-90-415(c) is not limited to the recovery of costs. The statute also allows a consumer to recover "expenses . . . reasonably incurred . . . for or in connection with the commencement and prosecution of the action." Ark. Code Ann. § 4-90-415(c). Appellee asserts that expenses in this case easily include the cost of copying exhibits and mileage.

We review issues of statutory construction de novo, as it is for this court to decide what a statute means. *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001). In this regard, we are not bound by the trial court's decision; however, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. *Id.* The circuit court relied upon Arkansas Code Annotated section 4-90-415(c) in awarding copy costs and mileage. Section 4-90-415(c) reads as follows:

> A consumer who prevails in any legal proceeding under this subchapter is entitled to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based upon actual time expended by the attorney, determined by the court to have been reasonably incurred by the consumer for or in connection with the commencement and prosecution of the action.

Ark. Code Ann. § 4-90-415(c) (Repl. 2001).

The basic rule of statutory construction is to give effect to the intent of the legislature. *State Office of Child Support Enforcement v. Morgan*, 364 Ark. 358, 219 S.W.3d 175 (2005). Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. *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. *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. *Id.* When the language of the statute is plain and unambiguous, conveying a clear and definite meaning, we need not resort to the rules of statutory construction. *Cooper Clinic, P.A. v. Barnes*, 366 Ark. 533, 237 S.W.3d 87 (2006). However, when a statute is ambiguous, we must interpret it according to the legislative intent, and our review becomes an examination of the whole act. *Id.* We reconcile provisions to make them consistent, harmonious, and sensible in an effort to give effect to every part. *Id.* A statute is ambiguous only where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning. *Id.* We also look to the legislative history, the language, and the subject matter involved. *State Office of Child Support Enforcement v. Morgan, supra.*

The statute at issue does not define the terms "costs and expenses," or delineate what types of costs and expenses the legislature intended to include or exclude. Ark. Code Ann. § 4-90-415(c). The only guidance in the statute is that costs and expenses shall include attorney's fees and shall be "determined by the court to have been reasonably incurred by the consumer for or in connection with the commencement and prosecution of the action." *Id.*

Rule 54(d) of the Arkansas Rules of Civil Procedure specifically delineates what fees are taxable as "costs":

> Costs taxable under this rule are limited to the following: filing fees and other fees charged by the clerk; fees for service of process and subpoenas; fees for the publication of warning orders and other notices; fees for interpreters appointed under Rule 43; witness fees and mileage allowances as provided in Rule 45; fees of a master appointed pursuant to Rule 53; fees of experts appointed by the court pursuant to Rule 706 of the Arkansas Rules of Evidence; and expenses, excluding attorney's fees, specifically authorized by statute to be taxed as costs.

Ark. R. Civ. P. 54(d)(2) (2008). Even if we assume that costs are limited to those items set forth in Rule 54(d), section 4-90-415(c) also allows a consumer who prevails to recover "expenses," including attorney's fees. We do not construe statutes to leave any word void or superfluous. *State Office of Child Support Enforcement v. Morgan, supra.* Thus, the legislature must have contemplated a distinction between costs and expenses.

"Expense," as defined in *Black's Law Dictionary*, means "[t]hat which is expended, laid out or consumed; an outlay; charge; cost; price." *Black's Law Dictionary* 687 (Revised 4th ed. 1968). The legislature has expressly designated attorney's fees as a recoverable expense. Otherwise, the only limitation on the recovery of any expenditure or outlay is that the court must determine it to have been reasonable and incurred in connection with the prosecution of an action under the Arkansas Lemon Law. Such a limitation insures against a windfall for Lemon Law claimants. In essence, section 4-90-415(c) seeks to make a prevailing consumer whole.

This interpretation is consistent with other provisions that provide a broad range of remedies to a consumer. Section 4-90-406(b)(1)(B) provides that a consumer can recover all collateral or reasonably incurred incidental charges as part of the replacement or refund. Ark. Code Ann. § 4-90-406(b)(1)(B) (Repl. 2001). Section 4-90-414(b)(6) provides that a consumer may not be charged with a fee to participate in an informal dispute proceeding. Ark. Code Ann. § 4-90-414(b)(6) (Repl. 2001).

Finally, Appellant claims it is unfair to construe the statute broadly since "only 'a consumer' can ever be a prevailing party under the statute." It is evident from the plain language of the Arkansas Lemon Law that the legislature sought to address the hardship a defective vehicle creates for a consumer. Ark. Code

Ann. § 4-90-402 (Repl. 2001). The legislature intended that a good-faith motor vehicle warranty complaint by a consumer be resolved by the manufacturer within a specific period of time. The statute also provides for an informal dispute settlement proceeding at the option of the manufacturer. Ark. Code Ann. § 4-90-414 (Repl. 2001). If the manufacturer fails to resolve a good-faith complaint, it will be at the manufacturer's peril to let the dispute be resolved in court.

The circuit court determined that copy costs and mileage expenses totaling $197.50 were reasonably incurred in connection with the instant litigation. Accordingly, we hold that the circuit court did not err in interpreting section 4-90-415(c) to allow for the recovery of those expenses.

Affirmed.

Scipio JOHNSON *v.* BONDS FERTILIZER, INC.; Bonds Brothers, Inc.; AGRI Group-Comp SI Fund; CNA Insurance Company

08-269 289 S.W.3d 431

Supreme Court of Arkansas
Opinion delivered December 11, 2008

Parker Law Firm, by: *Tim S. Parker*, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *John S. Cherry, Jr.* and *Michael Lee Wright*, for appellees.

PAUL DANIELSON, Justice. In this third appeal of this matter, appellant Scipio Johnson appeals from the order of the Workers' Compensation Commission, which found that he was performing employment services for both appellee Bonds Fertilizer, Inc. and the Bonds Brothers Trust, also known as the Farm, at the time of his accident on June 28, 1995.[1] *See Johnson v. Bonds Fertilizer, Inc.*, 365 Ark. 133, 226 S.W.3d 753 (2006) (*Johnson II*); *Johnson v. Union Pac. R.R.*, 352 Ark. 534, 104 S.W.3d 745 (2003) (*Johnson I*). Mr. Johnson asserts four points on appeal: (1) that the Commission's finding that he was performing work for Bonds Fertilizer on the date of his injury was not supported by substantial evidence; (2) that the Administrative Law Judge (ALJ) and the Commission erroneously exceeded this court's mandate in *Johnson II*; (3) that the ALJ and the Commission erred by applying the doctrines of dual employment, loaned employee, simultaneous employment, and joint employment;

[1] In addition to Bonds Fertilizer, the following are also appellees, in accord with the pleadings filed before, and the decisions by, the Commission: Bonds Brothers, Inc., AGRI Group-Comp SI Fund, and CNA Insurance Company. For the sake of clarity, the appellees will be jointly referred to as Bonds unless it is necessary to distinguish the parties.

and (4) that the ALJ and the Commission erred in denying his motion to dismiss appellee Bonds Brothers, Inc., and in failing to strike its motions and briefs. We affirm the Commission's order.

As set forth in both *Johnson I* and *Johnson II*, this matter arises from an accident in which a train collided with a truck near Tamo, Arkansas, on June 28, 1995. Mr. Johnson was a passenger in the truck and was seriously injured when he was thrown from the vehicle upon impact. Mr. Johnson and his wife, Bessie Johnson, filed suit in the Jefferson County Circuit Court against Union Pacific Railroad, Bonds Fertilizer, Inc., and Bonds Brothers, Inc., alleging negligence and a loss of consortium. The circuit court granted summary judgment to both Bonds Fertilizer, Inc. and Bonds Brothers, Inc. and granted partial summary judgment to Union Pacific, on the issue of inadequate warning devices. Following a jury trial against Union Pacific on the remaining issue of negligence, the jury returned a verdict in favor of Union Pacific. Mr. Johnson appealed to this court, and we affirmed the grant of partial summary judgment to Union Pacific, but reversed the grant of summary judgment to Bonds Fertilizer,[2] remanding the matter to the circuit court with leave for Mr. Johnson to pursue a determination before the Commission as to whether he was performing employment services for Bonds Fertilizer or for the Farm on the date of the accident.[3] *See Johnson I, supra.*

Following our remand, Mr. Johnson sought a determination from the Commission; however, the ALJ and the Commission, in a 2-1 decision, agreed with the argument of Bonds Fertilizer and the Farm that since the statute of limitations had run, the Commission had no further jurisdiction in the matter and was without authority to issue an advisory opinion. *See Johnson II, supra.* On appeal, this court held that the Commission erred in both of its conclusions and reversed and remanded the matter to the Commission for a determination "as to whether Johnson was performing employment services for Bonds Fertilizer or the Farm on the date of the accident." 365 Ark. at 137, 226 S.W.3d at 756.

Since our remand in *Johnson II*, a hearing was held before the ALJ on July 21, 2006, and on January 10, 2007, the ALJ issued its

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[2] Bonds Brothers, Inc. was not a party to the first appeal. *See Johnson I, supra.*

[3] This court's opinion further observed that it was not disputed that Mr. Johnson's injuries occurred while he was performing employment services. *See Johnson I, supra.*

order. In that order, the ALJ quoted the facts from our opinion in *Johnson I*, stating:[4]

> The record reflects that, on the date of the accident, Johnson was an employee of both the Farm and Bonds Fertilizer. Both companies, along with Bonds Brothers, were either owned or controlled by Kenny Bonds and Brian Bonds. Kenny and Brian each owned fifty percent of Bonds Brothers. Bonds Brothers is the sole shareholder of Bonds Fertilizer. The Farm is a partnership comprised of Kenny Bonds Farms, Brian A. Bonds Trust, and Bonds Brothers. When Johnson performed work for either the Farm or Bonds Fertilizer, he reported to the same supervisor, Allan Maxey. Some weeks, Johnson would perform tasks for both employers, but he would receive only one paycheck, from the company that he did the most work for that week. The week before the accident and the week of the accident, Johnson was paid by Bonds Fertilizer.
>
> On the morning of the accident, Johnson was performing work for the Farm, because one of the Farm's employees was out sick. That afternoon, Johnson was supposed to deliver a load of fertilizer that was coming in at 3:00 p.m. for Bonds Fertilizer. In the meantime, around 1:00 p.m., Maxey instructed Johnson to pick up a tractor for the Farm and begin laying irrigation pipe. Maxey instructed Johnson to ride with Frances Birmingham, an employee of Bonds Fertilizer. Alyston Luster, an employee of the Farm, also rode with them. The truck they were riding in was owned by Bonds Brothers, and it had a 1,000-gallon water tank hooked to the back.
>
> . . . .
>
> Following the accident, Kenny Bonds reported Johnson's accident to the insurance carrier for Bonds Fertilizer. The insurance carrier approved the claim and paid approximately $61,000 in medical and temporary total disability benefits to or on behalf of Johnson. Johnson accepted these benefits for over nine months, from July 1995 to April 1996. Subsequently, in February 1998, Johnson made a claim for additional benefits, listing as his employer:

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[4] In his brief, Mr. Johnson acknowledges that this court's recitation of the facts in *Johnson I* "is correct and in accordance with the testimony of witnesses."

> "Bonds Fertilizer, Inc. or Bonds Brothers Farms, Inc." That claim was later withdrawn by Johnson, in favor of the civil suit.

352 Ark. at 539-40, 104 S.W.3d at 746-47. In addition, the ALJ's order set forth the relationship between Bonds Brothers Trust, Bonds Brothers, Inc., and Bonds Fertilizer:

> In the deposition of Kenny Bonds, Jr., the relationship between the Bonds entities is explained. Bonds Brothers Trust is the operating partnership that runs the farm and was composed of Kenny Bonds, Kenny Bonds' Farm, Brian Bonds' Trust, and Bonds Brothers, Inc. It was commonly known as "The Farm." Bonds Brothers, Inc. is a corporation which is a partner in the Trust and owns the equipment and buildings leased and used by the Farm. Bonds Fertilizer, Inc. is a wholly owned subsidiary of Bonds Brothers, Inc. and operates a separate fertilizer business. Kenny Bonds, Jr. is the general partner of Bonds Brothers Trust, president of Bonds Brothers, Inc., and president of Bonds Fertilizer, Inc.

The ALJ determined that the preponderance of the evidence demonstrated that Mr. Johnson was paid by both Bonds Fertilizer and the Farm, "although he would get a check from only one of them for any particular pay period." The ALJ further determined, based on the evidence, that at the time of the accident, both Mr. Johnson and the driver of the truck were paid by Bonds Fertilizer and that Mr. Johnson was paid by Bonds Fertilizer both the week before and the week of the accident. Accordingly, the ALJ concluded, because Bonds Fertilizer paid Mr. Johnson and was not reimbursed, there was strong evidence that Bonds Fertilizer was Mr. Johnson's employer at the time of the accident.

The ALJ then discussed the doctrines of joint employment and dual employment, concluding that the credible evidence in the case "demonstrate[d] that Johnson was under the control of both employers at the same time when he was directed by his supervisor to ride with Birmingham to help retrieve a tractor on the Farm while waiting for the next load of fertilizer." In addition, the ALJ found that all three factors for dual employment were "plainly satisfied when the undisputed facts [were] examined."

In reviewing the loaned-employee doctrine, the ALJ noted that, even assuming Mr. Johnson was performing work for the Farm at the time of his accident, "there was no question but that he was loaned by Bonds Fertilizer to the Farm at that time." It further

found that it was clear from the evidence that Mr. Johnson "worked for both the fertilizer business and the farm on a regular basis and shifted from one to the other on an as-needed basis."

Finally, the ALJ considered the simultaneous-employment doctrine and concluded that

> Johnson was performing a duty for the common benefit of both the Farm and Bonds Fertilizer. He was traveling from one place of business to that of the other, as he was required to do in order to perform properly his assigned duties for the day — which included both fertilizer and farm work. Therefore, based on the credible evidence, I find that Johnson was the joint employee of both the Farm and Bonds Fertilizer and was performing employment services for the benefit of both employers at the time of the accident.

Accordingly, the ALJ's order set forth the following findings of fact and conclusions of law:

> 1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
>
> 2. The preponderance of the evidence demonstrates that claimant was simultaneously employed by Bonds Brothers Trust a/k/a The Farm and Bonds Fertilizer, Inc. on June 28, 1995.
>
> 3. The preponderance of the evidence demonstrates that claimant was performing employment related services for both employers at the time of the accident on June 28, 1995.

Mr. Johnson appealed the ALJ's decision to the full Commission, which affirmed and adopted the decision of the ALJ, including all findings and conclusions, in a 2-1 decision. Mr. Johnson now appeals the Commission's decision.

I. Substantial Evidence

For his first point on appeal, Mr. Johnson asserts that there was not substantial evidence to support the Commission's finding that he was performing work for Bonds Fertilizer at the time of the accident. Mr. Johnson avers that the evidence militated against the finding by the Commission and established that he was performing employment services solely for the Farm at the time of his injuries.

Bonds responds that Mr. Johnson was a dual employee for both Bonds Fertilizer and the Farm on the date of the accident. Nonetheless, Bonds avers, even if Mr. Johnson was an employee of

the Farm at the time, he was a loaned employee by Bonds Fertilizer to the Farm. In addition, Bonds asserts, Mr. Johnson was a simultaneous employee of Bonds Fertilizer and the Farm.

Our standard of review for decisions by the Commission is well established:

> On appeal, this court views the evidence and all reasonable inferences therefrom in the light most favorable to the Commission's decision and affirms that decision when it is supported by substantial evidence. It is for the Commission to determine where the preponderance of the evidence lies; upon appellate review, we consider the evidence in the light most favorable to the Commission's decision and uphold that decision if it is supported by substantial evidence. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. There may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we had sat as the trier of fact or heard the case *de novo*. It is exclusively within the province of the Commission to determine the credibility and the weight to be accorded to each witness's testimony. We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission.

Arbaugh v. AG Processing, Inc., 360 Ark. 491, 493-94, 202 S.W.3d 519, 521 (2005) (internal citations omitted).

It is well settled that the ALJ's findings are irrelevant for purposes of appeal, as this court is required by precedent to review only the findings of the Commission and ignore those of the ALJ. *See Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). However, here, as in *Freeman*, we must review the findings of the ALJ because the Commission made absolutely no independent findings of its own; rather, it simply adopted each of the findings made by the ALJ. *See id.* In the instant case, the ALJ determined that Mr. Johnson was performing employment-related services for both Bonds Fertilizer and the Farm at the time of the accident. We, then, must determine whether that decision was supported by substantial evidence.

This court has previously acknowledged the doctrines of lent employees and dual employment, quoting from Larson's *Workmen's Compensation Law*:

> § 48.00 When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if
>
> (a) The employee has made a contract for hire, express or implied, with the special employer;
>
> (b) The work being done is essentially that of the special employer; and
>
> (c) The special employer has the right to control the details of the work.

South Arkansas Feed Mills, Inc. v. Roberts, 234 Ark. 1035, 1038, 356 S.W.2d 645, 647 (1962) (quoting 1 Larson, *Workmen's Compensation Law* § 48.00, at 710)). In *Daniels v. Riley's Health & Fitness Centers*, 310 Ark. 756, 840 S.W.2d 177 (1992), we noted that the section further provided: "When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation." 310 Ark. at 759, 840 S.W.2d at 178.

Here, the ALJ's order specifically found that all three factors for dual employment were satisfied, stating:

> (a) at the time of the accident, Johnson worked for both Bonds Fertilizer and "the Farm."
>
> (b) the work being done on the day of the accident was essentially that of the Farm, although by his own testimony Johnson was also working for Bonds Fertilizer.
>
> (c) both Bonds Fertilizer and the Farm had the right to control the details of Johnson's work, depending on what Johnson was doing.

In *Cash v. Carter*, 312 Ark. 41, 847 S.W.2d 18 (1993), we examined whether the appellant was a loaned employee of appellee's construction company. In doing so, this court relied on the dual-employment doctrine, as set forth in *Daniels*, *supra*, and observed that the most significant question regarding a loaned employee is which company has direction and control of the employee. *See Cash*, *supra*. With respect to this doctrine, the ALJ found as follows:

> It is undisputed that on the day of the accident, Johnson was taking the place of a sick employee of the Farm. It is likewise undisputed that before the accident, Johnson had returned from lunch and was waiting to haul a load of fertilizer for Bonds Fertilizer, when he was told by his supervisor that the load had been cancelled. Johnson was told that he would not have any fertilizer to haul until 3 p.m., and directed to go pick up a tractor with poly-pipe on it to put out at the Farm. Under these undisputed facts, Johnson was a "loaned" or "temporary" employee of the Farm at the time of the accident, and the same analysis applies as under the "dual employment" doctrine. *See Cash v. Carter*, 312 Ark. 41, 45-46, 847 S.W.2d 18 (1993).

We hold that the Commission's decision was supported by substantial evidence. The evidence demonstrates that Mr. Johnson worked for both Bonds Fertilizer and the Farm and that on weeks in which he worked for both, he received only one paycheck from the company for which he did the most work. Both the week before the accident and the week of the accident, Bonds Fertilizer paid Mr. Johnson. On the morning in question, Mr. Johnson worked for the Farm, and that afternoon, at 3:00 p.m., he was to deliver a load of fertilizer for Bonds Fertilizer. However, at 1:00 p.m., his supervisor, who supervised his work for both Bonds Fertilizer and the Farm, directed Mr. Johnson to pick up a tractor for the Farm and to begin laying irrigation pipe. While riding with an employee of Bonds Fertilizer and an employee of the Farm, Mr. Johnson was injured when the truck in which he was riding was struck by a train. This evidence, viewed in the light most favorable to the Commission, was substantial evidence supporting the Commission's finding that Mr. Johnson was performing employment services for both Bonds Fertilizer and the Farm as a dual employee and a loaned employee. Accordingly, we affirm the Commission's decision.[5]

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[5] Because we hold that there was substantial evidence to support the Commission's decision on the bases of both the dual-employment and loaned-employee doctrines, we need not reach the additional bases relied upon by the ALJ and affirmed by the Commission. We, therefore, offer no comment on the doctrines of joint employment or simultaneous employment.

In addition, we note that along with the arguments already set forth within this first point, Mr. Johnson further asserted within his substantial-evidence challenge that: (1) the representations of Kenny Bonds, Jr., President of Bonds Fertilizer, Inc., and Michelle Miller,

II. Law of the Case

Mr. Johnson argues, for his second point on appeal, that the law-of-the-case doctrine barred the Commission from determining any issues other than for whom he was employed at the time of the accident. He contends that the ALJ and the Commission exceeded this court's mandate by examining the four doctrines of dual employment, joint employment, loaned employee, and simultaneous employment. Bonds counters that the ALJ merely conducted the necessary proceedings to answer this court's question and made its conclusions based upon a preponderance of the evidence, which the Commission then adopted.

Mr. Johnson's argument is without merit. We have long held that the trial court, upon remand, must execute the mandate. *See Wal-Mart Stores, Inc. v. Regions Bank Trust Dep't*, 356 Ark. 494, 156 S.W.3d 249 (2004). In *Wal-Mart*, we reviewed the history of the mandate rule, stating:

> The inferior court is bound by the judgment or decree as the law of the case, and must carry it into execution according to the mandate. The inferior court cannot vary it, or judicially examine it for any other purpose than execution. It can give no other or further relief as to any matter decided by the Supreme Court, even where there is error apparent; or in any manner intermeddle with it further than to execute the mandate, and settle such matters as have been remanded, not adjudicated, by the Supreme Court.

356 Ark. at 497, 156 S.W.3d at 252 (quoting *Fortenberry v. Frazier*, 5 Ark. 200, 202 (1843)). Citing to the Third Circuit Court of Appeals, we noted that the mandate rule "binds every court to honor rulings in the case by superior courts." *Id.* at 497-98, 156 S.W.3d at 252 (quoting *Casey v. Planned Parenthood*, 14 F.3d 848, 856 (3d Cir. 1994)). Accordingly, "[a] trial court must implement both the letter

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its attorney, were binding pivotal admissions on the ultimate issue; (2) Bonds Fertilizer, Inc. was prohibited from now taking the position that Mr. Johnson was not performing work for the Farm at the time of his injuries under the doctrines of judicial estoppel and the doctrine against taking inconsistent positions; and (3) Bonds Fertilizer, Inc., the Farm, and Bonds Brothers, Inc. are separate and distinct legal entities. In *Johnson II*, we remanded the matter to the Commission solely to determine "whether Johnson was performing employment services for Bonds Fertilizer or the Farm on the date of the accident." 365 Ark. at 137, 226 S.W.3d at 756. A review of the ALJ's order reveals no specific rulings on these arguments. Therefore, we decline to address them.

and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Id.* at 498, 156 S.W.3d at 252 (quoting *Casey, supra* (quoting *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir. 1985))).

Here, Mr. Johnson avers that the ALJ and the Commission somehow exceeded this court's mandate in *Johnson II*. In *Johnson II*, we specifically reversed and remanded the case "to the Commission to make a determination as to whether Johnson was performing employment services for Bonds Fertilizer or the Farm on the date of the accident." 365 Ark. at 137, 226 S.W.3d at 756. In turn, the record reflects that the Commission then remanded the matter to an ALJ "to conduct any and all necessary proceedings deemed appropriate to determine the employment relationship between the parties and to determine for whom the claimant was performing employment services at the time of his injury."

It is clear to this court that the Commission, as well as the ALJ, merely executed this court's mandate upon remand. Directions by an appellate court to the trial court, here, the Commission, as expressed by the opinion and mandate must be followed exactly and placed into execution. *See Dolphin v. Wilson*, 335 Ark. 113, 983 S.W.2d 113 (1998). Following *Johnson I*, the Commission did not consider whether Mr. Johnson was working for Bonds Fertilizer, Inc. or the Farm at the time of the accident. Instead, it declared that the statute of limitations had run and that it was without jurisdiction. In *Johnson II*, we specifically directed the Commission to determine for which employer Mr. Johnson was working at the time of the accident. It was, therefore, necessary for the Commission and the ALJ to consider the doctrines examined in making that determination, and they in no way exceeded our mandate. For these reasons, we affirm this point as well.

III. Misapplication of the Doctrines

Relying on language in *Cash, supra*, Mr. Johnson urges that his activities for the Farm were separate from those for Bonds Fertilizer and that, on the day of the accident, his activities could be separately identified with the Farm. For that reason, he claims, none of the four doctrines examined by the ALJ were applicable to the facts of his case. Bonds urges that under the undisputed facts of the case, Mr. Johnson was a loaned or temporary employee of the Farm at the time of the accident.

In *Cash*, *supra*, quoting *Daniels*, *supra*, we said:

> Employment may also be "dual" in the sense that, while the employee is under contract of hire with two different employers, his activities on behalf of each employer are separate and can be identified with one employer or the other. When this separate identification can clearly be made, the particular employer whose work was being done at the time of injury will be held exclusively liable.

312 Ark. at 46, 847 S.W.2d at 20 (quoting *Daniels*, 310 Ark. at 759, 840 S.W.2d at 178)). In this case, the ALJ found that

> it [was] clear from the evidence that Johnson worked for both the fertilizer business and the farm on a regular basis and shifted from one to the other on an as-needed basis. . . . The instant case is clearly distinguishable from the cases in which the court has found that the claimant was an employee of two employers, but the work was separable.

Again, a review of the evidence in the light most favorable to the Commission, as already set forth above, reveals that there was substantial evidence to support the Commission's decision that Mr. Johnson's activities at the time of the accident were not separately identifiable for either employer. Mr. Johnson had the same supervisor for both jobs; was working for the Farm, but was also to work on fertilizer jobs that day; and was paid by Bonds Fertilizer for his work that week. Hence, we affirm the Commission on this point.

IV. Denial of Motions to Dismiss and to Strike Briefs

For his final point on appeal, Mr. Johnson maintains that the Commission and the ALJ erroneously denied his motions to dismiss Bonds Brothers, Inc. and to strike its briefs. He contends that Bonds Brothers, Inc. had no interest in the litigation and that merely because it owned stock in Bonds Fertilizer, Inc. did not entitle it to appear as a party. Bonds maintains that the ALJ and the Commission acted within their discretion by denying Mr. Johnson's motions to ensure a full adjudication of all issues properly before the Commission.

Following the ALJ's order of January 10, 2007, but prior to its order of December 6, 2007, the Commission issued a separate order in which it denied Mr. Johnson's motions to dismiss and to strike. We hold that the Commission did not err in doing so.

In the affidavit of Kenny Bonds, which is a part of the record and was before the Commission, Mr. Bonds stated that

> Bonds Brothers, Inc. is the sole shareholder of Bonds Fertilizer, Inc. Bonds Brothers, Inc. owns all of the equipment, including vehicles, used by Bonds Fertilizer, Inc. and Bonds Brothers Trust. Bonds Brothers Trust, a partnership of Kenny M. Bonds, Jr., Bryan A. Bonds Trust, and Bonds Brothers, Inc., is the operating entity for the farming operation as required by Farm Service Agency.

Moreover, Mr. Johnson, at the time he originally filed his suit in Jefferson County Circuit Court, saw fit to bring suit against Bonds Brothers, Inc., as well as Bonds Fertilizer. Following Mr. Johnson's appeal of the circuit court's order in *Johnson I*, we determined that the Commission had exclusive, original jurisdiction to determine whether Mr. Johnson's injuries were covered by the Workers' Compensation Act and that for which employer Mr. Johnson was working at the time of the accident was an issue of fact for the Commission to resolve. To resolve that issue of fact, the Commission determined that the participation of Bonds Brothers, Inc. was necessary as Bonds Brothers, Inc. "[was] and continue[d] to be a necessary party" in the matter. We, therefore, cannot say that the Commission's decision was erroneous. Accordingly, we affirm the Commission on this point as well.

Affirmed.

Michael J. BRAY *v.* STATE of Arkansas

CR 08-1363 289 S.W.3d 455

Supreme Court of Arkansas
Opinion delivered December 11, 2008

No briefs filed.

PER CURIAM. Petitioner, Michael J. Bray, has filed a motion for rule on clerk. Based on the petition, however, it appears that petitioner is seeking a writ of certiorari to complete the record pursuant to Rule 3-5 of the Rules of the Supreme Court. But, in his partial record, filed November 21, 2008, petitioner has failed to include any documentation indicating that the transcript was ever ordered from the court reporter, nor has he included any notice of appeal, which is necessary to confer jurisdiction on this court. We therefore have no basis on which to issue the writ. *See* Ark. Sup. Ct. R. 3-5.

Motion denied.

William Mack EUBANKS *v.* STATE of Arkansas

CR 08-953 289 S.W.3d 464

Supreme Court of Arkansas
Opinion delivered December 11, 2008

William M. Pearson, for appellant.

No response.

PER CURIAM. Appellant William Mack Eubanks, by and through his attorney, William M. Pearson, has filed a motion to file a belated brief.

Eubanks's brief was originally due in this court on September 23, 2008. Attorney Pearson then sought and received a seven-day clerk's extension, making his brief due to be filed by September 30, 2008. Pearson also requested a second extension, which was granted, making his brief due on October 30, 2008. Pearson filed a third motion for extension, citing his heavy trial-related duties and asking for an additional fourteen days in which to file the brief. This court granted an extension of seven days, making the brief due on November 7, 2008; in doing so, we noted that this was the final extension. Pearson failed to meet this final deadline. He has now submitted the instant motion to file a belated brief, asserting that he completed the abstract, brief, and addendum on November 11, 2008.

We will accept a criminal appellant's belated brief to prevent an appeal from being aborted. *See Brown v. State*, 373 Ark. 453, 284 S.W.3d 481 (2008) (per curiam). However, good cause must be shown to grant the motion. *See Strom v. State*, 356 Ark. 224, 147 S.W.3d 689 (2004) (per curiam) (holding that appellate counsel's admitted failure to timely file the brief constituted good cause to grant motion for belated brief).

Here, Pearson accepts full responsibility and admits fault for failing to timely file Eubanks's brief. Accordingly, we grant the motion to file a belated brief and refer the matter to the Committee on Professional Conduct.

Latore Durand GOSSETT *v.* STATE of Arkansas

CR 08-1356 289 S.W.3d 463

Supreme Court of Arkansas
Opinion delivered December 11, 2008

Justin B. Hurst, for appellant.

No response.

PER CURIAM. Appellant Latore Durand Gossett, by and through his attorney, Justin B. Hurst, has filed a motion for rule on clerk. Appellant entered a conditional guilty plea to the crimes of possession of a schedule II controlled substance, crack cocaine, with intent to deliver; possession of drug paraphernalia; simultaneous possession of drugs and firearms; unauthorized use of property to facilitate a crime; and possession of a schedule IV controlled substance, marijuana. He was sentenced to a term of 168 months in the Arkansas Department of Correction. The judgment and commitment order was entered on July 31, 2007, and Appellant timely filed a notice of appeal from the judgment order on August 16, 2007.

Pursuant to Ark. R. App. P.–Civ. 5(a), which is applicable pursuant to Ark. R. App. P.–Crim. 4(a), the deadline for filing the record on appeal was November 14, 2007. Appellant timely filed a

motion for enlargement of time to lodge the record on October 9, 2007. However, the order granting his motion was not entered until November 16, 2007. Although the circuit court granted several subsequent motions for extension of time to lodge the record, the untimely entry of the first extension order culminated in Appellant's untimely tender of the record on April 16, 2008.

Despite Appellant's failure to properly perfect this appeal, the State cannot penalize a criminal defendant by declining to consider his first appeal when counsel has failed to follow an appellate rule. *Franklin v. State*, 317 Ark. 42, 875 S.W.2d 836 (1994) (per curiam). In *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004), we clarified our treatment of motions for rule on clerk and motions for belated appeals.

> 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 we no longer require an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where he has erred and is responsible for the failure to perfect the appeal. *See id.* at 116, 146 S.W.3d at 891.

Mr. Hurst does not admit fault, but his fault is clear from the record. Therefore, we direct the clerk of this court to accept the record and docket the appeal, and we refer the matter to the Committee on Professional Conduct.

Motion granted.

Victor RASMUSSEN *v.* STATE of Arkansas

CR 08-1319 289 S.W.3d 465

Supreme Court of Arkansas
Opinion delivered December 11, 2008

Justin B. Hurst, for appellant.

No response.

PER CURIAM. Appellant Victor Rasmussen, by and through his attorney, Justin B. Hurst, has filed a motion for rule on clerk. On March 21, 2008, a jury found Appellant Victor Rasmussen guilty of sexual assault in the first degree for which he was sentenced to 180 months, and sexual assault in the fourth degree, for which he was sentenced to 72 months. The judgment was entered on March 24, 2008. Appellant timely filed a notice of appeal on April 14, 2008. Pursuant to Ark. R. App. P.–Civ. 5(a), which is applicable pursuant to Ark. R. App. P.–Crim. 4(a), the deadline for filing the record on appeal was July 13, 2008.

Appellant timely filed a motion to extend the time within which to file the record in this court, on June 11, 2008, requesting an additional ninety (90) days. However, the order granting his motion was never filed with the circuit court clerk's office and did not comply with Rule 5(b)(1)(C) of the Rules of Appellate Procedure–Civil in that it failed to show that all parties had an opportunity to be heard on the motion. Although the Appellant timely filed his motion for extension of time to file the record, the order granting his motion was never filed making the Appellant's tender of the record on October 10, 2008, untimely.

Rasmussen moves this court to accept a belated appeal. Despite Appellant's failure to properly perfect this appeal, the State cannot penalize a criminal defendant by declining to consider his

first appeal when counsel has failed to follow the appellate rules. *Franklin v. State*, 317 Ark. 42, 875 S.W.2d 836 (1994) (per curiam). In *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004), we clarified our treatment of motions for rule on clerk and motions for belated appeals:

> 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.* at 116, 146 S.W.3d at 891. When it is plain from the motion, affidavits, and record that relief is proper under either rule based on error or good reason, the relief will be granted. *See id.* If there is attorney error, a copy of the opinion will be forwarded to the Committee on Professional Conduct. *See id.*

It is plain from Appellant's motion that there was error on Mr. Hurst's part. Mr. Hurst has also assumed responsibility for the error. Pursuant to *McDonald v. State*, *supra*, we grant Appellant's motion for rule on clerk and forward a copy of this opinion to the Committee on Professional Conduct.

Motion granted.

Kenny TRAVIS *v.* STATE of Arkansas

CR 08-1320 289 S.W.3d 474

Supreme Court of Arkansas
Opinion delivered December 11, 2008

Craig Lambert, for appellant.

No response.

PER CURIAM. Appellant Kenny Travis, by and through his counsel Craig Lambert,[1] has filed a motion for a belated appeal from the denial of his pro se petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37. Appellant was convicted of capital murder and sentenced to a term of life imprisonment on August 11, 2006. He filed a timely petition for postconviction relief on January 18, 2008. The Mississippi County Circuit Court entered an order on February 20, 2008, denying the Rule 37 petition.

Appellant filed the instant motion on November 12, 2008, averring that it was only after recently retaining Mr. Lambert to represent him that he discovered that the trial court had denied his petition for postconviction relief. Attached to his motion is an affidavit wherein Appellant states that he never received notice that his petition had been denied or that he ever received a copy of that order. The State has not filed a response.

This court recently addressed a similar situation in *Hampton v. State*, 374 Ark. 527, 288 S.W.3d 643 (2008) (per curiam), and granted the motion for belated appeal because good cause was established for doing so. *See also Rutledge v. State*, 355

[1] Appellant retained Mr. Lambert to represent him in the present appeal, and Mr. Lambert filed a motion for entry of appearance, which we granted this same day.

Ark. 499, 139 S.W.3d 518 (2003) (per curiam). In *Hampton*, the appellant averred that he never received notice of the denial of his petition for postconviction relief, and the State did not file a response. As a result, this court concluded that there was good cause to grant the motion as the State's failure to respond was tantamount to a determination that the State could not demonstrate that the circuit clerk promptly notified the appellant of the court's order. Likewise, in the present matter, Appellant has demonstrated good cause for his failure to file a timely notice of appeal, and we grant his motion for belated appeal.

Motion granted.

Ryan WHITESIDE *v.* RUSSELLVILLE NEWSPAPERS, INC.; Paxton Media Group, LLC; Neal Ronquist; Scott Perkins; and Janie Ginocchio

08-313 289 S.W.3d 461

Supreme Court of Arkansas
Opinion delivered December 11, 2008

Henry Clay Moore, for appellant.

PER CURIAM. Appellant Ryan Whiteside appeals from the circuit court's order granting summary judgment to appellees Russellville Newspapers, Inc.; Paxton Media Group, LLC; Neal Ronquist; Scott Perkins; and Janie Ginoccio. Mr. Whiteside further

appeals from the circuit court's order denying his motion for new trial. Because Mr. Whiteside submitted a brief without a proper addendum in violation of Arkansas Supreme Court Rule 4-2(a)(8) (2008), we order rebriefing.

Rule 4-2(a)(8) provides, in pertinent part:

> Following the signature and certificate of service, the appellant's brief shall contain an Addendum which 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). 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.

Ark. Sup. Ct. R. 4-2(b)(3).

[redacted] Here, Mr. Whiteside's brief is deficient due to the fact that his addendum lacks relevant pleadings essential to an understanding of the case. While the appellees abstracted the hearing on the motion for summary judgment and provided their motion for

summary judgment in their supplemental addendum, Mr. Whiteside's addendum lacks certain pleadings, including, but not limited to, the appellees' answer to his complaint, their brief in support of their motion for summary judgment, his response to their motion and brief in support, their reply to his response, and his response to their reply to his initial response.[1]

Because Mr. Whiteside has failed to comply with our rules, we order him to file a substituted abstract, addendum, and brief within fifteen days from the date of entry of this order. If Mr. Whiteside fails to do so within the prescribed time, the judgment appealed from may be affirmed for noncompliance with Rule 4-2. After service of the substituted abstract, addendum, and brief, the appellees shall have an opportunity to revise or supplement their brief in the time prescribed by the clerk.

Rebriefing ordered.

Shelton WORMLEY *v.* STATE of Arkansas

CR 08-1344 289 S.W.3d 463

Supreme Court of Arkansas
Opinion delivered December 11, 2008

[1] We note that it was Mr. Whiteside's responsibility, as the appellant, to abstract the summary-judgment hearing. *See* Ark. Sup. Ct. R. 4-2(a)(5). While the appellees did provide a supplemental abstract, we offer no opinion on the sufficiency of that abstract.

Donald E. Warren, Sr., for appellant.

No response.

PER CURIAM. Shelton Wormley, by counsel, John L. Kearney, has filed this motion for rule on clerk. The circuit court's judgment and commitment order was entered on May 29, 2008, and the attorney for Wormley, Donald E. Warren, Sr., filed a notice of appeal on June 12, 2008. The trial court granted a motion filed by Mr. Warren to substitute John L. Kearney as counsel for appellant on July 16, 2008. The record in this matter was due to be filed by September 11, 2008. Because the record was not tendered to this court until November 17, 2008, it is untimely.

We are unable to consider the motion for rule on clerk filed by Mr. Kearney at this time. Under Arkansas Rule of Appellate Procedure–Criminal 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 Mr. Warren filed the notice of appeal on June 12, 2008, the trial court lacked jurisdiction to relieve him and substitute Mr. Kearney as counsel for appellant. Consequently, because Mr. Kearney was never properly appointed as counsel, he does not represent appellant, and this court will not consider a motion for rule on clerk filed by him.

Because Mr. Warren has not been relieved as counsel of record, we direct him to file a motion for rule on clerk on Wormley's behalf within thirty days. At that time, Mr. Warren may file a motion to withdraw as counsel, and Mr. Kearney, should he wish to represent Wormley on appeal, may file a motion with this court for appointment of counsel.

Motion for rule on clerk denied.

Lili Mitchell DAVIS, Rose M. White, Jack D. Wilson, Dennis Burnett, Wayne Nunnerly, and Owen Honeysuckle *v.* BRUSHY ISLAND PUBLIC WATER AUTHORITY

08-562 290 S.W.3d 16

Supreme Court of Arkansas
Opinion delivered December 19, 2008

James F. Lane, P.A., for appellants.

Wright, Lindsey & Jennings LLP, by: *Troy A. Price, C. Tad Bohannon*, and *Michelle M. Kaemmerling*, for appellee.

JIM HANNAH, Chief Justice. Appellants Lili Mitchell Davis, Rose M. White, Jack D. Wilson, Dennis Burnett, Wayne Nunnerly, and Owen Honeysuckle appeal the order of dismissal in favor of appellee Brushy Island Public Water Authority of the State of Arkansas (Authority), formerly known as Brushy Island Water Association, Inc. (Association). On appeal, the appellants contend that the circuit court erred in dismissing their claims under the doctrines of claim preclusion, issue preclusion, and mootness. We affirm.

Appellants are members of the former Brushy Island Water Association, Inc. They filed a complaint seeking to invalidate the July 15, 2003 vote whereby the Association was converted to the Authority.

The present action is the second case challenging the validity of the conversion vote. Previously, former members of the Association sued the Authority and its directors, seeking a declaration that the vote to convert the Association from a nonprofit corporation into a water authority was void and invalid. *See Williams v. Brushy Island Pub. Water Auth.*, 368 Ark. 219, 243 S.W.3d 903 (2006). The circuit court granted the Authority's motions (1) for summary judgment, (2) to strike an amendment to the Association's complaint, and (3) to appoint a receiver for the Authority. *See id.* We affirmed the circuit court's decision in its entirety. *See id.*

While the appeal in the *Williams* case was pending, the appellants in the instant case filed a complaint for declaratory judgment in the circuit court on January 10, 2006. In the complaint, the appellants requested, in relevant part, that the circuit court declare (1) that the July 15, 2003 vote of Association members to convert the Association to the Authority failed to carry a two-thirds majority as required by Arkansas Code Annotated section 4-28-225(a)(2) (Supp. 2003), (2) that the Authority has no existence because the membership conversion vote failed to carry by a two-thirds majority, and (3) that the Authority does not have corporate existence. The circuit court dismissed the appellants' complaint, pursuant to Arkansas Rule of Civil Procedure 12(b)(8), finding that the appellants' complaint and the then-pending *Williams* case were "between the same parties arising out of the same transaction or occurrence." The appellants did not appeal from this order, nor did they seek to intervene in the *Williams* case. In addition, the appellants did not seek a stay of the order in the *Williams* case appointing CAW as receiver. Therefore, during the pendency of the appeal, CAW moved forward with the improvements directed by the order.

Following the issuance of this court's decision in the *Williams* case, the appellants again filed a complaint for declaratory judgment on December 22, 2006, requesting that the circuit court find and declare that the vote to convert did not receive a two-thirds vote of the members present at the meeting and, pursuant to Arkansas Code Annotated section 4-28-225(a)(2), the vote failed, and the Association was not properly converted to the Authority. Accordingly, the appellants requested that the circuit court find and order that the Authority has no existence and that the Association continues to exist in the form that it held prior to the July 15, 2003 vote. On October 8, 2007, the Authority moved

for summary judgment on the grounds of res judicata and mootness. On March 5, 2008, the circuit court dismissed the complaint with prejudice. The appellants now bring this appeal.

As a threshold matter, we must determine whether the appellants' complaint should have been dismissed under the doctrine of mootness, as the Authority contends. The Authority claims that the complaint for declaratory judgment is moot because it is clear from the receivership order that the circuit court's decision to appoint a receiver had nothing to do with whether the assets in question were owned by a water association or a water authority. The Authority asserts that even if a court were to enter judgment declaring the conversion vote invalid, the facilities of the former Association are, and will continue to be, in receivership, pursuant to the order in the *Williams* case. The appellants assert that the Authority offered no evidence of facts, events, or occurrences that have transpired during the course of this litigation or in the course of the 2003 suit, including the *Williams* appeal, from which the circuit court could conclude that the issue of the passage of the conversion vote by the statutorily mandated two-thirds majority would have no practical legal effect on the outcome of this litigation. We disagree.

As a general rule, the appellate courts of this state will not review issues that are moot. *See Cotten v. Fooks*, 346 Ark. 130, 55 S.W.3d 290 (2001). To do so would be to render advisory opinions, which this court will not do. *See id.* We have generally held that a case becomes moot when any judgment rendered would have no practical legal effect upon a then-existing legal controversy. *See id.*

In this case, the appellants filed a complaint for declaratory judgment, seeking, in relevant part, that the circuit court: (1) declare that the July 15, 2003 vote of the Association members to convert the Association to the Authority failed to carry by a two-thirds majority, as required by Arkansas Code Annotated section 4-28-225(a)(2); (2) declare that the Authority has no existence because the July 15, 2003 Association membership vote failed to carry by a two-thirds majority; and (3) declare that the Brushy Island Public Water Authority was not properly constituted and does not, therefore, have corporate existence.

The appellants' complaint is moot because any judgment rendered by the circuit court would have no practical legal effect upon the case. In its October 18, 2005 order appointing CAW as

receiver, the circuit court found that Brushy Island lacked sufficient management or staff to adequately serve the needs of Brushy Island customers and that Brushy Island lacked the necessary infrastructure to provide Brushy Island customers with adequate fire service protection. The circuit court also noted that the Arkansas Department of Health and Human Services had cited Brushy Island for several violations of the rules and regulations pertaining to public water systems and the national primary drinking water regulations. Accordingly, the circuit court found that it was in the best interest for Brushy Island customers that CAW be appointed as receiver for Brushy Island. In the order of receivership, the circuit court expressly empowered and authorized CAW to perform any of the following duties:

a. to take possession and control of the Assets and any and all proceeds, receipts, and disbursements arising out of or from the Assets;

b. to receive, preserve, protect, and maintain control of the Assets, or any part or parts thereof;

c. to manage, operate, and carry on the business of Brushy Island, including the power to enter into any agreements, incur any obligations in the ordinary course of business, lawfully cease to carry on all or any part of the business, or lawfully cease to perform any contracts of Brushy Island;

d. to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel, and such other persons from time to time on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this Order;

e. to settle, extend, or compromise any indebtedness owing to Brushy Island;

f. to purchase or lease such machinery, equipment, inventories, supplies, premises, or other assets to continue the business of Brushy Island or any part or parts thereof;

g. to execute, assign, issue, and endorse documents of whatever nature in respect of any of the Assets, whether in the name of CAW, as a receiver, or in the name and on behalf of Brushy Island, for any purpose pursuant to this Order;

h. to initiate, prosecute, and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to Brushy Island, the Assets, or CAW, as receiver for Brushy Island, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

i. to market any or all of the Assets that are not necessary for the operation of Brushy Island, including advertising and soliciting offers in respect of the Assets or any part or parts therefor and negotiating such terms and conditions of sale as CAW, as receiver, in its discretion may deem appropriate;

j. to sell, convey, transfer, lease, or assign the Assets or any part or parts thereof out of the ordinary course of business, (i) without the approval of this Court in respect to any transaction not exceeding fifty thousand dollars ($50,000), provided that the aggregate consideration for all such transactions does not exceed two hundred and fifty thousand dollars ($250,000); and (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

k. to apply for any permits, licenses, approvals, or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by CAW, as receiver, in the name of Brushy Island; and

l. to take any steps reasonably incidental to the exercise of these powers.

In addition, the circuit court ordered CAW to contract for and begin improvements to the Brushy Island water system so that the system would meet standards for water systems operated by CAW. Specifically, CAW was ordered to install improvements, detailed in the order as follows:

> The Improvements consist of the installation of approximately 4400 Linear Feet (LF) of 24-inch Ductile Iron (DI) pipe, 4900 LF of 12-inch DI pipe, 4900 LF of 8-inch DI pipe, 4300 LF of 3-inch PVC pipe, and 5900 LF of 2-inch PVC pipe and appurtenances.

> The Improvements will also include the installation of 10 new Fire Hydrants, 320 new service meters and Pressure Regulators, as well as repair and/or replacement of existing service lines as required.

The order stated that Brushy Island customers would be responsible for paying the debt to finance the improvements and that the debt would be recouped as a surcharge on utility bills each month.

Whether CAW is receiver for a water association or a water authority, it is still receiver for the assets of Brushy Island pursuant to the October 18, 2005 order. The record reveals that the improvements opposed by the appellants are substantially completed. The debt incurred by Brushy Island to finance the improvements is still in effect, pursuant to the October 18 order, and the customers are still obligated to pay certain amounts each month as a surcharge to repay the debt for the improvements.

[redacted] Based on the foregoing, we hold that any judgment rendered on the conversion vote would have no practical legal effect upon the former Association because its facilities are now subject to receivership. The circuit court was correct in dismissing this case under the doctrine of mootness.[1] Because we so hold, we need not address the appellants' remaining arguments.

Affirmed.

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[1] We have recognized two exceptions to the mootness doctrine. The first exception involves issues that are capable of repetition, yet evade review. *Honeycutt v. Foster*, 371 Ark. 545, 268 S.W.3d 875 (2007). The second exception concerns issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation. *Id.* The appellants do not contend that either exception applies.

Ruth Ann COUCH,
Administratrix of the Estate of Jennifer Ann Green, Deceased *v.*
FARMERS INSURANCE COMPANY, INC., and
Mid-Century Insurance Company Los Angeles, California

08-389 289 S.W.3d 909

Supreme Court of Arkansas
Opinion delivered December 19, 2008

Blair & Stroud, by: *H. David Blair*, and *Johnny L. Nichols*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, PLLC, by: *Stuart P. Miller* and *Lindsey K. Bell*, for appellees.

DONALD L. CORBIN, Justice. This is an appeal from an order granting summary judgment in favor of Appellees Farmers Insurance Company, Inc., and Mid-Century Insurance Company Los Angeles, California, a member of the Farmers group, in a case where Appellant Ruth Ann Couch, Administratrix of the Estate of Jennifer Ann Green, Deceased, sought recovery for underinsured-motorist (UIM) benefits under multiple policies issued by Appellees. Appellant raises three arguments on appeal, specifically that the trial court erred in finding that the other insurance provisions of the policies issued by Appellees were (1) unambiguously incorporated into the UIM endorsement; (2) not void as being in derogation of Ark. Code Ann. § 23-89-209 (Repl. 2004); and (3) not void as against public policy when applied to the UIM coverage. As this appeal presents a question of statutory interpretation, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(6). We find no error and affirm.

The record reflects that on January 15, 2000, Jennifer Ann Green was killed in a single-vehicle accident, while a passenger in Jason Reams's vehicle. At the time of her death, Jennifer was a named insured on an automobile insurance policy issued by Appellee, Mid-Century. This policy provided UIM coverage in the amount of $50,000 for all claims arising out of injury to a single person. After a settlement was reached whereby Reams's insurance

carrier paid $20,000 to Appellant, Mid-Century paid benefits of $50,000, including $5,000 for a death benefit and $5,000 to cover funeral expenses, under the UIM coverage of the policy upon which Jennifer was the named insured.

Once Mid-Century paid out on Jennifer's policy, Appellant sought payment for UIM benefits under three additional policies in effect with Appellees, wherein Jennifer, as a family member of the three named insureds and a resident of the household, was an insured under those policies. Two of the policies at issue, each with $50,000 limits under the UIM coverage, were issued by Farmers: Policy No. 18146299762 and Policy No. 18146299763, with the named insureds under both policies being Joe and Ruth Ann Couch, Jennifer's stepfather and mother. The third policy, Policy No. 18150550870, also with a $50,000 limit of UIM coverage, was issued by Appellee Mid-Century and listed the named insured as Roddy Couch, Jennifer's sibling. Appellees refused to pay under the three additional policies, citing to other insurance provisions in those policies that Appellees asserted precluded Appellant from recovering under multiple policies.

Appellant filed suit, alleging that premiums had been paid for UIM coverage on each of the three policies, and because Jennifer was an insured under each of those policies, they were entitled to benefits from Farmers in the amount of $100,000, and benefits from Mid-Century in the amount of $50,000. Appellant also sought an award of statutory penalties, prejudgment interest, and all costs, including attorneys' fees. After filing an answer denying Appellant's allegations, Appellees filed a motion for summary judgment. Therein, Appellees stated that Mid-Century had paid out on the policy in which Jennifer was the named insured and that the Appellant sought to stack the UIM benefits from three additional policies, each of which contained anti-stacking provisions. Appellees asserted that because of the clear and unambiguous anti-stacking language, it was entitled to summary judgment. Thereafter, the trial court entered an order denying the motion for summary judgment.

Appellees filed a renewed and amended motion for summary judgment, again arguing that the three policies at issue each contained anti-stacking provisions that prohibited Appellant from recovering under multiple policies. After taking the motion under advisement, the circuit court entered a letter order on July 16, 2007, granting the motion for summary judgment. Therein, the circuit court acknowledged that it initially denied the motion for

summary judgment, but upon review of the amended motion, which included an argument about a specific provision within the policies regarding stacking between multiple policies issued by the same insurance company, determined that summary judgment was warranted. A written order reflecting the trial court's ruling was entered of record on September 26, 2007. This appeal followed.

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 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.* The facts here are undisputed by the parties. As there is not a genuine issue of material fact, the case was appropriately determined as a matter of law. Therefore, the issue here is whether summary judgment was granted in favor of the correct party based upon the interpretation of the law at issue.

As her first point on appeal, Appellant argues that the circuit court erred in finding that the other insurance provisions of the policies were unambiguously incorporated in the UIM coverage endorsement. Specifically, Appellant asserts that the anti-stacking language contained in the UIM section is limited to intra-policy stacking and is thus inapplicable in this case. Appellant further argues that if the applicability of the other insurance clause is ambiguous, any ambiguity must be resolved in favor of the insured. Appellees counter that the anti-stacking provision is clear and unambiguous. We agree with Appellees.

When presented with an issue regarding interpretation of a contract, this court has stated:

> The first rule of interpretation of a contract is to give to the language employed the meaning that the parties intended. In construing any contract, we must consider the sense and meaning of

> the words used by the parties as they are taken and understood in their plain and ordinary meaning. "The best construction is that which is made by viewing the subject of the contract, as the mass of mankind would view it, as it may be safely assumed that such was the aspect in which the parties themselves viewed it." It is also a well-settled rule in construing a contract that the intention of the parties is to be gathered not from particular words and phrases, but from the whole context of the agreement.

Health Resources of Ark., Inc. v. Flener, 374 Ark. 208, 211, 286 S.W.3d 704, 706-07 (2008) (citations omitted).

In granting summary judgment, the circuit court held that each of the four insurance policies at issue contained clear and unambiguous anti-stacking language that applied to the UIM coverage. Specifically, the court stated that the anti-stacking language appeared "to be applied by reference to the Under-Insured Motorists Endorsement and by its terms it unambiguously provides that the policy limits of the four policies in this case cannot be stacked." We now turn to the policy provisions at issue.

In one of the insurance policies[1] issued by Farmers on behalf of the named insureds, Joe Couch and Ruth Ann Couch, the following language is found:

> *PART II — UNINSURED MOTORISTS*
>
> *Coverage C — Uninsured Motorist Coverage*
>
> *(Including Underinsured Motorist Coverage)*
>
> . . . .
>
> *Other Insurance*
>
> . . . .
>
> 4. If any applicable insurance other than this policy is issued to you by us or any other member company of the Farmers Insurance Group of Companies, the total amount payable among all such policies shall not exceed the limits provided by the single policy with the highest limits of liability.

[1] Each of the policies at issue here contain the exact same language.

The following language is found in the endorsement for Underinsured-Motorist Coverage:

> Under Part II of the policy the provisions that apply to Exclusions, Limits of Liability, Other Insurance and Arbitration remain the same and apply to this endorsement except where stated otherwise in this endorsement.
>
> This endorsement is part of your policy. It supersedes and controls anything to the contrary. It is otherwise subject to all other terms of the policy.

Considering our rules of contract interpretation and giving the language employed the meaning the parties intended, we cannot say that the trial court erred in finding that the anti-stacking language clearly and unambiguously applied to the UIM coverage. Nothing in the insurance contracts demonstrates the existence of an ambiguity involving intra-policy stacking versus inter-policy stacking, as Appellant suggests. The language cited by Appellant, "[o]ur maximum liability under the UNDER-Insured Motorist Coverage is the limits of the UNDERInsured Motorist Coverage stated in this policy," is not in conflict with the other insurance clause and simply sets forth the limits for liability under that particular policy. Accordingly, there is no merit to Appellant's argument that there was an ambiguity in the insurance contracts.

Next, Appellant argues that the trial court erred in finding that the other insurance clause when applied to UIM coverage was not void as being in derogation of section 23-89-209. In support of this argument, Appellant cites to this court's decision in *Heiss v. Aetna Casualty & Surety Co.*, 250 Ark. 474, 465 S.W.2d 699 (1971). Appellees counter that *Heiss* is inapplicable and nothing in section 23-89-209 precludes the prohibition against the stacking of policies. Appellees are correct.

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.* 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.* We turn then to the statute at issue.

Section 23-89-209 sets forth the provisions for UIM coverage and provides in relevant part:

> (a)(1) No private passenger automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicles in this state shall be delivered or issued in this state or issued as to any private passenger automobile principally garaged in this state unless the insured has the opportunity, which he or she may reject in writing, to purchase underinsured motorist coverage.

Clearly, section 23-89-209 mandates that an insurer make UIM coverage available to an insured, but an insured is allowed to reject such coverage in writing. We fail to see, however, how the anti-stacking provisions at issue here are in derogation of this section. Simply because an insurer must offer UIM coverage does not translate to a requirement that an insurer not be allowed to prohibit the stacking of benefits. We agree with Appellees that an exclusion to coverage cannot violate public policy where an insured can opt out of UIM coverage altogether. *See Harasyn v. St. Paul Guardian Ins. Co.*, 349 Ark. 9, 75 S.W.3d 696 (2002).

Likewise, the *Heiss* decision relied on by Appellant is unavailing in this regard. In *Heiss*, 250 Ark. 474, 465 S.W.2d 699, a man was killed in a collision involving an uninsured motorist. The deceased had an insurance policy and paid separate premiums for uninsured-motorist coverage and medical payments. The insurer claimed that it was entitled to deduct the medical payments made from the $20,000 limit contained in the uninsured-motorist section of the policy. This court rejected the insurer's argument, holding that any such deduction for medical expenses was in derogation of the explicit requirements of the uninsured-motorist statute and financial responsibility laws at issue, which established limits of payment for injuries or death. To hold otherwise would have allowed the insurer to pay less than mandated by the legislature. Pursuant to section 23-89-209(a)(4), however, if an insurer issues UIM coverage, such coverage must be at least equal to the

limits prescribed for bodily injury or death in Ark. Code Ann. § 27-19-605 (Repl. 2008), and the amount paid by Farmers under Jennifer's policy exceed that statutory limit. Accordingly, our decision in *Heiss* is of no import to the present case.

Before leaving this point, we note that Appellant argues that it is unfair to allow Appellees to receive multiple premiums but only require them to pay on one policy. In support of this contention, Appellant cites to cases from other jurisdictions that have held as much. First, just as we held in *Chamberlin v. State Farm Mutual Automobile Insurance Co.*, 343 Ark. 392, 36 S.W.3d 281 (2001), the reliance on authority from other jurisdictions is unpersuasive, particularly where this court has previously addressed the same issue. Moreover, the Couch family maintained four insurance policies on four different automobiles, and the premiums paid on those policies were calculated based on coverage for each singular vehicle. At the time the Couches contracted with Appellees to provide insurance coverage, they were aware that each of those policies contained language prohibiting the stacking of multiple policies. If we were to void the anti-stacking provisions of these contracts, Appellees would be forced to pay quadruple coverage in exchange for only one premium paid for the deceased. Accordingly, we find no merit to the contention that Appellees are gaining a windfall because it accepted multiple premiums where those premiums were calculated on coverage for a single vehicle and based on the explicit prohibition of stacking multiple policies.

As her final point on appeal, Appellant argues that the trial court erred in finding that the other insurance clause, when applied to UIM coverage, is not void as against public policy. In support of her contention, Appellant argues that the anti-stacking provision undermines the public policy favoring compensation of the person wrongfully injured or killed and that limitations on coverage are not favored. In advancing her argument, Appellant acknowledges this court's decisions in *Clampit v. State Farm Mutual Automobile Insurance Co.*, 309 Ark. 107, 828 S.W.2d 593 (1992), and *Chamberlin*, 343 Ark. 392, 36 S.W.3d 281, but argues that those cases are distinguishable and should be limited so as to not apply to this case. Appellees counter that this court has settled the public-policy argument and that there is no reason to deviate from that precedent. We agree.

This court has held that unless the legislature has specifically prohibited exclusions, courts will not find the restrictions void as against public policy. *Harasyn*, 349 Ark. 9, 75 S.W.3d 696.

Moreover, as we previously stated, an exclusion to coverage cannot violate public policy when one considers that a driver can opt out of the coverage altogether. *Id.* While acknowledging the holding in *Harasyn*, Appellant avers that the decision should be overruled or at least limited to the facts of that case. In the absence of a compelling reason to do so, this court declines to overrule *Harasyn*. It has been said that

> [it] is necessary, as a matter of public policy, to uphold prior decisions unless great injury or injustice would result. The policy behind *stare decisis* is to lend predictability and stability to the law. In matters of practice, adherence by a court to its own decisions is necessary and proper for the regularity and uniformity of practice, and that litigants may know with certainty the rules by which they must be governed in the conducting of their cases. Precedent governs until it gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable.

State Auto Prop. & Cas. Ins. Co. v. Ark. Dep't of Envtl. Quality, 370 Ark. 251, 257, 258 S.W.3d 736, 741 (2007) (quoting *Cochran v. Bentley*, 369 Ark. 159, 174, 251 S.W.3d 253, 265 (2007)).

Appellant also acknowledges this court's holdings in *Clampit* and *Chamberlin* upholding anti-stacking provisions as not being violative of public policy. Appellant contends, however, that those two cases are distinguishable and that their application should be limited. We disagree. In *Clampit*, 309 Ark. 107, 828 S.W.2d 593, a husband and wife owned two vehicles that were insured under separate policies. The couple and their daughter were killed in an automobile collision while occupants in one of the insured vehicles. The other driver was underinsured, and personal representatives of the deceased brought an action against the insurer to recover the limits of UIM benefits under both policies. The insurer refused to pay under both policies, citing an owned-but-not-insured exclusion which precluded recovery under both policies. This court held that the exclusion to UIM coverage did not violate the public policy of this state, explaining, by way of example, that if an insurer is required to insure against a risk of an undesignated-but-owned vehicle, it is required to insure against risks that it is unaware of and unable to charge a premium for. The court further reasoned:

> If we were to disallow the exclusions in question, the insurance companies would have to spread the increased (and unknown) risk

> among all insureds, regardless of the risk or circumstances of each case, the end result being that multi-car owners would be acquiring insurance at rates subsidized by single-car owners — a result we deem neither desirable nor compatible with public policy.

Id. at 113, 828 S.W.2d at 597.

Following *Clampit*, this court again addressed the issue of stacking in *Chamberlin*, 343 Ark. 392, 36 S.W.3d 281. In that case, the insured, while a passenger in her husband's vehicle, was injured in a collision with an underinsured driver. At the time of the accident, the insured and her husband owned three separate insurance policies, one for each of their three vehicles, issued by the same insurer. The insurer paid UIM benefits on only one policy, rejecting claims on the other two policies because of owned-but-not-insured exclusions contained in each policy. The insured filed suit, and after the trial court granted summary judgment, the insured appealed to this court. We affirmed the grant of summary judgment, noting that we had considered and rejected the appellant's precise argument in *Clampit*. Although the insured argued that this court's position reflected a minority-jurisdiction position, this court held that it was bound to follow its prior law. In concluding that the anti-stacking provision was valid, the court noted that the policy language was clear and unambiguous and that the parties were free to contract as to the terms, as long as they were not violative of state law. Finally, the *Chamberlin* court noted: "Although aware of our judicial decisions . . . the legislature has not amended the governing statutes to permit stacking. . . . [T]he General Assembly's silence over 'a long period gives rise to an arguable inference of acquiescence or passive approval' to the court's construction of the statute." *Id.* at 398, 36 S.W.3d at 284 (quoting *Chapman v. Alexander*, 307 Ark. 87, 90, 817 S.W.2d 425, 427 (1991)).

Despite the clear pronouncements in both *Clampit* and *Chamberlin*, Appellant asks this court to deviate from its established position that anti-stacking provisions are not contrary to the public policy of this state. The distinction that those two cases involved owned-but-not-insured exclusions rather than another insurance clause is not a meaningful one. The gist of *Clampit* and *Chamberlin* is that an insurer may prohibit the stacking of multiple insurance policies if those policies unambiguously prohibit the stacking of benefits. Just as in the prior cases, at issue here are multiple policies insuring multiple vehicles, and each of those policies contained

clear and unambiguous language excluding the stacking of policies. If we were to disallow those exclusions, we would bind Appellees to a risk that was plainly excluded and for which Appellant did not pay. Accordingly, we find no merit to Appellant's argument that the trial court erred in determining that the anti-stacking provisions were not void as violative of public policy.

Affirmed.

Bernard MARKS *v.* STATE of Arkansas

CR 08-472 289 S.W.3d 923

Supreme Court of Arkansas
Opinion delivered December 19, 2008

Robinson & Associates, P.A., by: *Luke Zakrewski*, for appellant.

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

ROBERT L. BROWN, Justice. Appellant Bernard Marks appeals from his conviction for capital murder and his sentence to life imprisonment without parole. He asserts two points on appeal. We affirm.

Testimony at trial revealed that on the morning of July 5, 2004, Marks, Chris Claiborne, and Ricky Howard left the Three Gables nightclub together. Howard was driving the three men in a car he had borrowed. The three men arrived outside of the residence of Alvin Benjamin to find Michael Walker, the ultimate victim, standing in the front yard. The three men got out of the vehicle, and Marks and Claiborne began to beat Walker. Immediately after that, while Walker was lying unconscious in the road, Marks got in the borrowed vehicle and proceeded to run over Walker. In the early morning hours of July 5, 2004, Walker was taken to the emergency room of the Jefferson Regional Medical Center in Pine Bluff. Walker was severely injured and subsequently died of his injuries. Marks was later arrested and charged with capital murder.

At Marks's trial, Ricky Howard was called as a witness for the State. On direct examination by the prosecutor, he testified that he saw Marks pushing, hitting, and kicking Walker, and that Marks stated that he was going to run Walker over. Howard testified that he then observed Marks get into the car and start to move it and that the car ran over Walker. On cross-examination, Howard testified that he fled the scene when Marks got in the car. During the prosecutor's redirect examination, Howard testified that he did not actually see the car run over Walker, but he heard a noise — "bl-bloom, bl-bloom, bl-bloom." When the prosecutor asked Howard what the noise was, defense counsel objected: "He said he heard it. He didn't say he saw it." The judge overruled the objection and said, "If he knows, he can answer it. If not, he can respond accordingly." The prosecutor questioned, "What-what happened to a body," and Howard stated "Ran over." At the conclusion of the trial, Marks was convicted of capital murder and sentenced accordingly.

For his first point on appeal, Marks contends that the circuit judge erred by overruling his objection to Howard's testimony that the sound he heard was Marks driving over Walker. Marks claims that Howard lacked the requisite personal knowledge to testify under Arkansas Rule of Evidence 602. He claims that "the record lacks any basis for a conclusion that Howard had sufficient knowledge to distinguish the sound of a vehicle running over a

human body as opposed to some other similar object." The State responds that Marks has mischaracterized Rule 701 under the Arkansas Rules of Evidence as a Rule 602 objection. The State adds that Marks's true argument on appeal is that Howard was not qualified as a lay witness under Rule 701 to make the inference that the sound he heard was that of a car driving over a human body. The State claims that the circuit judge did not abuse his discretion because Howard's opinion testimony was rationally based on his perception and the surrounding circumstances and was helpful to a clear understanding of the determination of whether Marks was driving the car that ran over Walker.[1] Additionally, the State argues that Marks cannot show prejudice because the testimony of other witnesses established that Marks ran over Walker with the car.

Trial courts have broad discretion in deciding evidentiary issues, and their decisions are not reversed absent an abuse of discretion. *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003). This court will not reverse an evidentiary decision by the trial court in the absence of prejudice. *McFerrin v. State*, 344 Ark. 671, 42 S.W.3d 529 (2001).

As already noted, Marks first contends that Howard's testimony was inadmissible under Arkansas Rule of Evidence 602. Rule 602 provides, in pertinent part, as follows:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.

Ark. R. Evid. 602.

In the case before us, sufficient evidence was introduced at trial to support a finding that Howard had personal knowledge of the matter to which he testified. It was undisputed that Howard was present at the scene of the crime. He testified that he witnessed Marks beating Walker, that he heard Marks state that he was going to run over Walker, and that he saw Marks get into the car and begin driving. Finally, immediately after running from the scene, he heard the sound — "bl-bloom, bl-bloom, bl-bloom." Howard, without question, had personal knowledge of

[1] The fact that Walker had been run over with a car was undisputed at trial.

the events to which he testified. The circuit judge did not err in permitting the testimony under Rule 602.

Rule 701, which the State maintains is the appropriate rule for our analysis, reads:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are
>
> (1) Rationally based on the perception of the witness; and
>
> (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

Ark. R. Evid. 701.

We agree with the State that Rule 701 governs this case. In *Carton v. Missouri Pacific Railroad Co.*, 303 Ark. 568, 798 S.W.2d 674 (1990), we set out a three-prong test for determining admissibility under Rule 701. First, the testimony must pass the "personal knowledge" test of Rule 602. *Id.* Second, it must be rationally based, that is, the opinion must be one that a normal person would form on the basis of the facts observed. *Id.* Finally, the opinion must meet the "helpful" test. *Id.*

The facts in this case are these:

- Marks, Howard, and Claiborne left a club together on the morning of July 5, 2005. The three men went to the home of Alvin Benjamin.
- Upon arriving at Benjamin's house, Howard observed Marks and Claiborne assaulting the victim, Michael Walker.
- Howard then heard Marks state that he was going to run Walker over, and saw Marks get into a car and begin driving.
- When Marks started to move the car, Howard turned and ran from the scene. While running away, Howard heard the sound — "bl-bloom, bl-bloom, bl-bloom."
- At trial, Howard testified that the "bl-bloom, bl-bloom" sound was the sound of Marks running over Walker's body.

Marks asserts that the trial judge abused his discretion in allowing Howard to testify that the tell-tale bumping sound was the sound of Marks driving over Walker because Howard did not actually see what caused the sound. He contends that Howard lacked sufficient knowledge to distinguish the sound of a vehicle running over a human body as opposed to another object because there was no evidence that Howard had seen or heard a vehicle run over a human body on a prior occasion.

Marks is incorrect. For the first prong, under the *Carton* test, Howard's testimony concerning Marks driving over Walker was based on his personal knowledge of Marks's actions at the scene of the crime as already noted in the opinion. *See* Ark. R. Evid. 602 ("Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself."). This easily satisfies the first prong of the Rule 701 analysis.

Turning to the second prong, under *Carton*, Howard's opinion that the bumping sound he heard was Marks driving a car over Walker's body was formed on the basis of the facts Howard observed at the scene of the crime and his perception of what happened to Walker. It is not necessary that Howard actually heard previously the exact sound a car makes driving over a human body. Rather, it is sufficient that his opinion and inference were ones that a normal person would form on the basis of the facts he observed and what he heard. In *Felty v. State*, 306 Ark. 634, 816 S.W.2d 872 (1991), we stated that opinion testimony by lay witnesses is admissible "in observation of everyday occurrences, or matters within the common experience of most persons." The common experience of most persons when coupled with the facts Howard observed and what he heard at the scene of the crime reasonably leads to the inference Howard made in regard to the source of the sound.

Rule 701(1) speaks in terms of "perception" of the witness. "Perception" is not limited to what is actually seen, as Marks would have it. Rather, "perception" is defined in *Black's Law Dictionary* as "[a]n observation, awareness *or* realization, usually based on physical sensation or experience; appreciation or cognition." *Black's Law Dictionary* 1172 (8th ed. 2004) (emphasis added). Here, Howard saw the fight, heard the threat, saw Marks get into the car and start driving toward Walker, and then heard

the sound of the car running over the body. Based on this, he could certainly form his opinion based on perception that Marks, in fact, ran over Walker.

[redacted] Finally, Howard's opinion testimony was helpful to a determination of a fact in issue, which is the third prong. That fact was whether Marks was the driver of the car that ran over Walker's body. Because Howard's opinion testimony satisfies the three-prong analysis for determining admissibility under Rule 701, there was no abuse of discretion by the circuit judge in allowing it into evidence.

Marks next urges that the circuit judge erred by failing to correct, sua sponte, defense counsel's misstatement of the law regarding the burden of proof during his opening statement. At trial, Marks's counsel reserved his opening statement until after the State had presented its case-in-chief. After the prosecution rested, Marks's counsel began his opening statement by saying, "If you will recall, yesterday morning the judge told you that I would reserve my opening statement until such time as the burden shifts, or at least until the close of the State's case. The responsibility from this point on is for the defendant to move forward." Defense counsel failed to raise an objection to his own statement.

Marks recognizes that this court does not recognize "plain-error" and that the contemporaneous-objection rule has not been complied with here. Marks, nevertheless, asks this court to expand the recognized *Wicks* exceptions to the contemporaneous-objection rule to include a statement that the burden of proof in a criminal case has shifted to the defendant, when made by the defendant's own trial counsel, even though defense counsel did not object to his own statement.

Marks is correct that Arkansas does not recognize the plain-error rule, under which plain errors affecting substantial rights may be reviewed on appeal although they were not brought to the attention of the trial judge. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). It is a fundamental rule of this court that an argument for reversal will not be considered absent an appropriate objection in the trial court. *Id.* Four exceptions are recognized: (1) when a trial court fails to bring to a jury's attention a matter essential to the consideration of the death penalty; (2) when an error is made by a trial judge himself or herself at a time when defense counsel has no knowledge of the error and thus no opportunity to object; (3) when the serious nature of an error

obligates the trial judge to intervene, without objection, either by admonition to the jury or the declaration of a mistrial; and (4) when an evidentiary ruling affects substantial rights. *Id.* Our case law is clear that *Wicks* presents only narrow exceptions that are to be rarely applied. *Anderson v. State*, 353 Ark. 384, 398, 108 S.W.3d 592, 600 (2003).

[redacted] Admittedly, the facts involved in this point are somewhat bizarre because Marks argues that his defense counsel erred in his statement, did not object to his own error, but that the circuit judge should have stepped in and corrected it. It is, of course, a fundamental principle of criminal law that the State has the burden of proving the defendant guilty beyond a reasonable doubt. Marks asks this court to determine whether a statement indicating that the burden of proof in a criminal case has shifted to the defendant, when made by the defendant's own counsel, implicates the third *Wicks* exception. Marks's argument presupposes that defense counsel incorrectly stated the burden of proof. We are not convinced that he did. Defense counsel started to say that he had reserved his opening statement until the burden shifted, but then quickly corrected himself to say until the prosecution rested. He then said that "the responsibility from this point on is for the defendant to move forward." Nothing in these statements impressed upon the jury the idea that the defendant had the burden of proving his innocence. Rather, the statements referred to the defendant's ability to proceed with the presentation of defense evidence, if the defendant so desired.

In like situations, this court will defer to the superior position of the circuit judge to control and manage the arguments of counsel. *Anderson*, 353 Ark. at 405-06, 108 S.W.3d at 606. We note, in addition, that the correct burden of proof was stated to the jury in the closing argument of counsel for both parties and in the circuit judge's final instructions. This court will not reverse the action of a trial court in matters pertaining to its control, supervision, and determination of the propriety of arguments of counsel in the absence of a manifest abuse of discretion. *Id.* at 395, 108 S.W.3d at 598. We conclude that the defense counsel's statements were not so flagrantly incorrect as to compel a finding that the circuit judge's failure to intervene, sua sponte, and instruct the jury as to the law was a manifest abuse of discretion.

The record in this case has been reviewed in accordance with Arkansas Supreme Court Rule 4-3(h), and no reversible error has been found.

Affirmed.

CORBIN and DANIELSON, JJ., concur.

PAUL E. DANIELSON, Justice, concurring. I, too, affirm Marks's judgment and conviction because I cannot say that the admission of Howard's testimony constituted reversible error. However, I do so because, despite the circuit court's abuse of discretion in admitting the testimony, that error was harmless.

Here, a review of the record reveals that Howard testified to the following on direct examination: (1) that when Marks finished hitting Walker, Marks said that he was "going to run [Walker] over"; (2) that Marks then"[j]umped in the car"; (3) that Marks moved the car; (4) that the car ran over Walker; and (5) that he then left and went home. However, it was revealed on cross-examination that Howard did not see Marks run over Walker.[1] Howard testified that "[w]hen [Marks] jumped in the car, that's when I left." He then confirmed that he "ran off before this incident." Following this testimony, on redirect examination, Howard clarified his testimony, stating that he did not see Marks run over Walker, but heard a noise. In addition, Howard testified that he saw the car driving after him, which Marks was driving.

With respect to Rule 701, we have held that the rule today is not a rule against conclusions, but is a rule conditionally favoring them. *See Moore v. State*, 362 Ark. 70, 207 S.W.3d 493 (2005). Here, the majority attempts to interpret and construe the rule; however, we have already done so, and it is our prior interpretation that renders the admission of Howard's testimony erroneous.

In *Felty v. State*, 306 Ark. 634, 816 S.W.2d 872 (1991), we examined Felty's argument that the circuit court erred in admitting the testimony of two lay witnesses because their statements were conclusions that could not be supported by personal knowledge. While ignored by the majority, this court specifically discussed the rule and the testimony it contemplates:

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[1] It is important to note that it was not until cross-examination that Howard testified that he did not actually see Marks run over Walker. Thus, there is no issue regarding preservation for our review, as Marks objected at the first opportunity.

> [The rule] provides that a lay witness may give an opinion with two (2) limitations. Limitation (1) is the requirement of firsthand knowledge or observation. Limitation (2) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not an opinion or conclusion. For example, if a witness is asked, "What kind of day was it?" he might respond, "Beautiful." It would be an admissible opinion. He would not have to state it was a clear skied, sunny, 72 degree spring day with a slight breeze. The witness can respond in everyday language which includes his conclusion about the type of day. However, if attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the Rule. See Advisory Committee's Notes to Federal Rule 701.
>
> *In sum, opinion testimony by lay witnesses is allowed in observation of everyday occurrences, or matters within the common experience of most persons. Statements by eyewitnesses that the victim was "scared" and "trying to get away" easily fit within the limitations imposed on lay witness opinion.*

306 Ark. at 639-40, 816 S.W.2d at 875 (emphasis added). Under this court's interpretation of the rule, it is clear that Howard's testimony did not meet the requirements of the rule, as he lacked firsthand knowledge nor was his opinion, that Walker was run over, rationally based on his perception of an everyday occurrence.

According to *Felty*, Howard's testimony was only admissible, pursuant to Rule 701, if it was rationally based on an observation of everyday occurrences or a matter within the common experience of most persons. I simply cannot agree that the sound "bl-bloom, bl-bloom" is an everyday occurrence or within the common experience of most persons, as is suggested by the majority's analysis. For Howard to be permitted to testify that Marks did in fact run over Walker, when Howard did not witness such, was simply an abuse of discretion by the circuit court.

In sum, Howard's testimony, here, "ran over," had to be rationally based on a perception of an everyday occurrence. It is absurd, and clearly contrary to our case law, to suggest that an opinion based on the sound of "bl-bloom, bl-bloom" is the equivalent of an opinion regarding the weather or one's impres-

sion of another, as set forth in *Felty*.[2] Indeed, Howard's statement that Marks ran over Walker is precisely the type of meaningless assertion amounting "to little more than choosing up sides" that the rule requires be excluded. Howard lacked personal knowledge, and further, his testimony was not rationally based on a perception of an everyday occurrence. For that reason, the circuit court abused its discretion in allowing Howard's testimony.

That being said, Howard's testimony was merely cumulative to that of Bobbie Riley and, further, the medical examiner. Riley testified that Marks and Claiborne beat and kicked Walker, and, afterward, Marks stated that he was going to run Walker over. She further stated that before Marks ran Walker over, he pulled Walker's body to the middle of the road, behind the car, then started the car and ran over Walker. In addition, the medical examiner testified that Walker's body surface showed "road rash," which was indicative of an individual being run over by a motor vehicle.

We have repeatedly held that prejudice is not presumed and that no prejudice results where the evidence erroneously admitted was merely cumulative. *See Wright v. State*, 368 Ark. 629, 249 S.W.3d 133 (2007). Moreover, we do not reverse for harmless error in the admission of evidence. *See id.* Because the admission of Howard's testimony was harmless due to its cumulative nature, I would affirm on this point. I, therefore, concur.

CORBIN, J., joins.

[2] Such a sound, as described, could just as easily been a blown tire or a car driving over the curb. Whatever inference was to be drawn from Howard's testimony, prior to his statement that Marks ran over Walker, was within the jury's province.

Roy REED *v.* STATE of Arkansas

CR 08-345 289 S.W.3d 921

Supreme Court of Arkansas
Opinion delivered December 19, 2008

[redacted]

Appellant, pro se.

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

ROBERT L. BROWN, Justice. Appellant Roy Reed has filed this pro se appeal from the circuit judge's denial of his petition for postconviction relief, which was lodged pursuant to Arkansas Rule of Criminal Procedure 37.1.

The history of the case is as follows. In 2005, Reed was convicted of possession of methamphetamine, manufacturing methamphetamine, and possession of paraphernalia with the intent to manufacture methamphetamine. He was sentenced as a habitual offender to eight years, thirty years, and eight years, respectively, to be served concurrently. He appealed and argued that the circuit judge erred in denying his motion for directed verdict on the charge of possession of drug paraphernalia with intent to manufacture. The court of appeals affirmed in an unpublished opinion. *See Reed v. State*, CACR 06-271 (Ark. App. Nov. 29, 2006) (unpublished).

On February 15, 2007, Reed filed the petition for postconviction relief, which is at issue in this case, and raised three points: (1) that he was subjected to double jeopardy because possession of methamphetamine is a lesser-included offense of manufacturing methamphetamine; (2) that his trial counsel was ineffective for failing to make an accomplice-corroboration argument; and (3) that his trial counsel was ineffective for failing to object with respect to the affidavit supporting the search warrant for his residence. The circuit judge denied Reed's petition without a hearing and said:

> Petitioner's convictions were affirmed on direct appeal on November 29, 2006 (CACR-06-271). Petitioner has filed the instant Rule 37 petition alleging several errors on the part of his trial counsel. The allegations are: counsel failed to make double jeopardy arguments; failure of counsel to seek correction of a sentence illegally imposed; failure of counsel to make a accomplice corroboration argument; and, failure of counsel to make specific objections in his motion to suppress.

> Because each of the allegations complained of in the Rule 37 petition could have been raised on direct appeal and were not, Petitioner has waived the arguments. *See Blair v. State*, 290 Ark. 22 (1986).

The petition was then dismissed with prejudice. No findings of fact or conclusions of law were contained in the judge's order.

There are two problems with the judge's order. The first is an error of law. While it is true that, ordinarily, Rule 37.1 does not provide a remedy when an issue could have been raised in the trial or argued on appeal, an exception is made for errors that are so fundamental as to render the judgment of conviction void and subject to collateral attack. *See Finley v. State*, 295 Ark. 357, 748 S.W.2d 643 (1988). This court has held that a violation of double jeopardy is such a fundamental error. *See Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000). So too is an allegation of ineffective assistance of counsel for failure to raise critical issues at the trial level on the defendant's behalf, which prejudiced the defendant's right to a fair trial. *See, e.g.*, *McGehee v. State*, 348 Ark. 395, 72 S.W.3d 867 (2002). It is beyond dispute that the latter issue may be raised in a petition for postconviction relief such as we have before us. *See* Ark. R. Crim. P. 37.1 through 37.5 (2008). All of Reed's points on appeal fall within these exceptions. Hence, the circuit judge's decision to dismiss Reed's appeal on the basis of waiver was error.

This leads to the second problem we face with the judge's order. Because of his dismissal of Reed's petition due to waiver, he made no written findings as required by Rule 37.3. This court has held that Rule 37.3(a) is mandatory and requires written findings. *See, e.g.*, *Scott v. State*, 351 Ark. 619, 96 S.W.3d 732 (2003); *Bilyeu v. State*, 337 Ark. 304, 987 S.W.2d 277 (1999); *Williams v. State*, 272 Ark. 98, 612 S.W.2d 115 (1981). It is elementary that this court cannot reach the merits of a postconviction claim for relief absent a circuit judge's written findings of fact because, on review, this court determines whether the findings are supported by a preponderance of evidence. *See Williams*, 272 Ark. at 99, 612 S.W.2d at 115-116. Unless the findings are clearly erroneous, they will be affirmed. *Id.* In short, without such specific findings, there can be no meaningful review.

This court has, on occasion, affirmed the denial of a Rule 37 petition notwithstanding the circuit judge's failure to make writ-

ten findings under Rule 37.3(a), but we have done so only in two circumstances: (1) where it can be determined from the record that the petition is wholly without merit, or (2) where the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted. *Bilyeu*, 337 Ark. at 305, 987 S.W.2d at 277 (reversing and remanding where there were allegations contained in the petition for postconviction relief that were supported by assertions of fact that precluded summary dismissal); *see also Long v. State*, 294 Ark. 362, 742 S.W.2d 942 (1988) (affirming the denial of a Rule 37 petition notwithstanding the absence of trial court findings when we could determine from the record that the petition was without merit.) We conclude that none of Reed's points on appeal are so conclusive on the face of the petition or on the face of the record to show that no relief is warranted. We take this opportunity to emphasize that it is not incumbent on this court to scour the record in a Rule 37 appeal to determine if the petition is wholly without merit when there are no written findings. That is the circuit judge's function, if no hearing is held.

For these reasons, we reverse the circuit judge's order of dismissal and remand for compliance with Rule 37.3. It may well be that the circuit judge will want to hold a hearing on Reed's petition pursuant to Rule 37.3(c), following which he must make findings of fact and conclusions of law. If he does not conduct a hearing, he must make written findings for this court to review under 37.3(a).

Reversed and remanded.

Barbara DESCHNER, Individually and as Court Appointed Guardian of Christopher Deschner *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, and Allstate Insurance Company

07-1159 290 S.W.3d 6

Supreme Court of Arkansas
Opinion delivered December 19, 2008

Parker Law Firm, by: *Tim S. Parker*, for appellant.

Huckabay, Munson, Rowlett & Moore, P.A., by: *Sarah E. Greenwood*, for appellee State Farm Mutual Automobile Insurance Company.

Benson & Wood, PLC, by: *Brian Wood*; and *Meckler, Bulger & Tilson, LLP*, by: *Peter J. Valeta*, for appellee Allstate Insurance Company.

JIM GUNTER, Justice. This appeal arises from two orders of the Carroll County Circuit Court granting summary judgment in favor of Appellees State Farm Mutual Automobile Insurance Company, Inc. (State Farm) and Allstate Insurance Company, Inc. (Allstate). Appellant Barbara Deschner (Deschner), individually and as the court appointed guardian of her son, Christopher Deschner, appeals both orders of the circuit court. We affirm.

On October 31, 2002, eleven-year old Christopher Deschner was shot in the eye by a paintball fired from a vehicle while he was trick-or-treating. The vehicle was driven by Keith Blane Neal. Derek Balance and Gene Jackson were passengers in the vehicle. Christopher Deschner sustained injuries to his eye, including loss of peripheral vision, a decrease in vision from 20/20 to 20/80 and migraine headaches associated with optic damage. Deschner filed suit against Neal, Jackson, and Balance in Carroll County Circuit Court alleging that they were liable for Christopher's injuries. *See Deschner v. Balance*, Carroll County (W.D.) No. 2002-172.

The vehicle driven by Keith Neal was insured by an automobile insurance policy issued by State Farm. Neal's parents, Pamela and Gordon Neal (the Neals), were also insured by a homeowner's policy issued by Allstate. On August 7, 2006, State Farm filed a complaint for declaratory judgment, seeking a declaration of the rights and relations of the parties pursuant to the automobile insurance policy issued to the Neals. In its complaint, State Farm asserted that it did not provide liability coverage for the claims against Balance or Jackson because they were not "using the insured automobile." State Farm also contended that it did not provide liability coverage for the claims against Neal because the claims "do not seek damages because of 'bodily injury' caused by an 'accident resulting from the ownership, maintenance, or use of your car.' " The circuit court granted summary judgment in the declaratory-judgment action filed by State Farm.

On August 29, 2006, Deschner filed a third-party complaint against Allstate, alleging that Keith Neal was covered by the homeowner's insurance policy issued by Allstate to his parents. The third-party complaint stated, "[a]s a matter of law, the injuries suffered by Christopher Deschner did not arise out of the operation, maintenance, or use of an automobile as correctly decided by a previous order of this Court granting the motion for summary judgment filed by State Farm Mutual Automobile Insurance Company." Allstate answered the complaint, denying Deschner's alle-

gations, and then filed a counterclaim and cross claim requesting declaratory judgment that the homeowner's policy did not cover any of the defendants.

State Farm and Allstate filed motions for summary judgment on February 20, 2007, and March 15, 2007, respectively. After hearings on both motions, the circuit court granted State Farm's motion for summary judgment on March 19, 2007, and granted Allstate's motion on May 11, 2007. Deschner filed a timely notice of appeal on May 31, 2007. On June 6, 2007, the circuit court entered a judgment against Balance, Neal, and Jackson, finding them jointly and severally liable for Christopher Deschner's injuries and awarding Deschner $100,000 on her negligence claims. Deschner's appeal of the orders granting summary judgment to State Farm and Allstate was certified to us from the Arkansas Court of Appeals on October 28, 2008, because it involves an issue of substantial public interest and a significant issue needing clarification or development of the law pursuant to Ark. Sup. Ct. R. 1-2(b)(4) and (5) (2008).

On appeal, Deschner asserts that the circuit court erred in granting summary judgment in favor of Allstate. In the alternative, Deschner asserts that the circuit court erred in granting summary judgment in favor of State Farm.

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 entitled to judgment as a matter of law. *See Anglin v. Johnson Reg'l Med. Ctr.*, 375 Ark. 10, 289 S.W.3d 28 (2008). 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.*

In the present case, the circuit court ruled that neither the State Farm automobile policy nor the Allstate homeowner's policy provided coverage for Christopher Deschner's injuries. Our law

regarding the construction of insurance contracts is well settled. *McGrew v. Farm Bureau Mut. Ins. Co.*, 371 Ark. 567, 268 S.W.3d 890 (2007); *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 & Cas. 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. *McGrew*, *supra*; *Elam*, *supra*. Once it is determined that coverage exists, it then must be determined whether the exclusionary language within the policy eliminates coverage. *McGrew*, *supra*; *Norris*, *supra*. Exclusionary endorsements must adhere to the general requirements that the insurance terms must be expressed in clear and unambiguous language. *McGrew*, *supra*. 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.*

I. State Farm Automobile Policy

We will first address the circuit court's order granting summary judgment in favor of State Farm. In its motion for summary judgment, State Farm argued that Deschner's claims were not covered by the State Farm automobile policy because the claims did not arise out of an accident resulting from the ownership, maintenance, or use of the car. The State Farm policy states, in pertinent part:

> We will:
>
> 1. Pay damages which an insured becomes legally liable to pay because of:
>
> a. bodily injury to others, and
>
> b. damage to or destruction of property including loss of its use,
>
> caused by accident resulting from the ownership, maintenance or use of your car.

Deschner concedes in her response to Allstate's motion for summary judgment that the.State Farm policy does not provide coverage by stating that "the shooting of Christopher Deschner

was not a *proper* 'use' or 'occupancy' of the automobile at issue." Deschner even admits in her third-party complaint against Allstate that the State Farm policy does not provide coverage by stating, "[a]s a matter of law, the injuries suffered by Christopher Deschner did not arise out of the operation, maintenance, or use of an automobile as correctly decided by a previous order of this Court granting the motion for summary judgment filed by State Farm Mutual Automobile Insurance Company." Although Deschner now attempts to revive her argument against State Farm, the argument is inconsistent and not fully developed. Thus, because Deschner concedes that the State Farm policy does not provide coverage, she has abandoned this argument on appeal, and we need not address this issue.

II. Allstate Homeowner's Policy

For her second point on appeal, Deschner asserts that "if Christopher Deschner's injuries would not be covered by the language of the automobile policy insuring Keith Blane Neal then they should be covered under the Neals' homeowner's policy with Allstate for the unintentional negligent conduct of its insured Keith Neal." Specifically, Deschner contends that Allstate contractually agreed that it would be obligated to pay damages up to the applicable policy limits for acts of negligence of Keith Neal that caused injury to Christopher Deschner.

In response, Allstate admits that Keith Neal was insured under the homeowner's policy issued to his parents, but asserts that there are no issues of material fact in this case. Allstate additionally argues that the homeowner's policy provides no coverage because (1) the paint-ball shooting was not a covered "occurrence"; (2) the homeowner's policy excludes coverage for injuries resulting from intentional acts of the insured person; and (3) Deschner's sole claim against Keith Neal is based on his "use" and "occupancy" of a motor vehicle.

Allstate's homeowner's policy states that it will provide coverage for the following:

> Subject to the terms, conditions and limitations of this policy, Allstate will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies, and is covered by this part of the policy.

Allstate excludes the following from coverage:

> 1. We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if:
>
> a) such insured person lacks the mental capacity to govern his or her conduct;
>
> b) such bodily injury or property damage is of a different kind or degree than intended or reasonably expected;
>
> c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.
>
> . . . .
>
> 5. We do not cover any bodily injury or property damage arising out of the ownership, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of any motor vehicle or trailer . . . .

Deschner asserts that the exclusionary language in the Allstate policy is almost identical to the language included in the State Farm policy. The State Farm policy includes coverage for injuries arising out of the ownership, maintenance, and use of a vehicle, and the Allstate policy excludes coverage for injuries arising out of the ownership, maintenance, use, *or occupancy* of a vehicle. Regarding the provisions in the two policies, the circuit court stated:

> The State Farm policy says that we cover ownership, maintenance or use. Allstate says that we don't cover ownership, maintenance, use, occupancy or anything that involves that automobile we do not cover it and in this instance I think that the policy language is pretty definite. They say that if you want to be covered by automobile insurance you have got to buy an automobile policy . . . . So I think, unfortunately we have a situation here that neither the automobile policy nor the homeowners insurance would cover this.
>
> . . . .
>
> I know the terms of this policy because I think the terms of [Allstate's] policy are much broader than the [State Farm poli-

> cy]. The [Allstate] policy pretty much says that if you have anything to do with an automobile it is not covered.

The provision in the Allstate policy excluding coverage for the "ownership, maintenance, use, or occupancy" of a vehicle is clear and unambiguous. There is no question of fact regarding Neal's occupancy of the vehicle. Christopher Deschner's injuries were the result of a paint ball fired from the Neals' car that was occupied by Keith Neal, Derek Balance and Gene Jackson. Giving effect to the plain language of the policy, *see McGrew, supra,* we hold that Christopher Deschner's injuries are clearly excluded from coverage because they arise out of the occupancy of a vehicle. Accordingly, we affirm the orders of the circuit court granting summary judgment in favor of both State Farm and Allstate.

Affirmed.

IMBER, J., not participating.

Dwain OLIVER *v.* Ronnie PHILLIPS, Calhoun County Election Commission (Hon. Allen G. Watson, Chair; Hon. James Rawls; Hon. Barbara Floss); and Hon. Charlie Daniels, in his Official Capacity as Secretary of State, Arkansas's Chief Election Officer

08-1209 290 S.W.3d 11

Supreme Court of Arkansas
Opinion delivered December 19, 2008

Tony Joe "T.J." Huffman and *Compton, Prewett, Thomas and Hickey, P.A.*, by: *Floyd M. Thomas, Jr.*, for appellant.

Robin J. Carroll, Calhoun County Prosecuting Att'y, for appellee Calhoun County Board of Election Commissioners.

James M. Pratt, Jr., P.A., by: *James M. Pratt, Jr.*, for appellee Ronnie Phillips.

JIM GUNTER, Justice. Appellant, Dwain Oliver, appeals his unsuccessful challenge to his opponent's qualifications in a judicial race in Calhoun County. Appellant asserts the trial court erred in holding that: (1) it lacked jurisdiction to grant appellant's petition and (2) the issue presented by appellant's petition was moot. Because this appeal pertains to elections and election procedures, this court has jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(a)(4). We affirm.

On March 11, 2008, appellant and appellee Ronnie Phillips were certified by the Calhoun County Board of Election Commissioners as candidates for the position of Calhoun County District Judge. On May 19, 2008, one day before the general election, and sixty-nine days after certification, appellant filed a petition for declaratory relief and motion for writ of mandamus, asserting that Phillips was a resident of Dallas County, not Calhoun County, and was thus ineligible to be a candidate.[1] To support his argument, appellant cited amendment 80, section 16(D) of the Arkansas Constitution, which states:

> All Justices and Judges shall be qualified electors within the geographical area from which they are chosen, and Circuit and District Judges shall reside within that geographical area at the time of election and during their period of service. A geographical area may include any county contiguous to the county being served when there are no qualified candidates available in the county to be served.

Appellant requested that Phillips's name be stricken from the ballot and that any votes cast for Phillips not be counted. Appellant requested an expedited hearing at the court's earliest opportunity and served notice to Phillips and the other appellees on May 19.

The general election was held on May 20, with Phillips receiving 151 votes and appellant receiving 126 votes. On May 22, appellant filed a motion for preliminary injunction, asking the court to enjoin the Calhoun County Election Commission (the Commission) and the Secretary of State from certifying the election results.

On May 23, the Commission filed a response to appellant's petition for declaratory relief and writ of mandamus. In its response, the Commission argued that because no hearing was held

[1] Appellant named Phillips, the Calhoun County Election Commission, and the Secretary of State, Charlie Daniels, as defendants to the suit.

or ruling was made prior to the election, appellant's petition and motion were moot. Phillips filed a separate response on May 28 in which he also asserted appellant's request was moot.

A hearing on the matter was held on May 28. At the hearing, the Commission argued that the case should be dismissed for two reasons: (1) because the petition was filed one day prior to the election, it was impossible to have the hearing within two to seven days pursuant to Ark. R. Civ. P. 78(d) (2008),[2] and the issue is now moot; (2) because the court did not have jurisdiction to decide a pre-election challenge post-election. At the conclusion of the hearing, the court agreed with the Commission and found that "a pre-election issue being decided post-election is outside the jurisdiction of the Court." In its order, filed June 23, 2008, the court made the following findings:

> 3. There are two types of election contests provided for by statute: pre-election eligibility challenges and post-election, election contests. *Zolliecoffer v. Post*, 371 Ark. 263, 264 (2007). A party wishing to challenge a candidate's eligibility to stand for election must bring the challenge by way of a petition for writ of mandamus and declaratory judgment prior to the election. *Id.* at 265.
>
> 4. Arkansas statutes do not provide for a post-election petition for writ of mandamus and complaint for declaratory relief to challenge a candidate's eligibility. *Pederson v. Stracener*, 354 Ark. 716, 128 S.W.3d 818 (2003). Although Oliver's petition was filed pre-election, the timing of his petition made it impossible for this issue to be resolved prior to the election.
>
> 5. Because the issue was presented but not expedited and ruled on prior to the election, the issue is now moot. *Ball v. Phillips County Election Commission*, 364 Ark. 574, 222 S.W.3d 205 (2006). Nor does this court have jurisdiction to decide a pre-election eligibility issue in a post-election proceeding. *Zolliecoffer*, cited above.

Appellant then filed a notice of appeal to this court on July 21, 2008.

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[2] Arkansas Rule of Civil Procedure 78(d) provides:

> Upon the filing of petitions for writs of mandamus or prohibition in election matters, it shall be the mandatory duty of the circuit court having jurisdiction to fix and announce a day of court to be held no sooner than 2 and no longer than 7 days thereafter to hear and determine the cause.

The right to contest an election is purely statutory. *Pederson v. Stracener*, 354 Ark. 716, 128 S.W.3d 818 (2003). A statutory right to challenge the eligibility of a candidate before the election is provided by Ark. Code Ann. § 7-5-207(b) (Supp. 2007); however, this statute only allows pre-election challenges to a candidate's eligibility. *Zolliecoffer v. Post*, 371 Ark. 263, 265 S.W.3d 114 (2007).[3] Post-election, the only private right to challenge an election is found under Ark. Code Ann. § 7-5-801 (Repl. 2007), which provides for a challenge by a candidate to contest certification by the county board of election commissioners.

On appeal, appellant first asserts that the trial court erred in finding that it lacked jurisdiction to consider appellant's petition. In its order, the trial court cited *Zolliecoffer, supra*, for the proposition that it had no jurisdiction to decide a pre-election eligibility issue in a post-election proceeding. In *Zolliecoffer*, the losing candidate in a mayoral election filed a petition for writ of mandamus and declaratory judgment two days after the election. This court held that the trial court lacked subject-matter jurisdiction to consider the petition because the petition was filed post-election. Appellant argues that the case at bar is distinguishable because he filed his petition pre-election, not post-election, and therefore the trial court had jurisdiction to decide the case on the merits and prior to the official vote certification.

In response, appellees argue that although appellant's petition was filed pre-election, the lateness of the filing made it impossible to conduct a hearing on the merits prior to the election and within the "no sooner than 2 and no longer than 7 days" requirement of Rule 78(d). And because Arkansas election law does not provide for a post-election petition for a writ of mandamus and declaratory relief, the trial court was without jurisdiction to hear the matter post-election. *Pederson, supra*.

Appellant did file his petition pre-election, albeit by only one day. Consequently, the trial court had jurisdiction when appellant's petition was filed, and Arkansas case law has established that "where a court once rightfully acquires jurisdiction of a cause,

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[3] Arkansas Code Annotated section 7-5-207(b) provides in pertinent part:

> 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 or she is a candidate[.]

it has the right to retain and decide." *Wasson v. Dodge*, 192 Ark. 728, 730, 94 S.W.2d 720, 721 (1936) (citing *Estes v. Martin*, 34 Ark. 410, 419 (1879)). *Zolliecoffer* and *Pederson* are both distinguishable because the appellants in those cases did not file their petitions pre-election. Accordingly, we hold that because the action was filed pre-election, the trial court did have jurisdiction, and that jurisdiction was not subsequently erased by the election.

For his second argument on appeal, appellant contends that the trial court erred in finding that the issue presented by appellant was moot. The trial court's order stated that "because the issue was presented but not expedited and ruled on prior to the election, the issue is now moot" and cited *Ball v. Phillips County Election Commission*, 364 Ark. 574, 222 S.W.3d 205 (2006). In *Ball*, this court held that a petition challenging the eligibility of a candidate, filed eight days before the election, was untimely and moot. In so holding, we stated:

> Ball failed to pursue her petition for mandamus and declaratory judgment expeditiously in order to obtain the remedy to remove Jones' name from the ballot before the election or before the election results were certified. In other words, Ball's lawsuit became moot due to her own failure to act timely in the special proceeding.

Id. at 579, 222 S.W.3d at 208. We also noted that the candidates' names were certified approximately thirty-eight days previously, and Ball offered no compelling reason for waiting until eight days before the election to file her petition.

Appellant attempts to distinguish the holding in *Ball* by arguing that Ball's appeal was deemed moot but the petition itself was only deemed untimely. However, this is a distinction without a difference, because in *Ball* it was the untimeliness of the petition that rendered the case moot. *See id.* at 578, 222 S.W.3d at 207 ("Ball's inability to have Jones' name removed from the ballot . . . was due to her decision to wait until eight days before the election to file her petition . . . . In short, this election case is moot.") As in *Ball*, appellant failed to pursue his petition expeditiously in order to obtain the remedy of removing Phillips's name from the ballot before the election, and appellant has offered no compelling reason for his delay in filing the petition.

In addition, waiting until the day before the election to file the petition rendered it impossible for the trial court to fulfill the requirement under Rule 78(d) that the trial court hold a hearing

no sooner than two and no longer than seven days thereafter. We established in *Ball* that this type of eligibility challenge should be filed in time to resolve all relevant issues prior to the election. *See* 364 Ark. at 577-78, 222 S.W.3d at 207 ("If Ball had filed her suit within this thirty-eight day period [after certification] . . . there would have been ample time in which to resolve all relevant issues raised by Ball prior to the September 21, 2004 election.") Also, this court has clearly stated that "[o]nce the election takes place, the issue of a candidate's eligibility under § 7-5-207(b) becomes moot." *Clement v. Daniels*, 366 Ark. 352, 355, 235 S.W.3d 521, 523 (2006) (citing *State v. Craighead County Bd. of Election Comm'rs*, 300 Ark. 405, 779 S.W.2d 169 (1989)). We therefore affirm the trial court's finding that the issue presented in appellant's petition was moot.

Appellant also makes the argument that there is a contradiction between amendment 80's "at the time of the election" provision and § 7-5-207(b)'s "qualified and eligible at the time of filing as a candidate" language. Appellant asserts that the case was ripe, not moot, at the time it was filed at the brink of the election because under the clear language of amendment 80, a judicial candidate has until "at the time of election" to bring himself within the qualifying parameters by establishing a residence in the geographical area and becoming a qualified elector. According to appellant, the trial court erred in "elevating the Election Code's statutory provisions and case law enforcement procedures over the Constitution's controlling provisions to dismiss the action below."

Though the circuit court ruled on this issue from the bench, the final written order did not address this issue. In a recent case where the judge made a constitutional decision from the bench, we said: "Pursuant to Administrative Order 2(b)(2), an oral order announced from the bench does not become effective until reduced to writing and filed." *McGhee v. Ark. State Bd. of Collection Agencies*, 368 Ark. 60, 67, 243 S.W.3d 278, 284 (2006). When the circuit court makes no ruling on an issue, the appellate court is precluded from reaching the issue on appeal. *Travis v. State*, 371 Ark. 621, 369 S.W.3d 341 (2007). Therefore, this issue is not preserved for our review.

In conclusion, we hold that the trial court did have jurisdiction to consider appellant's petition, but that the trial court was correct in its finding that the petition was moot.

Affirmed.

Nadine WILSON *v.* Dardanelle District of the YELL COUNTY DISTRICT COURT

08-901 290 S.W.3d 1

Supreme Court of Arkansas
Opinion delivered December 19, 2008

Sanford Law Firm, PLLC, by: *Josh Sanford* and *Vanessa Kinney*, for appellant.

Ralph C. Ohm, for appellee.

PAUL E. DANIELSON, Justice. This appeal arises from an order of the Yell County Circuit Court denying a petition for writ of mandamus filed by appellant Nadine Wilson against appellee Dardanelle District of the Yell County District Court ("district court"). On appeal, Wilson argues that the circuit court erred in ruling that Wilson could not use the small-claims division of the district court in her efforts to collect small-claims judgments. Wilson further contends that the circuit court erred in ruling that she would be required to be represented by counsel to collect those judgments. We affirm the circuit court's order.

Wilson owns a collection agency called Seneca Collection Agency, Inc. and Sunstone Judgment Recovery (Sunstone), which is a "judgment-recovery" business. Acting individually through Sunstone, Wilson became the owner of assignment of judgments in the following cases: (1) *Lawrence Vaughn d/b/a Vaughn's Truck & Equipment v. Daniel Warren d/b/a Daniel Warren Trucking*, Case No. 2005-430, in the amount of $1,091.97; (2) *Paula White d/b/a Room 2 Room v. Amber Robuck*, Case No. 2005-247, in the amount of $393.88; (3) *Paula White d/b/a Room 2 Room v. Katie Sue Owens*, Case No. 2005-248, in the amount of $417.61; (4) *Paula White d/b/a Room 2 Room v. Carla McNeese*, Case No. 2005-249, in the amount of $611.40; (5) *J.H. Hasty Jr. v. Jeremy Thomason*, Case No. 2004-208, in the amount of $353.29; (6) *Hobby Shop Deluxe d/b/a Henry Hutmacher, Charles H. Craig, Jr., and Douglas M. Harley v. Janet*

Elliot and Steve Elliot, Case No. 2003-1024, in the amount of $884.28; (7) *Roger Burns and Louise Burns v. Buddy Turner d/b/a Circle M. Movers*, Case No. 2004-1, in the amount of $4,533.29; (8) *Cogswell Motors v. Anthony Thomas*, Case No. 1997-137, in the amount of $1,477.34; (9) *Cogswell Motors v. Tammy Skelton*, Case No. 1998-155, in the amount of $623.71; and (10) *Cogswell Motors v. Melissa Muck*, Case No. 2000-13, in the amount of $4,471.37. After a judgment was rendered by the district court, the small-claims, judgment-creditor plaintiffs signed an acknowledgment of assignment that assigned all title, rights, and interest to Wilson. The district court entered orders, acknowledging the assignment of these judgments to Wilson, between November 22, 2006, and March 28, 2007. These judgments were enforced through writs of garnishment.

Subsequently, on April 20, 2007, the district court entered an order setting aside the assignments. While not at issue in the instant case, Wilson appealed one case, *Roger and Louise Burns v. Buddy Turner d/b/a Circle M. Movers*, CV 2007-45, to circuit court. On May 30, 2007, the circuit court found the assignment of judgment in the *Burns* case valid and set aside the district court's order setting aside the assignment in the *Burns* case. In the district court, Wilson then filed a motion to reconsider setting aside the assignments, noting the circuit court's order setting aside the judgment. On July 20, 2007, the district court denied Wilson's motion to reconsider.

On October 1, 2007, Wilson filed a petition for writ of mandamus in the circuit court and alleged (1) that she had a right to collect the judgments pursuant to Arkansas Code Annotated § 16-65-120 (Repl. 2005), and (2) that the district court misinterpreted Rule 10(d)(4) of the District Court Rules and section 4 of Administrative Order 18. Further, Wilson averred that she was entitled to declaratory judgment under Ark. Code Ann. § 16-111-104 (Repl. 2006), on the grounds that the language of section 4(b) does not prevent her from filing a complaint under Arkansas Rule of Civil Procedure 3(a). In her prayer for relief, Wilson requested that the circuit court enter a declaratory judgment in addition to a writ of mandamus ordering the district court "to interpret and apply correctly all relevant laws." On October 25, 2007, the district court answered the writ, denying the allegations in Wilson's petition. Wilson filed a first-amended petition for writ of mandamus on November 13, 2007. The district court answered, pleading affirmative defenses, on November 27, 2007.

On February 5, 2008, the circuit court held a hearing on Wilson's petition for writ of mandamus. On cross-examination, Wilson stated that she enforced the judgment rather than collected the judgment and that there was a "fine line" between collection and enforcement. She further admitted that she typically received forty percent of what she recovered. After hearing testimony and arguments, the circuit court made the following conclusion:

> There [are] two concepts that the court is concerned with. One is as you both have pointed out that Administrative Order 18 (4)(b) provides that no action may be brought in Small Claims Court by any collection agency or an assignee of a claim. And further we have the concept that Mr. Ohm [representing Defendant] has pointed out that a person not licensed to practice law in the state can't represent another, and there is Arkansas case law and part of the Code Annotated that deals with that.
>
> The Court is going to find in this case that Ms. Wilson is a collection agency or an assignee and that she cannot use the court to collect debts on these judgments. Accordingly, your petition for mandamus will be denied.

On March 11, 2008, the circuit court denied Wilson's petition for writ of mandamus and entered an order, finding that Wilson was engaged in the practice of acting as a collection agency and did not have the authority to use the district court in her efforts to collect small-claim judgments in the small-claims division of the district court. Further, the circuit court found that Wilson was not a licensed attorney, was acting as a collection agent, and should have been required to be represented by counsel in order to collect district-court judgments in the civil division of the district court. Subsequently, on May 13, 2008, Wilson filed a motion for relief from the judgment pursuant to Arkansas Rule of Civil Procedure 60(a) (2008), and on May 23, 2008, the circuit court denied Wilson's Rule 60 motion. From the March 11 order, Wilson now brings her appeal.

For her first point on appeal, Wilson argues that the circuit court erred in ruling that she acted as a collection agency and that she was prohibited from "enforcing her judgments." Wilson contends that, under section 4(b) of Administrative Order 18, she should not be prohibited from enforcing her judgments in the small-claims division of a district court. In response, the district court asserts that the circuit court correctly determined that

Wilson engaged in the practice of acting as a collection agency. The district court asserts that the circuit court properly concluded that Wilson attempted "to collect judgments on behalf of third persons on a contingency fee basis." Further, the district court avers that Wilson "attempted to get around this prohibition by having the plaintiffs sign an assignment of judgment," which, the district court maintains, "was nothing more than an attempt to avoid Administrative Order No. 18." The standard of review on a denial of a writ of mandamus is whether the circuit court abused its discretion. *Dobbins v. Democratic Party of Arkansas*, 374 Ark. 496, 288 S.W.3d 639 (2008).

The issue is whether Wilson, while engaging in the practice of her judgment-recovery business, acted as a collection agency. Section 4(b) of Administrative Order 18 provides in pertinent part:

> 4. *Small Claims Division.* The small claims division shall have the same jurisdiction over amounts in controversy as provided in subsection 3 of this administrative order. Special procedural rules governing actions filed in the small claims division are set out in Rule 10 of the District Court Rules. The following restrictions apply to litigation in the small claims division:
>
> . . . .
>
> (b) *Entities restricted from bringing actions.* No action may be brought in the small claims division by any collection agency, collection agent, or the assignee of a claim or by any person, firm, partnership, association, or corporation engaged, either primarily or secondarily, in the business of lending money at interest. "Credit bureaus and collection agencies," by definition, shall include those businesses that either collect delinquencies for a fee or are otherwise engaged in credit history or business.

This issue involves the interpretation of our court rules. The first rule in considering the meaning and effect of a statute or rule is to construe it just as it reads, giving words their ordinary and usually accepted meaning in common language. *Stanley v. Ligon*, 374 Ark. 6, 285 S.W.3d 649 (2008). Court rules are construed by the same means and canons of construction used in statutory interpretation. *Id.*

[redacted] Section 4(b) defines "collection agencies" as "those businesses that either collect delinquencies for a fee or are otherwise engaged in credit history or business." Here, Wilson admitted

that, although she believed that she "enforce[d]" a judgment rather than "collected" a judgment, she nevertheless received forty percent of that judgment as "an agreement between the judgment creditor and [her]." Thus, because Wilson "collect[ed]" a "delinquenc[y] for a fee" under section 4(b), she fits the definition of a collection agency, which is restricted from bringing an action in the small-claims division of the district court.

Further, Wilson contends that she was assigned the judgment under Ark. Code Ann. § 16-65-120, which provides that a person or a party may transfer or sell a judgment or cause of action at any time after the lawsuit has been filed. She asserts that once a judgment was assigned to her, she had every right to collect it. However, under section 4(b), no "assignee of a claim" may bring an action in the small-claims division. Here, Wilson repeatedly admitted that she was assigned these claims. While she takes issue with the term of what she collected, we are left with the language of section 4(b), which calls for the collection of "delinquenc[ies]." A delinquency is defined as "[a] debt that is overdue in payment." *Black's Law Dictionary* 460 (8th ed. 2004). We interpret "delinquency" to include the judgments or debts in this case that Wilson collected. Therefore, based upon our interpretation of section 4(b) of Administrative Order 18, we hold that the circuit court properly ruled that Wilson engaged in the practice of acting as a collection agency.

For her second point on appeal, Wilson argues that even if she were a collection agency, then she was not "bringing an action" under section 4(b), but rather enforcing a judgment. Specifically, Wilson contends that she is not prohibited from acting in the district court because her act of filing acknowledgments of the assignment, as well as writs of garnishment, is not "an action" under section 4(b). The district court responds and argues that the circuit correctly found that Wilson was prohibited from using the small-claims court to collect judgments. Specifically, the district court avers that Wilson attempted to circumvent the process by attempting to assign a small-claim plaintiff's claim to herself and to name herself as a real party of interest.

However, the circuit court did not specifically rule on this issue of whether Wilson brought an action under section 4(b). Similarly, in her third point on appeal, Wilson raises the issue of whether she was a new party, under Rule 10(d)(4) of the District Court Rules, prohibited from bringing an action into the district

court. In fact, she concedes in her brief that the circuit court did not specifically cite to Rule 10(d)(4) in its ruling. We have held that we will not review a matter on which the circuit court has not ruled, and a ruling should not be presumed. *See Stilley v. University of Arkansas at Ft. Smith*, 374 Ark. 248, 287 S.W.3d 544 (2008). Accordingly, we decline to reach the merits of Wilson's second and third points on appeal.

Finally, Wilson argues that the circuit court erred in ruling that she should be required to be represented by counsel in order to collect district-court judgments in the small-claims and civil divisions of the district court. Specifically, Wilson claims that, regardless of whether she acted as a collection agency, she is entitled to represent herself in the enforcement of her judgments in the small-claims and civil divisions of the district court.

We have previously discussed that, in enforcing her judgments, Wilson acted as a collection agency, which is prohibited under section 4(b). In their briefs, both Wilson and the district court discuss whether she engaged in the practice of law. However, the circuit court did not make a specific ruling on that issue, and therefore, we are precluded from delving into the question. *See Stilley, supra.*

Affirmed.

June D. SCAMARDO *v.*
SPARKS REGIONAL MEDICAL CENTER

08-820 289 S.W.3d 903

Supreme Court of Arkansas
Opinion delivered December 19, 2008

[redacted]

[redacted]

[redacted]

[redacted]

Law Offices of Charles Karr, P.A., by: *Charles Karr*, for appellant.

Davis, Wright, Clark, Butt & Carithers, PLC, by: *Constance G. Clark* and *Sidney P. Davis, Jr.*, for appellee.

ELANA CUNNINGHAM WILLS, Justice. June Scamardo appeals the order of the Sebastian County Circuit Court granting summary judgment in favor of Sparks Regional Medical Center (Sparks). On appeal, Scamardo argues that the circuit court erred in refusing to apply the law of the case doctrine to preclude the motion for summary judgment filed by Sparks. Scamardo also contends that the trial court erred in holding that Sparks was entitled to charitable immunity and in refusing to rule that the charitable immunity doctrine should be abolished. Finally, Scamardo asserts that the circuit court erred in finding Rule 56 of the Arkansas Rules of Civil Procedure constitutional. We find no error and affirm.

This is the second time these parties have been before this court. In November 2002, Scamardo filed a medical negligence action against Sparks, Dr. Robert Jaggers, and Sparks's liability insurer, Steadfast Insurance Company (Steadfast). Under Arkansas case law governing the charitable immunity doctrine before May 2002, a plaintiff could only file an action against a qualified charitable entity by filing the action directly against the entity's insurer under the direct action statute, Ark. Code Ann. § 23-79-210. *See George v. Jefferson Hosp. Ass'n Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999). This state of the law changed with the decision in *Clayborn v. Bankers Standard Insurance Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002), where the court distinguished immunity from suit and immunity from liability, holding that immunity from suit means that an entity is not required to stand trial *at all*, but

immunity from liability is only a *defense* to a suit. Therefore, under *Clayborn*, the Arkansas direct-action statute — Ark. Code Ann. § 23-79-210 — only provided for direct action against a liability insurer if the insured entity was immune from suit in tort. *Id.* In *Clayborn*, this court specifically stated that it had "never said that charitable organizations are altogether immune from *suit*." *Id.* at 566, 75 S.W.3d at 179 (emphasis in original). Citing this court's precedent in *Clayborn*, the liability insurer in this case, Steadfast, filed a motion to dismiss Scamardo's complaint, contending that it was not a proper party defendant.

Scamardo appealed from the circuit court's order granting Steadfast's motion to dismiss. This court affirmed the circuit court's order in *Scamardo v. Jaggers*, 356 Ark. 236, 149 S.W.3d 311 (2004) (*Scamardo I*), declining to overrule *Clayborn*, and noting that "the losing party's insurer (here, Steadfast) can be bound to pay up to its policy limits any judgment entered against the nonprofit entity (Sparks)." *Scamardo I*, 356 Ark. at 247, 149 S.W.3d at 318. However, "the prevailing party in a lawsuit against the nonprofit may not execute on the property or assets of the nonprofit to satisfy any judgment." *Id.*

Scamardo voluntarily nonsuited her claims against Sparks and Dr. Jaggers a little more than a year after the decision in *Scamardo I*. Approximately nine months later, this court overruled both *Clayborn* and *Scamardo I* in *Low v. Insurance Co. of North America*, 364 Ark. 427, 220 S.W.3d 670 (2005). This court held that the direct action statute and the charitable immunity doctrine required a tort action to be filed directly against the entity's insurer, because a charitable entity is *completely* immune from suit and cannot be named as a defendant. Several months after *Low* was handed down, Scamardo refiled her claims against Sparks and Dr. Jaggers under the one-year savings statue — Ark. Code Ann. § 16-56-125(a)(1) (Repl. 2005), and several unnamed defendants, but failed to name Steadfast as a defendant. Sparks filed an answer to Scamardo's complaint, arguing that it was a nonprofit hospital and immune from suit under the charitable immunity doctrine, and, therefore, not a proper party defendant. Sparks subsequently filed a motion for summary judgment, alleging that it qualified for charitable immunity under the eight factors listed in *George*, *supra*, and arguing that it was not a proper party defendant. The circuit court granted this motion, dismissing Scamardo's complaint with prejudice. Additionally, the circuit court granted a motion filed by Scamardo to dismiss with prejudice her claims against Dr. Jaggers

and the unnamed defendants, all of whom had never been served with process in the action. Scamardo now appeals the circuit court's order granting summary judgment in favor of Sparks.

Summary judgment is to be granted by a circuit court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *See Health Res. of Ark., Inc. v. Flener*, 374 Ark. 208, 286 S.W.3d 704 (2008). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* The court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* The appellate court's review focuses not only on the pleadings, but also on the affidavits and documents filed by the parties. *Id.*

Scamardo first argues that the circuit court erred by granting Sparks's motion for summary judgment because the law of the case doctrine precluded Sparks from arguing that Scamardo's refiled complaint against it was barred by the doctrine of charitable immunity. Specifically, Scamardo argues that the law of the case doctrine applies because "Sparks took the position in *Scamardo I* that it was not immune from suit and that its insurance carrier was not subject to suit under the direct action statute." Accordingly, Scamardo contends, Sparks should not be allowed "to take inconsistent positions in *Scamardo I* and *Scamardo II* and win on each of them."[1]

This court discussed the law of the case doctrine in *R.K. Enterprises, LLC v. Pro-Comp Management, Inc.*, 372 Ark. 199, 203, 272 S.W.3d 85, 88 (2008), stating as follows:

> [T]he law-of-the-case doctrine . . . "prohibits a court from reconsidering issues of law and fact that have already been decided in a

[1] Sparks's answer to the first complaint asserted the defense of charitable immunity, but admitting that, although it was immune from any execution against its assets, it was not immune from suit based on the holding in *Clayborn, supra.* In its answer to Scamardo's refiled complaint, it stated that it was protected by the charitable immunity doctrine and not a proper party defendant.

> prior appeal." *Byme, Inc. v. Ivy*, 367 Ark. 451, 457, 241 S.W.3d 229, 235 (2006). This court has explained that "[o]n second appeal, . . . the decision of the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented." *Vandiver v. Banks*, 331 Ark. 386, 391, 962 S.W.2d 349, 352 (1998) (quoting *Mercantile First Nat'l Bank v. Lee*, 31 Ark. App. 169, 173, 790 S.W.2d 916, 919 (1990)). Stated differently, "[t]he doctrine of the law of the case . . . prevents an issue raised in a prior appeal from being raised in a subsequent appeal unless the evidence materially varies between the two appeals." *Vandiver*, 331 Ark. at 391-92, 962 S.W.2d at 352.

There is an exception to the law of the case doctrine in this instance. *Scamardo I* has been overruled. An appellate decision, once overruled, is normally treated as if it had never been. *Felton v. Rebasmen Med. Ctr.*, 373 Ark. 472, 284 S.W.3d 486 (2008). We have, therefore, made an exception to the law of the case doctrine in the particular context of overruled decisions. *See Washington v. State*, 278 Ark. 5, 643 S.W.2d 255 (1982) (the doctrine of law of the case was inapplicable where, during the interim between the decision in the first appeal and retrial, the first decision had been overruled by other later cases); *Am. Ry. Express Co. v. Davis*, 158 Ark. 493, 250 S.W. 540 (1923) (decision of Arkansas Supreme Court on first appeal was no longer the "law of the case" on the second appeal, where in the meantime the United States Supreme Court decision followed previously had been overruled).

[redacted] As a consequence, *Scamardo I* was not the law of the case and did not prevent the circuit court from applying the *Low* decision, or from reaching the question of Sparks' entitlement to charitable immunity. *See, e.g., Anglin v. Johnson Reg'l Med. Ctr.*, 375 Ark. 10, 289 S.W.3d 28 (2008) (plaintiff could not prevail where he had months after the decision in *Low, supra*, to properly name the insurance company and failed to do so); *Felton, supra*; *cf. Stracener v. Williams*, 84 Ark. App. 208, 137 S.W.3d 428 (2003) (plaintiffs could not prevail under prior law where they failed to amend their complaint after *Clayborn* within the one-year savings statute, and did not act diligently for purposes of the doctrine of equitable tolling).

[redacted] Turning to the question of Sparks's entitlement to charitable immunity, Scamardo argues that "Sparks does not qualify for the charitable immunity defense because it was not

created and maintained exclusively for charity." In *George*, *supra*, this court listed eight factors to aid in determining whether an entity is entitled to charitable immunity:

> (1) whether the organization's charter limits it to charitable or eleemosynary purposes; (2) whether the organization's charter contains a "not-for-profit" limitation; (3) whether the organization's goal is to break even; (4) whether the organization earned a profit; (5) whether any profit or surplus must be used for charitable or eleemosynary purposes; (6) whether the organization depends on contributions and donations for its existence; (7) whether the organization provides its services free of charge to those unable to pay; and (8) whether the directors and officers receive compensation.

Id. at 211-12, 987 S.W.2d at 713. These eight factors are "illustrative, not exhaustive, and no single factor is dispositive of charitable status." *Id.* (citing *Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997)).

■ Review of the evidence in the record shows that Sparks meets six of the eight factors listed in *George*. The first and second factors are satisfied by Sparks's Articles of Incorporation, which show that Sparks is "a public benefit corporation" under the provisions of the Arkansas Nonprofit Corporation Act of 1993, and that it is "organized, pledges its assets to, and shall be operated exclusively for charitable, scientific, and educational purposes."

■ In a sworn affidavit filed with Sparks's motion for summary judgment, Dan Hamman, Chief Financial Officer for Sparks, stated that forms filed with the Internal Revenue Service show that the Sparks's operating margin in 2007 was 0.8% and 0.3% in 2006, indicating a loss from operations. The affidavit also provided that any surplus of funds received by Sparks is used to maintain its "charitable community benefit of providing medical assistance to the public." Further, the affidavit provided evidence that Sparks provided services and care to persons unable to pay in 2007 totaling $7,562,627, and that under its Charity Care policy, Sparks provides services free of charge to patients unable to pay at the same level of care provided to those who are able to pay. Additionally, the reimbursement provided by Medicare and Medicaid to Sparks was approximately $4.2 million under cost, and

Sparks considers this amount to constitute additional charity care. Accordingly there was evidence that Sparks met the third, fourth, fifth, and seventh factors.

As to the sixth factor, although Sparks receives contributions and donations, most of its operating funds are provided through Medicare, Medicaid, and individual patients and/or the patients' private insurers. In *George*, this court noted that the nonprofit hospital at issue there only received donations totaling approximately 6% of its financial obligations, but stated that "a modern hospital, with rare exception, would find it extremely difficult to operate wholly or predominately on charitable donations." *George*, *supra*, 337 Ark. at 214, 987 S.W.2d at 714. As was the case in *George*, the fact that Sparks receives most of its funding through sources other than contributions or donations does not "negate its overriding charitable purpose." *Id.*

The eighth factor listed in *George* concerns an organization's compensation to directors and officers. Article IX of Sparks's Articles of Incorporation provides that "[t]he Corporation shall not have or issue shares of stock and no dividends shall be paid and no part of the income of the Corporation shall be distributed to its members, directors, and officers." It is undisputed that Sparks's Chief Executive Officer receives approximately $350,000 per year in compensation, and that the next two ranking officers receive approximately $250,000 and $230,000 respectively. Although Scamardo argues that such compensation is evidence that Sparks is "big business" rather than a charitable nonprofit, this court addressed and rejected the same argument in *George*, stating:

> it is not necessary for charitable organizations to have entirely volunteer staff and management. [Jefferson Regional Medical Center's] size and complexity make knowledgeable, well-qualified personnel essential. Such persons do not readily volunteer their services or serve at rates of compensation markedly lower than market rates.

337 Ark. at 214, 987 S.W.2d at 714. Similarly here, such compensation for the senior administrative positions required to manage Sparks "does not put the hospital in the position of being maintained for private gain, profit, or advantage of its organizers." *Id.*

Based on the totality of the evidence shown in the record, circumstances, and the factors this court has adopted to help determine whether an organization is entitled to charitable immunity, the trial court did not err in granting Sparks's motion for summary judgment. Although Scamardo asserts that these are questions of fact for a jury to decide, in *George* this court addressed this argument, stating:

> We disagree. While there may be fact issues involved, they are not matters of disputed fact. Rather, they are differing legal interpretations of undisputed facts. In such cases, the appellate court should grant summary judgment where reasonable persons would not reach different conclusions based upon those undisputed facts.

Id. at 212-13, 987 S.W.2d at 713. Additionally, Scamardo argues that the charitable immunity doctrine should be abolished. Abolishment of charitable immunity is a public policy decision, and this court has repeatedly stated that public policy is for the General Assembly to decide, not the courts. *Med. Liab. Mut. Ins. Co. v. Alan Curtis Enters., Inc.*, 373 Ark. 525, 285 S.W.3d 233 (2008).

Finally, Scamardo argues that Arkansas Rule of Civil Procedure 56 is unconstitutional, because it denies her the right to a jury trial. This court recently examined and rejected this argument in *Anglin*, 375 Ark. at 21, 289 S.W.3d at 36, holding that "where there is no factual dispute, there is no constitutional right to a trial by jury." Here, as noted above, there are no factual disputes; instead, there are differing legal interpretations of undisputed facts.

Affirmed.

BROWN, J., concurs.

ARKANSAS DEMOCRAT-GAZETTE and Noel Oman *v.* PULASKI COUNTY DISTRICT COURT

08-1435 289 S.W.3d 901

Supreme Court of Arkansas
Opinion delivered December 19, 2008

Williams & Anderson PLC, by: *Jess Askew III*, for appellants.

Thomas M. Carpenter, Little Rock City Att'y, for appellee.

PER CURIAM. The Arkansas Democrat-Gazette (ADG) and Noel Oman petition this court for a writ of certiorari to be issued by this court to the Pulaski County District Court. ADG asserts that jurisdiction to issue the writ of certiorari lies in this court because amendment 80 repealed Arkansas Constitution article 7, section 14. Article 7, section 14 provided for issuance of writs by the circuit courts to the district courts under its superintending control. Amendment 80 does not so provide.

ADG asserts that only the Arkansas Supreme Court may issue writs of certiorari. While Arkansas Constitution amendment 80, section 2(E) provides that the Arkansas Supreme Court has the "power to issue and determine any and all writs necessary in aid of its jurisdiction," it is silent on the question of whether the circuit court may issue a writ of certiorari to the district court. Although

amendment 80 does not speak to original jurisdiction in and issuance of writs by the circuit court, appellate jurisdiction over the district court is placed in the circuit court. *See* Ark. Const. amend. 80, § 7(A). However, Arkansas Constitution amendment 80, section 19(B)(1) indicates that the adoption of amendment 80 did not repeal the jurisdiction of the circuit court over matters previously cognizable by that court. Thus, while superintending control of all courts is reserved to this court[1] by amendment 80, the circuit courts hold jurisdiction to review and decide issues first raised in the district court.

Certiorari is a common law writ issued from a superior tribunal to a lower tribunal that removes the record from the lower to the superior tribunal for consideration there. *Helena Daily World v. Phillips County Circuit Court*, 361 Ark. 146, 205 S.W.3d 134 (2005); *McAllister v. McAllister*, 200 Ark. 171, 138 S.W.2d 1040 (1940). It is of ancient origin, *City Inv. Co. v. Crawley*, 199 S.E. 747 (Ga. 1938), and does not necessarily depend on constitutional or statutory enactment for its existence. 14 Am. Jur. 2d *Certiorari* § 8 (2000). It may be provided for by statute, but it may also issue as a common-law writ. *Id.*

The writ of certiorari reviews actions taken by the lower court. *Ark. Dep't of Human Servs. v. Collier*, 351 Ark. 506, 95 S.W.3d 772 (2003); *Bell v. Conner*, 176 Ark. 530, 3 S.W.2d 319 (1928). The question presented is whether the circuit court may issue the common-law writ of certiorari. After the adoption of amendment 80, the Arkansas Constitution is now silent on the question.[2] Where the law is silent on statutory or other authority to act, such cases "remain at common law." *Ex parte Couch*, 14 Ark. 337, 338 (1854). In the absence of statutory or other authority, under the common law, a court of general and original jurisdiction holds jurisdiction to bring up the record of a lower court by certiorari for purposes of review. George E. Harris, *A Treatise on the Law of Certiorari* § 1 (1893). Circuit courts "are courts of original

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[1] *See Foster v. Hill*, 372 Ark. 263, 268, 275 S.W.3d 151 (2008) ("Superintending jurisdiction is one of three types of jurisdiction held by courts of last resort that also includes appellate and original jurisdiction.")

[2] We note that Arkansas Code Annotated section 16-13-205 (Repl. 1999) provides that circuit courts hold the power to issue writs of certiorari to an "inferior tribunal." The argument about section 16-13-205 was not developed by the parties and will not be considered. *See Johnson v. Encompass Ins. Co.*, 355 Ark. 1, 130 S.W.3d 552 (2003).

jurisdiction of all justiciable matters not otherwise assigned." Ark. Const. amend. 80, § 6.[3] The power to issue the writ is inherent under this provision. The power to issue the writ is also "inherent in higher courts of record." 14 Am. Jur. 2d *Certiorari* § 8. With respect to the district court, the circuit court is a higher court of record. The district court is a court of limited jurisdiction. *See Jones v. Huckabee*, 369 Ark. 42, 250 S.W.3d 241 (2007). Under the common law, as a court of general jurisdiction superior to that of the district court, the circuit court may issue the writ of certiorari to the district court.

We hold that under the common law and the Arkansas Constitution, the circuit court holds the authority to issue writs of certiorari to the district court. Accordingly, we reject the argument that the adoption of amendment 80 deprived the circuit court of the authority to issue writs of certiorari. We further hold that the circuit court is the appropriate court to petition for a writ of certiorari directed at the district court and that any resort to this court must be based on alleged errors occurring in the circuit court. The petition is denied.

[3] *See also* Ark. Code Ann. § 16-13-201 (Supp. 2007) (stating that circuit courts hold original jurisdiction of all justiciable matters not otherwise assigned and that the circuit court holds appellate jurisdiction over decisions of the district court).

John Barton HOBBS *v.* Honorable David L. REYNOLDS, Circuit Judge

CR 08-1364 289 S.W.3d 917

Supreme Court of Arkansas
Opinion delivered December 19, 2008

Peel Law Firm P.A., by: *John R. Peel* and *Jennifer L. Modersohn*, for appellant.

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

PER CURIAM. On November 21, 2008, petitioner John Hobbs filed a petition for writ of prohibition and, in the alternative, a petition for writ of certiorari, as well as a motion for temporary stay and expedited relief. We now consider these motions.

An order of protection was entered by the Faulkner County Circuit Court on June 19, 2007. On September 4, 2007, Hobbs was charged by misdemeanor information with a violation of order of protection, a violation of Arkansas Code Annotated § 5-53-134 (Supp. 2005), and a Class A misdemeanor, in the Faulkner County Circuit Court. The criminal information states that the misdemeanor occurred in Faulkner County. However, the facts in the affidavit reveal that, on August 29, 2007, Hobbs allegedly beat Melissa Hobbs at her home in Southaven, Mississippi. A bench warrant was issued on September 4, 2007; Hobbs was arrested on May 27, 2008, and the warrant and return was filed with the Faulkner County Circuit Court on June 2, 2008. After Hobbs's arrest, the circuit court set bond in the amount of $10,000, and, as a condition of the bond, required Hobbs to submit to GPS electronic monitoring. A petition for bail was filed on June 18, 2008. On August 18, 2008, the State filed a motion for revocation of bond, and an order was entered revoking Hobbs's bond. A bond hearing was held, and on October 8, 2008, the circuit court ordered that Hobbs was to be held without bond for violating the terms of electronic monitoring. On November 13, 2008, Hobbs filed a second petition for bail.[1] On November 20, 2008, both parties jointly stipulated that Hobbs's alleged criminal conduct occurred in Mississippi and that the information was incorrect in stating that the crime occurred in Faulkner County. On November 17, 2008, Hobbs filed a motion to dismiss in Faulkner County Circuit Court, and the circuit court denied his motion to dismiss on November 20, 2008. Hobbs, a resident of Faulkner County, is currently a pretrial detainee without bail incarcerated in the Faulkner County Detention Center awaiting trial on the misdemeanor charge.

In his petition for writ of prohibition, Hobbs, citing Ark. Code Ann. § 5-1-104(a)(1) (Repl. 2006), argues that, in order for the circuit court to have jurisdiction over prosecuting the crime, the offense must have occurred in Arkansas. He further avers that,

[1] We note that we do not find a ruling on Hobbs's second petition for bail in the record.

because the alleged criminal act occurred in Mississippi, the circuit court in Arkansas is wholly without jurisdiction. He also asserts that there is no final order from which to appeal and that no other remedy is available. In the alternative, Hobbs contends that a writ of certiorari should issue because he is being held on a misdemeanor charge without bail. In his motion for temporary stay, Hobbs requests a temporary stay of the trial court proceedings and the establishment of a briefing schedule. On December 1, 2008, the State filed a response, arguing that this court should deny Hobbs any temporary or extraordinary relief.

A writ of prohibition is extraordinary relief that is appropriate only when the circuit court is wholly without jurisdiction. *International Paper Co. v. Clark County Circuit Court*, 375 Ark. 127, 289 S.W.3d 103 (2008). The writ is appropriate only when there is no other remedy, such as an appeal, available. *Id.* When considering a petition for a writ of prohibition, this court confines its review to the pleadings in the case. *Id.* Prohibition is a proper remedy when the jurisdiction of the trial court depends upon a legal rather than a factual question. *Id.* Prohibition is never issued to prohibit a trial court from erroneously exercising jurisdiction. *Id.* Writs of prohibition are prerogative writs, extremely narrow in scope and operation; they are to be used with great caution and forbearance. *Id.* They should issue only in cases of extreme necessity. *Id.*

Territorial jurisdiction over a criminal defendant is controlled by statute: "A person may be convicted under a law of this state of an offense committed by his or her own . . . conduct for which he or she is legally accountable if . . . [e]ither the conduct or a result that is an element of the offense occurs within this state. . . ." Ark. Code Ann. § 5-1-104 (Repl. 2006). We have stated that territorial jurisdictional claims, such as those raised by Hobbs under Ark. Code Ann. § 5-1-104, can be raised on direct appeal. *See, e.g.*, *Kirwan v. State*, 351 Ark. 603, 96 S.W.3d 724 (2003). Under *Kirwan*, Hobbs may raise these jurisdictional claims in a direct appeal, and we cannot say that the circuit court is wholly without jurisdiction. For these reasons, we deny Hobbs's petition for writ of prohibition.

We now turn to Hobbs's petition for writ of certiorari to review the circuit court's denial of bail. Writs of certiorari have been labeled the appropriate vehicle for relief in bail proceedings. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). Article 2,

§ 8 of the Arkansas Constitution provides that "[a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when proof is evident or the presumption great." A criminal defendant has an absolute right before conviction, except in capital cases, to a reasonable bail. *Reeves v. State*, 261 Ark. 384, 548 S.W.2d 822 (1977). *See also Perroni v. State*, 358 Ark. 17, 186 S.W.3d 206 (2004); *Duncan v. State*, 308 Ark. 205, 823 S.W.2d 886 (1992). Further, Arkansas Rule of Criminal Procedure 9.6 (2008) does not in noncapital cases preclude the setting of a new and reasonable bail with whatever terms and restrictions deemed appropriate within its provisions. *Reeves*, 261 Ark. at 387, 548 S.W.2d at 824. The standard of review is an abuse of discretion. *See Foreman v. State*, 317 Ark. 146, 875 S.W.2d 853 (1994) (per curiam).

The State argues that circuit court did not abuse its discretion in denying bail because Hobbs violated the terms of his electronic monitoring as required by his previous bond. However, the State's argument is misplaced. Here, Hobbs was not charged with a capital offense, but rather, he was charged with a Class A misdemeanor for violating an order of protection. Under *Reeves*, the circuit court should have set a new, reasonable bail in this noncapital, misdemeanor case "with whatever terms and restrictions deemed appropriate within its provisions." *Reeves*, 261 Ark. at 387, 548 S.W.2d at 824. For these reasons, we hold that the circuit court's pretrial denial of Hobbs's bail was an abuse of discretion. Accordingly, we grant Hobbs's petition for writ of certiorari.

Further, Hobbs filed a motion for temporary stay and expedited relief and included in his petition is a request for a temporary stay of the trial-court proceedings and the establishment of a briefing schedule. We deny Hobbs's motion for temporary stay and expedited relief.

Rodney PANKAU *v.* STATE of Arkansas

CR 08-1389 289 S.W.3d 900

Supreme Court of Arkansas
Opinion delivered December 19, 2008

Kenneth R. Shemin, for appellant.

No response.

PER CURIAM. Appellant Rodney Pankau, by and through his attorney, Kenneth R. Shemin, has filed the instant motion for belated appeal. The circuit court entered a judgment and commitment order on September 30, 2008. The notice of appeal was due to be filed on October 30, 2008, but was not filed until October 31, 2008.

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

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

356 Ark. at 116, 146 S.W.3d at 891 (footnote omitted). While this court no longer requires an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where

he or she has erred and is responsible for the failure to perfect the appeal. *See id.* When it is plain from the motion, affidavits, and record that relief is proper under either rule based on error or good reason, the relief will be granted. *See id.* If there is attorney error, a copy of the opinion will be forwarded to the Committee on Professional Conduct. *See id.*

In accordance with *McDonald*, Mr. Shemin has candidly admitted fault. The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion granted.

Jonathan Lepresse STEVENSON *v.* STATE of Arkansas

CR 08-1388 290 S.W.3d 5

Supreme Court of Arkansas
Opinion delivered December 19, 2008

Teresa Bloodman, for appellant.

No response.

PER CURIAM. Attorney Teresa Bloodman filed a motion for rule on clerk, and amended motion for rule on clerk, on behalf of her client Jonathon Laprese Stevenson seeking an order of this court that the clerk lodge and docket the appeal in this case. The clerk refused to docket the appeal based on an untimely notice of appeal. We treat this as a motion for belated appeal and grant the motion.

Stevenson's judgment and commitment order was filed on December 13, 2007. Stevenson filed a motion for new trial on January 7, 2008, an amended motion for new trial on January 14, 2008, and a second amended motion for new trial on May 14, 2008. His initial motion filed January 7, 2008, and the amended motion filed January 14, 2008, were timely under Arkansas Rule of Criminal Procedure 33.3(b) as posttrial motions filed within thirty days after the date of entry of judgment. The second amended motion for new trial was not timely as it was not filed within thirty days after the date of entry of judgment.

Under Arkansas Rule of Criminal Procedure Rule 33.3(c), a posttrial motion is deemed denied thirty days after the motion is filed if the circuit court neither grants nor denies the motion. Because it was untimely, the second amended motion for new trial did not extend the

thirty days of Rule 33.3(c) after which the motion for new trial was deemed denied. The January 14, 2008 amended motion, as the last timely motion, was deemed denied on February 13, 2008. Pursuant to Arkansas Rule of Appellate Procedure–Criminal 2(a)(3), Stevenson had thirty days from the February 13, 2008 date on which his amended motion for new trial was deemed denied within which to file his notice of appeal. No notice of appeal was ever filed on the judgment and commitment order.

On November 12, 2008, an Amended Judgment and Commitment Order was entered and Stevenson filed a notice of appeal from that amended judgment on November 18, 2008. Assuming there was a motion to amend the judgment, it would have been a posttrial motion for relief, and if by filing it Stevenson wished to extend the time within which to file his notice of appeal, it had to be filed within thirty days of entry of the judgment and commitment order. *See Hadley v. State*, 321 Ark. 499, 902 S.W.2d 231 (1995). Nothing in the record reflects that a motion to amend the judgment was filed or that it was timely filed. It is the appellant's duty to bring before this court a record sufficient to decide the issue presented. *See, e.g.*, *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001). If there was a motion to amend the judgment, it was not a timely posttrial motion. Pursuant to Arkansas Rule of Appellate Procedure–Civil 5, the record was untimely when there was no timely notice of appeal to the judgment and commitment order. The notice of appeal filed on November 18, 2008, was a nullity.

Stevenson filed a motion for rule on clerk; however, counsel's failure to comply with the rules of this court and file a timely notice of appeal is apparent. As we have noted, 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." *See McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). As we further noted in *McDonald*, there is no advantage in declining to admit fault where fault exists and 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.* Pursuant to *McDonald*, *supra*, we grant this as a motion for belated appeal. We also forward a copy of this opinion to the Committee on Professional Conduct.

Stanley D. JACKSON *v.* STATE of Arkansas

CR 07-1016 290 S.W.3d 574

Supreme Court of Arkansas
Opinion delivered January 8, 2009

Janice W. Vaughn, Arkansas Public Defender Comm'n, for appellant.

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

ELANA CUNNINGHAM WILLS, Justice. At approximately 1:45 a.m. on January 22, 2005, Dumas Police Department Investigator Chuck Blevins received a call reporting a shooting at Debbie Dean's, a restaurant in Dumas. Upon arriving at Debbie Dean's, Blevins found the body of Herman Cobb, Jr., on the floor with a gunshot wound to the head. After the coroner arrived, Blevins also discovered that Cobb had also been shot in the thigh. There were indications that a fight had taken place in the restaurant, as well.

Later in the day on January 22, 2005, appellant Stanley Jackson and his brother, Damon Freeman (who was also known as Damon Jackson), turned themselves in to the police. After both men gave statements to the police, Jackson was arrested and charged with capital murder.[1] In March of 2007, Jackson was tried and convicted of capital murder, and a Desha County jury sentenced him to life imprisonment. Jackson filed a timely notice of appeal, and now raises six points for reversal. We find no error and affirm.

I. Sufficiency of the Evidence

In his first argument on appeal, Jackson contends that the trial court erred in denying his motion for directed verdict.[2] We treat a motion for directed verdict as a challenge to the sufficiency

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[1] Jackson was also charged with being a felon in possession of a firearm; however, the circuit court subsequently granted Jackson's motion to sever this charge from the capital murder charge.

[2] The court notes its strong displeasure with the brief in this case. Prior to the submission of the briefs, Jackson's appellate counsel filed a motion to submit an enlarged brief, seeking permission to file a thirty-six page brief. The court denied the motion, but we did allow counsel to file a thirty-page brief. When the briefs were submitted, counsel's brief was thirty pages long; however, seven to eight of those thirty pages were single-spaced. Rule 4-1(a) of the Rules of the Arkansas Supreme Court requires briefs to be "double-spaced, except for quoted material, which may be single-spaced and indented." The single-spaced

of the evidence. *See Wertz v. State*, 374 Ark. 256, 287 S.W.3d 528 (2008); *Stephenson v. State*, 373 Ark. 134, 282 S.W.3d 772 (2008). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Wertz, supra.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.*

One commits capital murder if, "with the premeditated and deliberated purpose of causing the death of another person, [he] causes the death of any person[.]" Ark. Code Ann. § 5-10-101(a)(4) (Repl. 2006 & Supp. 2003). This court has said that "[p]remeditated and deliberated murder occurs when it is the killer's conscious object to cause death, and he forms that intention before he acts and as a result of a weighing of the consequences of his course of conduct." *Daniels v. State*, 373 Ark. 536, 285 S.W.3d 205 (2008); *Carmichael v. State*, 340 Ark. 598, 602, 12 S.W.3d 225, 228 (2000); *see also O'Neal v. State*, 356 Ark. 674, 158 S.W.3d 175 (2004) (defining deliberation as "weighing in the mind of the consequences of a course of conduct, as distinguished from acting upon a sudden impulse without the exercise of reasoning powers").

This court has also noted that premeditation and deliberation may be formed in an instant. *Winston v. State*, 372 Ark. 19, 269 S.W.3d 809 (2007); *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999). Moreover, while intent can rarely be proven by direct evidence, a jury can infer premeditation and deliberation from circumstantial evidence, such as the type and character of the weapon used; the nature, extent, and location of wounds inflicted; and the conduct of the accused. *Fudge v. State*, 341 Ark. 759, 20 S.W.3d 315 (2000).

The facts introduced at trial indicated that Cobb and Jackson's brother, Damon Freeman,[3] were embroiled in a fight in the early morning hours of January 22, 2005. The State's first witness,

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portions of appellant's brief, however, contain no quoted materials. Rather, they consist primarily of summaries of various witnesses' testimony and potential jurors' comments during voir dire. We refer this matter to the Supreme Court Committee on Professional Conduct.

[3] Damon Freeman is also known as Damon Jackson, but for clarity's sake, we refer to him as "Freeman."

Nick Ward, testified that he and Cobb had been riding around that night and decided to stop and get something to eat at Debbie Dean's. About five or ten minutes after they ordered their food, Jackson and Freeman came in; Jackson left, but Freeman ordered something to eat. Freeman and Cobb began to argue about something and started fighting. Jackson came back in the restaurant and asked who was trying to fight his brother. At the same time, Ward said, Jackson pulled a gun out of his pants. As Jackson began to fire the weapon, Ward "bumped" him, and Jackson shot out a light fixture.

Ward testified that Jackson fired the gun again, hitting Cobb in the leg. Ward further testified that Cobb stated, "You shot me, cuz." At some point after this shot, Jackson dropped the gun, but Ward testified that Jackson must have picked it back up again because he was the next person whom Ward observed with the gun. Freeman and Cobb continued wrestling, and Freeman slammed Cobb to the ground. Ward and Freeman both asked Jackson not to shoot Cobb. However, despite their pleas, Ward said that Jackson "just shot" and Cobb "just laid back down, fell back down." Ward stated that perhaps a minute or two elapsed between the second and third shots. He also asserted that Cobb never reached for the gun and that he was watching the altercation the entire time. On redirect examination, Ward identified Jackson as the man who shot Cobb.

Lee Jones testified that he was also present at Debbie Dean's that night. Jones said that he was placing an order for some food alongside Freeman when Freeman and Cobb began arguing. Freeman stepped back from the counter, hit Cobb in the face, and started fighting with him. Jones was attempting to break up the fight when Jackson came in and drew his gun. Jones saw Jackson aim the gun at Cobb and fire, and then Jones ran behind the counter where he heard another shot. After the shooting ended, Jones stood up and saw Jackson and Freeman standing in front of the door, and he saw Cobb "laid out in the floor." On cross-examination, Jones stated that the only person he saw in the restaurant that night with a gun was Jackson.

Other witnesses described a similar scene. Latoya Thomas testified that Freeman and Cobb were fighting, and then shots were fired. She said that the first shot took out the light; the second shot hit Cobb in the leg; and "the third shot I was out of Debbie Dean's." Thomas verified that Jackson was the one who shot Cobb

in the leg, and she did not see anyone else with a gun. She also stated that she heard Ward begging Jackson not to shoot Cobb again.

Anthony Harrell, who also observed the fight between Freeman and Cobb, saw Jackson enter the restaurant with a gun and begin shooting at Cobb. After the first two shots, Harrell ducked behind the counter. While behind the counter, Harrell heard Cobb mumble, "Please don't shoot me" or "Please don't kill me." Shortly after that, Harrell heard the third shot.

Debbie Dean, the owner of the restaurant, testified that Cobb came in the restaurant that night and ordered some food. Some time later, Freeman came in, and the two men began fighting. She said that some customers tried to break up the fight, and Harrell, her fiancé, hollered at her to call the police. During the fight, she saw Jackson enter the restaurant, pull out a gun, and shoot up at the ceiling. After he shot out the light, she got down on the floor in the kitchen. She did not see anyone else with a gun that evening. Dean did say, however, that she heard Cobb mumble Freeman's name.

Kevin Knight, a police officer with the Dumas Police Department, testified that he interviewed Jackson as part of the investigation of the shooting.[4] After Jackson was read his *Miranda* rights, he gave a statement to Knight on January 23, 2005, in which he said that he was standing outside of Debbie Dean's when he heard someone say there was a fight inside. Upon entering the building, he saw his brother on the floor. Jackson said that Cobb pulled a gun, and Jackson and Cobb "tussled" over the gun. The first shot took out the lights, and after the second shot, Jackson said, he left the building.

In his statement, Jackson contended that he had "no intentions on anybody dying," and he was "just defending [himself] to keep [Cobb] from shooting [him]." Jackson then told Knight that the gun should still be on the floor of the restaurant if no one picked it up. Jackson denied that Freeman ever had the gun. When Knight asked why he turned himself in, Jackson replied that he felt like it would only get worse if he ran.

Jackson gave a second statement to Knight on January 24, 2005. In this statement, Jackson admitted that he killed Cobb, but he claimed it was not intentional and that the gun had only gone

[4] Jackson initially declined to give a statement in the hours following his arrest.

off as they were "tussling"over it. In this statement, Jackson said that he "snatched" the gun from Cobb as Cobb was falling to the ground, and that he ran outside and threw the gun in a ditch.

Dr. Frank Peretti, the Associate Medical Examiner at the Arkansas State Crime Lab, testified that Cobb suffered from two bullet wounds: the first appeared to have been fired from some distance away and traveled through his thigh without hitting any major blood vessels; the second entered Cobb's head above his left ear, traveled downward through the brain, and lodged in the bone of the skull. Dr. Peretti opined that, given the location and trajectory of the gunshot wound, it would not have been possible for the injury to have occurred if Cobb had been "tussling" over the gun by pulling or pushing it back and forth in front of him at chest level.

On appeal, Jackson argues that the above evidence "does no more than prove that when [he] entered Debbie Dean's and saw his brother and [Cobb] fighting, he pulled a gun and shot out the lights." He concedes that the evidence demonstrates that he shot Cobb in the leg, but he argues that there was no evidence showing that he possessed the premeditation and deliberation necessary to support a capital murder conviction.

However, it is clear that the State presented sufficient evidence to defeat Jackson's directed-verdict motion. No witness testified that they saw anyone other than Jackson with the gun, and Nick Ward testified that Jackson fired three shots. All witnesses agreed that the first shot took out a light fixture, and Cobb suffered two gunshot wounds: one to the thigh and one to the head. Moreover, in his statement, Jackson himself admitted that he killed Cobb. The fact that over a minute elapsed between the shot to Cobb's thigh and the shot to his head was sufficient to show premeditation and deliberation. *See, e.g.*, *Daniels v. State*, 373 Ark. 536, 285 S.W.3d 205 (2008) (finding evidence of premeditation and deliberation where security videotape showed that the defendant paused before delivering the fatal stabbing blow). Accordingly, we conclude that the circuit court did not err in denying Jackson's motion for directed verdict.

II. Voir Dire Issues

In his second point on appeal, Jackson raises numerous challenges to the manner in which voir dire was conducted. He contends that the trial court erred in 1) failing to continue the case

when a number of people who had been summoned for jury duty did not show up; 2) proceeding with jury orientation when Jackson was not present; 3) excusing certain jurors who had expressed reservations about the death penalty, allowing the State to ask the venire members "impermissible questions designed to commit them to a verdict," and allowing the State to death-qualify the jury; and 4) denying Jackson's *Batson* challenges.

The extent and scope of voir dire is left to the sound discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent an abuse of discretion. *See Price v. State*, 365 Ark. 25, 223 S.W.3d 817 (2006); *Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005). The judge's restriction of that examination will not be reversed on appeal unless that discretion is clearly abused. *Price, supra.* Abuse of discretion occurs when the circuit judge acts arbitrarily or groundlessly. *Id.*; *Horn v. State*, 356 Ark. 156, 171-72, 148 S.W.3d 257, 267-68 (2004).

In his first subpoint, Jackson argues that the circuit court erred when it failed to continue the trial after a number of the venire members who had been summoned for jury duty failed to appear. Jackson's trial was scheduled to begin in Desha County Circuit Court on the morning of Monday, February 26, 2007. However, on Saturday, February 24, 2007, a tornado struck the city of Dumas. On Monday morning, the circuit court assembled the attorneys in chambers prior to the beginning of the proceedings. At that time, Jackson had not arrived at the courthouse yet, although the court's clerk advised that the sheriff's office had said they were "on their way from Dumas with him right now." In addition, one of Jackson's attorneys, Llewellyn Marczuk, had not yet arrived at the courthouse because he had been involved in an auto accident on his way to court.

The judge commented that, despite the devastation in Dumas, he thought they could "select a jury from all of the other surrounding areas. But we'll just see who all shows up." The judge and counsel then discussed which attorneys would be handling which phases of the proceedings, how many witnesses each side would call, whether an offer had been made, and other preliminary matters. The court also informed the attorneys that it intended to excuse any jurors who had been directly affected by the storm.

The parties proceeded into open court, where the judge assembled those jurors who had shown up and played a videotaped

juror orientation. After the video was over, the court began asking questions to determine whether everyone was eligible to serve on a jury, such as whether everyone was over the age of eighteen, a citizen of the United States, and lived in Desha County, and whether anyone was a convicted felon or had served on a jury within the last two years. Two jurors were excused at this time.[5]

After another short period of discussion between the court and counsel, Bing Colvin, one of Jackson's attorneys, commented that the proceedings had been going on without Jackson's presence. Colvin moved for a mistrial, arguing the jury would infer, from Jackson's absence, that he was disinterested in the proceedings. The court denied the mistrial, noting that the roll had not been called and no jurors had been sworn in, but agreed to suspend the proceedings until Jackson arrived.

Jackson arrived at the courthouse shortly thereafter, and the court administered the oath to the prospective jurors. The State announced that it was ready for trial, but Jackson's attorneys asked the court for a continuance based on the fact that the defense team had not yet completed its mitigation investigation. The court denied the motion and proceeded to call the roll of the prospective jurors. Many of the names that were called received no response; Jackson alleges that, of the 108 people who had been summoned, twenty-eight failed to appear.

[redacted] On appeal, Jackson argues that the trial court's failure to continue the trial resulted in a violation of his fundamental right to a fair trial before an impartial jury made up of a cross-section of the community. However, as is apparent from the sequence of events set out above, Jackson never raised a fair-cross-section objection before the trial court. The essence of a "fair-cross-section" claim is the systematic exclusion of a "distinctive group" in the community. *See Harris v. State*, 320 Ark. 677, 682, 899 S.W.2d 459, 462 (1995) (citing *Lockhart v. McCree*, 476 U.S. 162 (1986)). However, an objection on this basis must be raised in a timely fashion. In *Harris*, *supra*, the defendant did not raise his fair-cross-section argument until after trial in his motion for new trial; this court held that his objection was untimely. *Id.* at 682-83,

[5] One woman had brought her child to court with her because she could not arrange for daycare, and one man was excused because he had sat on a jury within the last two years.

899 S.W.2d at 462. Here, the argument was never raised at all. Therefore, we decline to address it.[6]

Jackson's second subpoint concerns the court's decision to conduct jury orientation before he was brought to the courthouse. As noted above, Jackson's counsel moved for a mistrial based on Jackson's absence, but the trial court denied it. On appeal, Jackson asserts that a criminal defendant has the right to be present during the process of impaneling a jury, and that, by "moving forward with jury selection in [his] absence," the circuit court violated his constitutional right to a fair trial before an impartial jury made up of a cross-section of the community, as well as his confrontation and due-process rights.

The State responds that Jackson's argument is not preserved, as he failed to move for a mistrial at the earliest opportunity. We note that, at the time he made his motion, the court had already engaged in discussions with counsel and had played the orientation videotape for the jury. Clearly, Jackson had been absent throughout these proceedings, but the mistrial motion was not raised until well after these events occurred. A motion for mistrial must be raised at the first opportunity. *See Ellis v. State*, 366 Ark. 46, 233 S.W.3d 606 (2006); *Dorn v. State*, 360 Ark. 1, 199 S.W.3d 647 (2004). This is true even when the alleged error involves trial proceedings occurring in the defendant's absence. *See Clayton v. State*, 321 Ark. 602, 608, 906 S.W.2d 290, 294 (1995). Here, had Jackson moved for mistrial at the first opportunity — perhaps, say, as soon as the trial court initiated its discussion with counsel in chambers — the court could have halted the proceedings until Jackson arrived at the courthouse and avoided any potential problems.

In his third subpoint, Jackson argues that the circuit court "erred by excusing for cause potential jurors who expressed reservations about imposing the death penalty; by failing to excuse

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[6] Jackson asserts that the circuit court should have intervened on its own accord to address this matter, citing *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). However, this court has noted that, if we have previously rejected an attempt to argue an error on appeal when no objection was made, or no contemporaneous objection was raised, the alleged error cannot be within the *Wicks* categories. *See Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002). Therefore, as the *Harris* court held that a fair-cross-section challenge requires a timely objection, the argument cannot fall under the *Wicks* categories of arguments that may be raised for the first time on appeal.

those jurors who were unfit for jury duty; and by allowing the State to ask the venire persons impermissible questions designed to commit them to a verdict, and to use the answers to exclude from the jury anyone who had qualms about the death penalty."

Jackson alleges that the court erred by allowing the prosecutor to ask potential jurors a set of "A or B" questions regarding their views on the death penalty. The questions were these:

> A. I believe the death penalty is appropriate in some capital cases, and I could return a verdict resulting in death in a proper case; or
>
> B. Although I don't believe that the death penalty should be imposed, as long as the law provides for it, I could assess the death penalty in the proper set of circumstances.

The State struck any potential juror who answered "B" to this question. Jackson also argues that the State should not have been permitted to read the potential jurors the aggravating circumstances on which it was relying and ask those jurors whether they agreed that such a factor ought to be considered an aggravator. In essence, Jackson argues that this practice allowed the State to commit the jurors to a verdict and select only those who were prone to imposing the death penalty.

To the extent that Jackson objects to the "death-qualification" of his jury, his argument is moot because he was sentenced to life imprisonment. This court has held that, where a defendant receives a sentence of life in prison, he lacks standing to raise errors having to do with the death penalty. *See Hamilton v. State*, 348 Ark. 532, 537, 74 S.W.3d 615, 618 (2002); *King v. State*, 312 Ark. 89, 92, 847 S.W.2d 37, 39 (1993) (the fact that the jury was death-qualified and death was considered throughout the trial as a possible sentence is of no moment when death is not the penalty assessed). Therefore, we do not address Jackson's arguments wherein he urges that the trial court erred in 1) refusing to grant Jackson's cause challenges to jurors who stated that they would be unable to consider anything but the death penalty and 2) granting the State's cause challenges to jurors with reservations about the death penalty.

Nonetheless, Jackson argues that the "death-qualification" process left him with a jury that was unwilling to consider mitigation evidence. Specifically, he points to Juror Abernathy,

who stated that he did not believe in lesser degrees of murder, and contends that the trial court erred in refusing to strike Abernathy for cause. However, Jackson did not preserve his for-cause argument with respect to Abernathy.

Abernathy was one of a panel of six venire members; the other people were Mr. Hundley, Ms. O'Leary, Mr. Mays, Ms. Fletcher, and Mr. Regan. Jackson argues that Abernathy stated during voir dire that "I think if you murder somebody, . . . you've done it and that's it. There shouldn't be a lesser. If you murdered somebody you murdered somebody." Jackson initially moved to strike Abernathy for cause, but the court decided to allow the parties to attempt to rehabilitate him. When the State and the defense reached the end of their voir dire, the court asked again if there were any cause challenges. Jackson's attorneys immediately moved to strike Mr. Hundley, who was the deputy prosecutor's brother-in-law; this strike was granted in the following colloquy:

> THE COURT: I'll grant that one. Of course, I haven't heard arguments, but I'll grant that one.
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> MR. PORCH: Note my exception.
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> THE COURT: Very well, I'll note your exception.
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> THE CLERK: So Abernathy is cause?
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> THE COURT: No. Larry Hundley. Implied bias. Are there any others?

Jackson's counsel responded by naming Fletcher, O'Leary, and Mays. No other mention was made of Abernathy. Therefore, Jackson either failed to receive a ruling on his initial motion to strike Abernathy for cause, or he withdrew his for-cause challenge. Thus, he has failed to preserve his argument on appeal in regard to Abernathy. *See Flowers v. State*, 342 Ark. 45, 25 S.W.3d 422 (2000).

Next, Jackson urges more generally that the State's deliberate selection of death-prone jurors prohibited the jury from being able to consider any evidence of mitigation. In essence, he contends that the death-qualification of the jury prejudiced him by causing him to be tried by a jury prone to conviction, stating that the jury's "unwillingness to consider [his mitigation] evidence

manifested itself in a verdict of guilty of capital murder, rather than one of the lesser degrees of murder advanced" at trial. However, the United States Supreme Court has rejected this argument, *see Lockhart v. McCree*, 476 U.S. 162 (1986) (dismissing the notion that death-qualifying a jury results in a jury that is more prone to convict a capital defendant), as has this court. *See Hickson v. State*, 312 Ark. 171, 847 S.W.2d 691 (1993); *Ruiz v. State*, 299 Ark. 144, 772 S.W.2d 297 (1989).

Finally, Jackson argues that the trial court should have granted his motion to strike an entire six-member panel from the venire after the defense team received word from some of Jackson's family members that they had overheard Jason Curtis, one of the venire persons, making comments to the effect of, "If he's a Jackson, he's guilty." Jackson urges that this entire panel was tainted and should have been stricken for cause, which would have saved him from having to use four of his twelve peremptory strikes on this panel.

We do not address Jackson's argument because "it pertains to venire persons that appellant excused through the use of his peremptory challenges." *Willis v. State*, 334 Ark. 412, 420, 977 S.W.2d 890, 894 (1998). It is well settled that the loss of peremptory challenges cannot be reviewed on appeal. *Id.*; *see also Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996). The focus should not be on a venire person who was peremptorily challenged, but on the persons who actually sat on the jury. *Willis*, 334 Ark. at 420, 977 S.W.2d at 894. Of these six venire persons, the court struck Curtis for cause; the State exercised a peremptory challenge as to another; and the defense exercised peremptory challenges to the remaining four. Because Jackson excused these four out of the six venire persons through peremptory challenges, we do not address Jackson's allegations of error as to them. *See Willis*, 334 Ark. at 420, 977 S.W.2d at 894.

In his fourth and final subpoint pertaining to alleged errors during voir dire, Jackson argues that the circuit court erred in denying his *Batson* challenges to the State's striking of several jurors. 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. *Travis v. State*, 371 Ark. 621, 269 S.W.3d 341 (2007); *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. The first step requires the opponent

of the peremptory strike to present facts that show a prima facie case of purposeful discrimination. *Stokes v. State*, 359 Ark. 94, 194 S.W.3d 762 (2004). 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. *Travis, supra.* 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). The reason will be deemed race neutral "[u]nless a discriminatory intent is inherent in the prosecutor's explanation." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). 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. *Travis, supra.* We will not reverse a trial court's findings on a *Batson* objection unless the trial court' decision was clearly against the preponderance of the evidence. *Ratliff, supra.*

Jackson argues his jury was disproportionately deprived of African-American members due to the State's exercise of peremptory strikes.[7] The first of Jackson's *Batson* challenges was in regard to prospective juror Charles Carr. After the State moved to strike Carr, Jackson objected and pointed out that the State had been asking potential jurors if they had children close to Jackson's age, but had only been asking that question of black jurors. The State

[7] Jackson also argues that the State's use of peremptory challenges against African-Americans violated his rights to a jury comprised of a fair cross section of the community. However, the United States Supreme Court has held that the fair-cross-section requirement does not preclude the State from using peremptory challenges on the basis of race. *See Lockhart v McCree*, 476 U.S. 162, 173 (1986) ("We have never invoked the fair-cross-section principle to invalidate the use of . . . peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large."); *see also Holland v. Illinois*, 493 U.S. 474 (1990).

responded that it had not established a pattern of racially motivated strikes, noting that of the five peremptory challenges it had exercised to that point, four of them were white venire members. The State then offered, as a racially neutral reason, that it had excused Carr because he had answered "B" to the State's "A or B" question about his views on the death penalty. The court accepted this as a racially neutral reason.

The other three venire members about whom *Batson* challenges were raised were Jessie Powell, Percy Bentley, and Lorene Lewis. In each case, after Jackson raised his *Batson* challenge, the State explained that the potential jurors had answered "B" to its question on their views about the death penalty. In addition, as to Lorene Lewis, the State explained that Lewis had said that she went to church with Jackson's wife and had visited with her at the courthouse.

[redacted] On appeal, Jackson argues that the circuit court should have conducted a "reasonable and sensitive inquiry into the race-neutral reasons stated by the prosecutor." However, the record reflects that Jackson did not pursue any further questioning after the State offered its racially neutral explanations to the circuit court. In *Weston v. State*, 366 Ark. 265, 234 S.W.3d 848 (2006), this court noted that it is the responsibility of the party opposing the strike to move the matter forward at the third stage of the process and to meet the burden of persuasion. *Weston*, 366 Ark. at 375, 234 S.W.3d at 856. The *Weston* court further stated that "[t]his is not the trial court's responsibility, as the trial court can only inquire into the evidence that is made available to it. According to this court, if the party opposing the strike does not present more evidence, no additional inquiry by the trial court is required." *Id.*

Moreover, in *Weston*, *supra*, this court upheld the State's use of the same "A or B" questions as were utilized in this case. The *Weston* court noted that, while jurors should not be excused for cause without further questioning simply because they expressed reservations about the death penalty, the State could use its peremptory strikes to excuse jurors if it appeared they "would be less likely to impose the death penalty." *Weston*, 366 Ark. at 375, 234 S.W.3d at 856. Accordingly, there is no merit to Jackson's argument that the State's reason for striking these jurors (i.e., they had all answered "B") was not a valid reason for eliminating potential jurors. This is especially so when, as here, the State struck

every juror — not just the African-American ones — who answered "B" to its question about their views on the death penalty. Accordingly, we conclude that there is no merit to Jackson's *Batson* claim.

III. Ineffective Assistance of Counsel

In his third point on appeal, Jackson argues that the circuit court should have granted his motion for mistrial, made during voir dire, in response to the alleged ineffectiveness of one of his four attorneys. As attorney Marczuk was conducting voir dire of the fourth group of potential jurors, he raised an objection to a line of the State's questioning. After the court excused the venire members so that counsel could discuss Marczuk's objection, Marczuk asked that the panel be stricken, but the prosecutor, Thomas Deen, commented that it had been raising the same line of questions with the previous jurors. Marczuk replied that one of the other three attorneys had been objecting unsuccessfully to the question, and he did "not mind doing it again." Deen retorted, "That's probably because you were sleeping during the other ones."

After another defense attorney complained that Deen's comment was derogatory, Deen replied that Marczuk "has obviously been sleeping during these proceedings." The court then attempted to turn the discussion to the actual objection that had been raised, and the court ultimately denied defense counsel's request that the panel be stricken. At that point, defense attorney Bing Colvin again raised Deen's comment about Marczuk's sleeping, and the following colloquy occurred:

> COLVIN: Well, I've tried a number of cases against this prosecution, and one of their tactics is to make snide remarks like that. And it's got no place in a trial where a man's life is at stake. And it's only done to make us look bad. Now, it's just not —
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> COURT: What is the objection —
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> COLVIN: — got any place in the record. It's not got any place in front of the jury.
>
> DEEN: Look bad to who? There's nobody but us in here.

COLVIN: And that's what I meant. He's going to keep going. I want to make a record. I made an objection when we first got started when we were going through that death is different.

COURT: Well, let me — I understand. I think maybe it's my responsibility. And lead counsel for the defense obviously has delegated the responsibility to somebody else. But he's alert and he's ready to go now. Let's bring the jury back. The jury hasn't — we've been going several hours. But I mean, nobody is making up anything. But, you know, he has a battery of attorneys for the defense —

DEEN: I'm not suggesting he's suffered any prejudice by it. I'm not suggesting that in the slightest.

MARCZUK: Well, apparently he has. So I'll, we'll go ahead and declare me ineffective, Judge. I have no problem with that. If that's what you want to do, I have no problem with that. Maybe we should just start over. I'll go ahead and ask to recuse. If I might go ahead and ask to step aside.

COURT: Well, I'm ready to go forward.

MARCZUK: Is that denied, Judge?

COURT: Yes. I really think that if you want to be excused, you can. If you're ready to go, that's fine.

MARCZUK: No, I can't deny it, Judge. I stayed up late last night. I've fallen asleep. I'm sure not going to drive now. Sure not going to.

COURT: Now, he has three other competent attorneys. He's not the only counsel for the client. But in terms of your objections, I'm ready to bring in the jurors.

On appeal, Jackson argues that his attorney's behavior prejudiced his ability to receive a fair trial, and the trial court's "refusal to grant a mistrial violated [his] Sixth Amendment right to effective assistance of counsel, as well as a fair and impartial jury."

However, it is not apparent from the above colloquy that any of Jackson's attorneys ever specifically moved for a mistrial. In addition, the colloquy does not reflect that any of Jackson's attorneys ever argued that Jackson's right to a fair and impartial jury had been violated. Accordingly, neither of these arguments is preserved for appeal. *See Dorn v. State*, 360 Ark. at 4, 199 S.W.3d at 649 (a motion for mistrial, like an objection, must be both contemporaneous and specific).

Thus, the court need only consider whether Marczuk's actions rendered his assistance ineffective. Under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. *Sparkman v. State*, 373 Ark. 45, 281 S.W.3d 277 (2008). 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.* 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.* Furthermore, unless a petitioner makes both *Strickland* showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Id.* Actual ineffectiveness claims alleging deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *Id.*

Jackson cites cases in support of the premise that "sleeping counsel is tantamount to no counsel at all." *See, e.g.*, *United States v. Thomas*, 194 Fed. App'x 807 (11th Cir. 2006); *Burdine v. Johnson*, 262 F.3d 336 (2001). Cases such as *Burdine*, *supra*, and *Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996), have held that prejudice can be presumed from the fact of a defense attorney's sleeping through critical stages of a defendant's trial because "if counsel sleeps, the ordinary analytical tools for identifying prejudice are unavailable." *Tippins*, 77 F.3d at 686. *See also United States v. Cronic*, 466 U.S. 648 (1984) (a defendant is denied counsel not only when his attorney is physically absent from the proceeding, but when he is mentally absent as well, whether by being asleep, unconscious, or otherwise *non compos mentis*).

[redacted] However, the cases on which Jackson relies involve a sole defense attorney sleeping through large portions of the trial. *See, e.g.*, *Burdine*, 262 F.3d at 339 (witnesses testified that attorney

fell asleep as many as ten times during trial, once for at least ten minutes). Here, on the other hand, Jackson had four attorneys, all of whom participated in voir dire. Moreover, the record does not reflect how long Marczuk had been asleep, and even during those periods when he was sleeping, Jackson's other attorneys were actively engaged in voir dire. In *Ex Parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005), the Texas Court of Criminal Appeals refused to presume prejudice from lead counsel's naps, even when they occurred during critical stages of the trial, because the defendant had two attorneys and was thus never without counsel. *McFarland*, 163 S.W.3d at 752-53. Accordingly, because Jackson was never without the assistance of counsel — and counsel about whom he raises no claims of ineffectiveness — his argument lacks merit.

IV. Exclusion of Testimony

In his fourth point on appeal, Jackson takes issue with two of the circuit court's evidentiary rulings: the first ruling admonished the jury not to draw an inference from one witness's testimony that Damon Freeman was the one who shot Herman Cobb; the second ruling precluded Jackson from calling two witnesses who would have testified about the relationship between Jackson and his brother. The circuit court has wide discretion in making evidentiary rulings, and we will not reverse its ruling on the admissibility of evidence absent an abuse of discretion. *See Wright v. State*, 368 Ark. 629, 249 S.W.3d 133 (2007); *Brunson v. State*, 368 Ark. 313, 245 S.W.3d 132 (2006).

During Jackson's cross-examination of witness Anthony Harrell, Jackson engaged in a reenactment of the scene with Harrell in an attempt to demonstrate to the jury where Jackson, Freeman, and Cobb were located at the time Cobb was shot. Counsel then asked Harrell, "isn't it true that . . . [Freeman] is right-handed, and Herman Cobb is shot in the left side of the head, so it has to come from this angle of [Freeman], not [Jackson]? Isn't that correct? He was shot in the left side of the head?" Counsel then reiterated, "That's the side he gets shot in, the side [Freeman] is on. Right?" The State objected, arguing that there was no evidence that Freeman had shot Cobb and asking the court to strike the question from the record. The court agreed, admonishing the jury as follows:

> Ladies and gentlemen, I want to give you a cautionary instruction just for precautionary measures. There has not been any

> evidence presented at this time that supports that Herman Cobb was shot by [Freeman], and no inference is to be drawn that he was. And, if so, you are to disregard any inference that Herman Cobb was shot by [Freeman].

Jackson did not object to the admonition at the time. However, during the testimony of the next witness, Debbie Dean, Jackson asked the court to withdraw the admonition when Dean testified that she heard Cobb mumble Freeman's name. The court denied the request, explaining that the admonition had gone to "that particular statement."

On appeal, Jackson argues that the trial court erred by "directing the jurors to disregard evidence that Freeman may have killed Cobb." However, as the State notes, at the time the court admonished the jury, there simply was no evidence that Freeman had been the one who shot Cobb. All of the witnesses' testimony indicated that Jackson had been the only one seen with the gun, and Nick Ward testified that Jackson fired the third shot at Cobb. Therefore, the inference counsel wished to draw from his questioning was drawn from facts that were not in evidence. *See Perry v. State*, 279 Ark. 213, 216, 650 S.W.2d 240, 243 (1983) (questions which assume facts not in evidence are improper). Accordingly, the circuit court did not err in admonishing the jury.

Next, Jackson contends that the circuit court abused its discretion when it refused to allow him to call two of his sisters to testify during the guilt phase of his trial. These sisters, whose testimony Jackson was permitted to proffer, would have described the relationship between Jackson and Freeman in order to show that, by seeing his brother being beaten up by Cobb, Jackson was somehow provoked into shooting Cobb. This, Jackson contends, went to the heart of his defense that the shooting was an act of manslaughter, rather than an act of capital murder. After listening to the proffered testimony, however, the trial court ruled that it did not see how their testimony "would be relevant on guilt or innocence."

On appeal, Jackson urges that the circuit court's ruling prevented him from "present[ing] evidence to refute the elements of capital murder" in violation of his Fifth and Sixth Amendment rights to present a defense. He contends that he wished to call his sisters to "show the reasonableness of the provocation that led to this incident, as well as to explain [his]

emotional state at the time." However, even assuming that the sisters' testimony demonstrated the close nature of Jackson's relationship with his brother, the court's decision to exclude the testimony did not rise to the level of reversible error. This is so because, regardless of that testimony, the evidence still overwhelmingly showed that Jackson was not entitled to a manslaughter instruction, as discussed below. As such, the circuit court did not abuse its discretion in ruling that the sisters' testimony was irrelevant to the guilt phase of Jackson's trial.

V. Jury Instructions on Manslaughter as a Lesser-Included Offense

As mentioned above, Jackson was charged with capital murder. While the parties were preparing their jury instructions, Jackson asked the court to instruct the jury on the lesser-included offense of manslaughter. The court denied the request, finding that the facts did not support the instruction. Jackson then proffered the instruction to the court. On appeal, Jackson argues that the circuit court's rejection of his proffered jury instruction was error.

This court has stated repeatedly that it is reversible error to refuse to instruct on a lesser-included offense when there is the slightest evidence to support the instruction. *See Boyle v. State*, 363 Ark. 356, 361, 214 S.W.3d 250, 252-53 (2005) (citing *Flowers v. State*, 362 Ark. 193, 208 S.W.3d 113 (2005)). However, we will affirm a trial court's decision not to give an instruction on a lesser-included offense if there is no rational basis for giving the instruction. *Id.* at 362, 214 S.W.3d at 253. Finally, we will not reverse a trial court's ruling regarding the submission of such an instruction absent an abuse of discretion. *Id.* (citing *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003)).

The manslaughter instruction that Jackson wished to submit to the jury comes from Ark. Code Ann. § 5-10-104(a)(1) (Repl. 1997), which provides as follows:

> (a) A person commits manslaughter if: . . . [t]he person causes the death of another person under circumstances that would be murder, except that he or she causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse.... The reasonableness of the excuse is determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believed them to be[.]

In order for a jury to be instructed on extreme-emotional-disturbance manslaughter, this court has repeatedly held that there must be

evidence that the defendant killed the victim in the moment following some kind of provocation, such as "physical fighting, a threat, or a brandished weapon." *Boyle*, 363 Ark. at 362, 214 S.W.3d at 352 (quoting *Kail v. State*, 341 Ark. 89, 94, 14 S.W.3d 878, 881 (2000)).

This court has also stated that the passion that will reduce a homicide from murder to manslaughter

> may consist of anger or sudden resentment, or of fear or terror; but the passion springing from any of these causes will not alone reduce the grade of the homicide. There must also be a provocation which induced the passion, and which the law deems adequate to make the passion irresistible. An assault with violence upon another who acts under the influence thereof may be sufficient to arouse such passion.

MacKool v. State, 363 Ark. 295, 298-99, 213 S.W.3d 618, 620-21 (2005) (quoting *Rainey v. State*, 310 Ark. 419, 837 S.W.3d 453 (1992)). Thus, to qualify for the manslaughter instruction, there must be evidence of a provocation resulting in an extreme emotional disturbance. *Id.* The element of emotional disturbance may be proven by evidence of an external event calculated to arouse or provoke a reasonable person to take the actions that resulted in the victim's death. *Bankston v. State*, 361 Ark. 123, 129, 205 S.W.3d 138, 143 (2005).

Here, Jackson argues that there was evidence that he was provoked to shoot Cobb by witnessing the altercation between Cobb and his brother, an altercation that, by all accounts, Cobb was winning. He also notes that there was testimony that he and his brother were very close and that he looked out for Freeman. However, Jackson points to no evidence that Cobb's actions in fighting Freeman were calculated to provoke Jackson to take action.

We also note that, after shooting Cobb in the thigh, there was a delay of a minute or two before Jackson fired the fatal shot to Cobb's head. Moreover, during this interval of time, Ward and Freeman exhorted Jackson not to shoot Cobb. In light of this evidence, we cannot say that the trial court abused its discretion in finding that no rational basis existed for giving the jury Jackson's requested manslaughter instruction.

VI. Medical Examiner's Report

Jackson's final point on appeal concerns the circuit court's decision to allow the jury to take the medical examiner's report

with them into the jury room during deliberations. During Dr. Peretti's testimony, the State moved to introduce the medical examiner's autopsy report, which detailed his medical findings and conclusion as to the manner of Cobb's death. Jackson objected, arguing that admitting the report in addition to Dr. Peretti's testimony was simply "bolstering" and "cumulative" since the doctor had already testified. The trial court allowed the State to introduce the report at State's Exhibit 6. The court also allowed the State to supplement the autopsy report with the State Crime Lab's toxicology report. When the jury retired to begin deliberations, Jackson objected to the jury taking the report with them, stating that the report contained information that was not in evidence; however, the court overruled the objection.

On appeal, Jackson does not challenge the trial court's initial ruling allowing the report to be admitted into evidence; rather, he argues that the court erred in letting the jurors take the report with them into the jury room, reiterating his argument that the report contained evidence that had never been presented to the jury. Therefore, he claims, because neither he nor his attorneys were present when the jury received this evidence, his right to be present at a critical stage of the proceedings was violated, and prejudice must be presumed under *Davlin v. State*, 313 Ark. 218, 853 S.W.2d 882 (1993).

[redacted] Arkansas Code Annotated § 16-89-125(d)(3) (Repl. 2005) provides that, "[u]pon retiring for deliberation, the jury may take with them *all papers which have been received as evidence* in the cause." (Emphasis added.) In *Anderson v. State*, 367 Ark. 536, 242 S.W.3d 229 (2006), this court held that, where a videotaped statement had been introduced into evidence, it was not error for the trial court to allow the jury to have the videotape in the jury room during deliberations because the defendant had been present when the tape was played and introduced during trial. *Anderson*, 367 Ark. at 542-43, 242 S.W.3d at 234. Similarly, in the instant case, because the report was introduced into evidence during the trial, while Jackson was present and represented by counsel, the circuit court did not err in sending the report with the jury during deliberations.

In *Flanagan v. State*, 368 Ark. 143, 167, 243 S.W.3d 866, 883 (2006), this court concluded that the jury's taking exhibits (in that case, audiotapes and videotapes of out-of-court statements) that had been admitted into evidence and made exhibits at trial was not

a critical stage of criminal proceedings. Therefore, the defendant's presence would not have contributed to the fairness of the proceedings. *Id.* (citing *Anderson, supra*). Similarly, here, as noted above, the report had been admitted into evidence. Although the report may have contained some details about which Dr. Peretti did not testify, this would merely have constituted cause to move for redaction of portions of the exhibit, which Jackson did not do. However, the report had been admitted as an exhibit, and therefore, under § 16-89-125(d)(3), the court did not err in sending it back with the jury.

VII. Rule 4-3(h) Review

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

Veronica POST *v.* FRANKLIN COUNTY BOARD of ELECTION COMMISSIONERS, John Paul Pendergrass, Herman Verkamp and Randy Hillard, in Their Official Capacities; and Gary Zolliecoffer, Individually

08-723 290 S.W.3d 595

Supreme Court of Arkansas
Opinion delivered January 15, 2009

Butler & Green, P.A., by: *Chad M. Green* and *Adam H. Butler*, for appellant.

Barham Law Office, P.A., by: *R. Kevin Barham*, for appellee Gary Zolliecoffer.

DONALD L. CORBIN, Justice. Appellant Veronica Post appeals the order of the Franklin County Circuit Court dismissing for lack of subject-matter jurisdiction her petition for a writ of mandamus and request for declaratory judgment. Because this is the second appeal of this election case, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(4) and (7). We affirm.

Post and Appellee Gary Zolliecoffer were candidates for the office of mayor of Altus, Arkansas, in an election held November 7, 2006. It was not disputed that Post received 123 votes and

Zolliecoffer received 136 votes.[1] Two days after the election, Post initiated the litigation that comprised the first appeal; she alleged that Zolliecoffer was a convicted felon and asked that Appellee Franklin County Board of Election Commissioners (the "Board") declare him ineligible to run for office and remove his name from the ballot. The circuit court found that Zolliecoffer had pleaded guilty to burglary and grand larceny in 1965 and therefore was a convicted felon and an ineligible candidate; accordingly, the circuit court prohibited the Board from certifying any votes for Zolliecoffer. Zolliecoffer appealed that order. This court reversed and dismissed, finding that the circuit court lacked subject-matter jurisdiction to hear a preelection eligibility challenge filed after the election and that Post had not instituted a postelection contest because she had stipulated that Zolliecoffer received the most votes. *Zolliecoffer v. Post*, 371 Ark. 263, 265 S.W.3d 114 (2007).

While the first appeal was pending, however, and within the time allowed by statute, the Board certified the votes cast for Post. Zolliecoffer did not contest that certification pursuant to Ark. Code Ann. § 7-5-801 (Repl. 2007). Post was subsequently commissioned by the Governor and took the oath of office of mayor in January 2007.

This court issued its opinion in the first appeal on October 11, 2007. According to the petition she filed in the present case, Post contends that on November 15, 2007, the Board scheduled a meeting for November 19, 2007, to consider whether to certify votes in favor of Zolliecoffer. Post then filed the present action on November 19, 2007, against both Zolliecoffer and the Board. She sought a writ of mandamus prohibiting the Board from certifying any votes cast for Zolliecoffer and a judgment declaring that the fifteen-day requirement for certifying votes pursuant to Ark. Code Ann. § 7-5-701(a)(1) (Repl. 2007) was mandatory and that the Board was not authorized to certify votes cast in favor of Zolliecoffer.

The circuit court held a hearing on Post's petition on February 28, 2008. There, the Board stated that it met to take action following the opinion issued by this court in the first appeal,

[1] The record in the present appeal reveals there was some discussion as to whether Post actually received 123 votes or 126 votes, as reflected in various pleadings filed in both cases and in the opinion issued in the first appeal. The difference of the three votes is immaterial for purposes of this appeal.

but that it had also been notified of pending litigation, and therefore in the interest of preserving "judicial assets," would just wait until the court told it what to do. The Board also admitted during the hearing that on November 15, 2007, it had certified the votes cast for Post, and that now since the previously entered order had been reversed, the Board was "prepared to certify those votes. However, we need the Court's guidance because of the issues that were raised by Ms. Post, whether or not the fifteen days — whether or not it is untimely for us to certify."

Following the hearing, the trial court issued an order dated March 24, 2008, dismissing Post's petition for lack of subject-matter jurisdiction. The order incorporated the circuit court's letter opinion of March 11, 2008, wherein the court stated that based on the opinion of this court in the first appeal and the doctrine of the law of the case, "this Court finds that it still lacks jurisdiction of this matter on all issues before the Court with the exception of the Defendant Gary Zolliecoffer's request for a "Writ of Mandamus."[2] The present appeal followed.

As her first point for reversal, Post argues that she is without an adequate remedy to challenge the Board's unlawful actions, and we should therefore interpret section 7-5-701(a)(1) as creating a third type of action in election cases allowing her to challenge the Board's certification of results. *See, e.g.*, *Willis v. Crumbly*, 368 Ark. 5, 10-11, 242 S.W.3d 600, 604 (2006) (recognizing "two types of election cases provided for by statute: pre-election, eligibility challenges and post-election, election contests"). In essence, Post asks this court to construe the election code to fashion a remedy for her.

This second appeal is but another attempt to achieve the same objective as that of the first appeal. However, the decision of this court in the first appeal is now the law of the case, as the circuit court correctly observed. In the first appeal, Post sought to challenge Zolliecoffer's eligibility and certification as the winner. In the second appeal, Post seeks the same objective, which is to

[2] Apparently, based on this and other parts of the court's order, Zolliecoffer had filed a counterclaim for writ of mandamus, which the circuit court denied, finding that the Board did not act willfully in refusing to perform its duties. It is also apparent that Zolliecoffer had filed an additional counterclaim based in quo warranto, which the circuit court denied for lack of subject-matter jurisdiction. Zolliecoffer did not file a cross-appeal relating to these counterclaims, and therefore they are not at issue here.

prevent the votes for Zolliecoffer from being certified. These issues were decided adversely to Post in the first appeal. They are now the law of the case. *Scamardo v. Sparks Reg'l Med. Ctr.*, 375 Ark. 300, 289 S.W.3d 903 (2008). The law-of-the-case doctrine prohibits a court from reconsidering issues of law and fact that have already been or could have been presented in the first appeal. *Id.* Inasmuch as Post is still challenging Zolliecoffer's eligibility and the certification of him as the winner, the circuit court was correct in recognizing as the law of the case that it did not have subject-matter jurisdiction. *Zolliecoffer*, 371 Ark. 263, 265 S.W.3d 114 (citing *Pederson v. Stracener*, 354 Ark. 716, 128 S.W.3d 818 (2003)). Thus, we affirm the circuit court's order dismissing Post's petition for lack of subject-matter jurisdiction.

We next consider Post's second argument for reversal. She contends the circuit court erroneously granted the Board an additional fifteen days from the entry of its order to certify the votes cast in the 2006 Altus mayoral election. Section 7-5-701(a)(1) states as follows:

> No earlier than forty-eight (48) hours after the election and no later than the fifteenth calendar day after the election, the county board of election commissioners, from the certificates and ballots received from the several precincts, shall proceed to ascertain, declare, and certify the result of the election to the Secretary of State.

Post contends the circuit court is without authority to allow the Board's certification beyond this statutorily prescribed period. Zolliecoffer responds that Post should be estopped from claiming that the Board cannot now certify results because it was her action in obtaining the order that prohibited the timely certification in the first place.

We first observe that the circuit court correctly interpreted this court's opinion in the first appeal as reversing the order that originally prevented the Board from timely certifying votes for Zolliecoffer within the statutory period. Therefore, in its letter opinion issued in this second appeal, the circuit court stated that after the reversal of that injunction "there remains no further impediment to the Franklin County Election Commission in fulfilling their duties under the law and certifying the election results as per the votes cast, within fifteen days of the filing of the Orders in regard to this decision." Our review of this issue, including whether estoppel is appropriate here, is precluded be-

cause Post has invited the alleged error of which she complains. The doctrine of invited error provides that a person cannot complain of an alleged erroneous action of the trial court if she herself induced such action. *Peeks v. Ark. Dep't of Human Servs.*, 304 Ark. 172, 800 S.W.2d 428 (1990). This litigation began on November 9, 2006, which was in the midst of the statutorily prescribed period for certification, when Post requested and obtained an order prohibiting the Board from certifying the results of the election. Thus, Post sought the order that precluded the Board's timely certification of results. The doctrine of invited error operates so that she cannot now be heard to complain that any certification is now untimely following the reversal of the erroneously issued order.

Affirmed.

IMBER, J., not participating.

Ann C. DONOVAN *v.* SUPREME COURT COMMITTEE on PROFESSIONAL CONDUCT

08-804 290 S.W.3d 599

Supreme Court of Arkansas
Opinion delivered January 15, 2009

Bob Estes, for appellant.

Stark Ligon, Executive Director, and *Nancie M. Givens*, Deputy Director, Office of Professional Conduct, for appellee.

ROBERT L. BROWN, Justice. This matter is an appeal by appellant Ann Donovan from the Findings and Order of Panel A of the appellee Arkansas Supreme Court Committee on Professional Conduct ("Committee"), suspending Donovan's license to practice law for twelve months, reprimanding her, requiring her to pay restitution to her clients, and assessing costs. We affirm the Findings and Order of Panel A.[1]

Ann Donovan has been licensed to practice law in Arkansas since 1978. In 2005, she filed a bankruptcy action on behalf of William and Viola Parks, and as a result of that representation, the bankruptcy judge, Richard Taylor, referred her to the Committee for disciplinary action. The allegations by Judge Taylor were that Donovan had filed inaccurate schedules and petitions in the Parks bankruptcy matter, that she took no action for over a year after she was asked to correct the mistakes, and that she failed to communicate adequately with her clients and the bankruptcy trustee.

The Committee sent a formal complaint to Donovan, dated August 28, 2007. The complaint was sent to Donovan's address of record by certified, restricted delivery, return receipt mail. The complaint was returned unclaimed. On September 21, 2007, the Committee resent the formal complaint, again by certified, restricted delivery, return receipt mail. The Track & Confirm system of the United States Postal Service showed that the complaint was delivered at 8:24 a.m. on October 11, 2007. Donovan contends that she did not receive the complaint until she picked it up at the post office on October 16, 2007.[2]

The parties agree that, under section 9(B) of the Arkansas Procedures Regulating Professional Conduct ("Procedures"), Donovan had twenty days after the complaint was served to file a

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[1] According to the Procedures Regulating Professional Conduct, the Committee shall consist of two separate seven-member panels. Ark. Sup. Ct. P. Regulating Prof'l Conduct § 3(A)(1) (2008). In this opinion, "Committee" refers to the Committee as a whole. Panel A is the specific seven-member panel of the Committee that decided Donovan's case.

[2] On appeal, Donovan asserts that she became aware of the complaint on October 16, 2007. However, in her petition for reconsideration, she contended that she intended to pick up the complaint on October 13, 2007, but did not actually receive the complaint until the October 16, 2007.

response to the complaint or to request an extension of time to respond. The dispute between the parties is when the twenty-day period began to run. According to the Committee, it began to run on October 11, 2007, the day the Postal Service documentation shows that the complaint was delivered. Donovan contends that valid service of the complaint was never effectuated and, therefore, the twenty-day period never began running. She urges in the alternative, that even if the twenty-day period did begin to run, it did so on October 16, 2007, the day she contends that she received actual notice of the complaint.

On November 2, 2007, Donovan called the Committee's office and requested an extension of time to file her written response. She also sent the Committee a written extension request via facsimile transmission on the same day. On November 5, 2007, the Committee denied her request for an extension of time on grounds that it was received after the original twenty-day period had expired. According to the Committee, Donovan was required to respond to the formal complaint, in writing, within twenty days of October 11, 2007. It contended that Donovan's opportunity to respond, or to request additional time, was extinguished on October 31, 2007.

At its November 2007 meeting, Panel A of the Committee considered the formal complaint against Donovan and suspended her license to practice law in Arkansas for twelve months, as a sanction for violating multiple rules of professional conduct. Panel A also ordered that she pay restitution to her former clients in the amount of $1,400 and assessed costs in the amount of $50.00. As a final point, Panel A issued a reprimand, as a separate sanction for Donovan's failure to timely file a written response to the formal complaint.

The Committee sent a copy of Panel A's decision to Donovan by way of certified, restricted delivery, return receipt mail. The notice accompanying the decision included information regarding her right to file a petition for reconsideration with the Committee. Donovan failed to sign for the documents on two occasions, and the mailings were returned, as undelivered. On January 17, 2008, the Committee sent the documents to Donovan by first class mail. The Committee included a proof of service, which it requested that Donovan sign and return. She did not do so.

On February 8, 2008, Donovan filed a petition for reconsideration of Panel A's decision, with her proposed response to the

original complaint attached as an exhibit. Panel A denied the petition at its March 2008 meeting. The Findings and Order of Panel A were then filed with the clerk of this court as a final order on April 7, 2008, and Donovan was granted a stay of suspension of her law license pending her appeal.

This court reviews an appeal from the Committee de novo. *See, e.g.*, *Walker v. Supreme Court Comm. on Prof'l Conduct*, 368 Ark. 357, 362, 246 S.W.3d 418, 421-22 (2007). The de novo review looks to whether the factual findings were clearly erroneous, or whether the result reached was arbitrary or groundless. *Id.* We give due deference to the Committee's superior position to determine the credibility of the witnesses, and its findings of fact will not be reversed unless they are clearly against the preponderance of the evidence. *Id.* The Committee's conclusions of law are given no deference on appeal. *Id.*

Section 9 of the Procedures is primarily at issue in the instant appeal. It requires that, when disciplinary action is taken against an attorney, the Committee shall "furnish to the attorney complained against a copy of the formal complaint and advise the attorney that he or she may file a written response in affidavit form with any supporting evidence desired." Ark. Sup. Ct. P. Regulating Prof'l Conduct § 9(A)(1) (2008). Following effective service, the attorney has twenty days to respond to the complaint in writing. *Id.* § 9(B)(1). If the attorney does not respond, or request an extension of time to respond, within the required twenty days, the factual allegations of the complaint are considered admitted, and the attorney's right to a public hearing is extinguished.[3] *Id.* § 9(C)(4). In such circumstances, the attorney is entitled to file a petition for reconsideration within twenty days of service of the panel's decision to impose sanctions. *Id.* § 9(C)(4)(a). The petition for reconsideration must state, on oath, compelling and cogent evidence of unavoidable circumstances sufficient to excuse or justify the initial failure to respond. *Id.*

I. Untimely Request

The main thrust of Donovan's argument on appeal is that her request for an extension of time to respond to the formal complaint

[3] The formal complaint in the instant case stated, in bold, large font, on the front page: WARNING: Failure to timely file a written response to this Complaint can carry substantial adverse consequences and penalties, including that all allegations in the complaint will be deemed admitted, and you lose your right to any public hearing after a ballot vote.

was timely because the complaint was never properly served on her. She contends that service was not perfected because the Committee did not receive a return receipt, signed by her, evidencing delivery of the complaint. Because of this, Donovan argues that the Committee should have granted her additional time to respond and that Panel A erred in imposing sanctions without considering her response, which was tendered after Panel A made its findings. She further contends that Panel A erred in failing to hold a hearing on the matter. The Committee responds, to repeat in part, that it was not required to obtain a signed receipt and that a properly served complaint was delivered to the appellant on October 11, 2007. As such, her November 2, 2007 communication with the Committee, requesting an extension of the twenty-day time period to respond, was untimely. The Committee is correct on this point.

Throughout her briefs, Donovan cites this court, almost interchangeably, to section 9 of the Procedures and Rule 4 of the Arkansas Rules of Civil Procedure ("ARCP"), as they pertain to service of process. Section 9 specifically provides that a complaint from the Committee may be served on a respondent attorney by "mailing a copy of the formal complaint to attorney's address of record by certified, restricted delivery, return receipt mail." *Id.* § 9(A)(2)(a).

Rule 4 of the ARCP, on the other hand, specifies the way in which service may be perfected in all civil cases. Rule 4 allows for service "by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee." Ark. R. Civ. P. 4(d)(8)(A)(i) (2008). Rule 4 goes on to specify that service perfected by mail "shall not be the basis for the entry of a default or judgment by default unless the record contains a return receipt signed by the addressee or the agent of the addressee." *Id.* R. 4(d)(8)(A)(ii).

As Donovan acknowledges, this court has consistently held that the practice of law is a privilege and not a right. *See, e.g., Cambiano v. Neal*, 342 Ark. 691, 701, 703, 35 S.W.3d 792, 799 (2000). As such, courts cannot summarily restrict a lawyer's ability to exercise the privilege. *Ex parte Burton*, 237 Ark. 441, 445, 373 S.W.2d 409, 411 (1963). Nevertheless, it is well settled that any protections to a law license are subject only to the very lowest review under the Due Process and Equal Protection Clauses of the Constitution. *Cambiano*, 342 Ark. at 703, 35 S.W.3d at 799. This

court has also held that the Committee is in the nature of an administrative agency and is not bound by the rules of the court. *See Sexton v. Ark. Supreme Court Comm. on Prof'l Conduct*, 299 Ark. 439, 446-47, 774 S.W.2d 114, 118 (1989). Thus, the Committee is not required to adhere strictly to the Rules of Evidence or the Rules of Procedure. *Id.*

Unlike Rule 4 of the ARCP, section 9 of the Procedures does not require that the Committee produce a signed copy of the return receipt in order for it to act if the respondent attorney fails to respond within twenty days. In short, the language relied on by Donovan in Rule 4(d)(8)(A)(ii) of the ARCP is notably absent from section 9 of the Procedures. Since the Committee is not required to follow the ARCP, section 9 of the Procedures governs. Despite this, Donovan urges that Rule 4, while not controlling, is instructive to reach a fair result on appeal. We agree that there may be circumstances in attorney discipline cases where it is appropriate to look to the ARCP for guidance, but this is not one of those occasions. Rather, it is incumbent upon this court to apply the Procedures, which specifically apply to the Committee, where they differ from the ARCP, as in the instant case.

We conclude that Panel A's finding that the Committee properly served Donovan with a formal complaint on October 11, 2007, is not clearly erroneous. Donovan did not respond, or request an extension of time, until November 2, 2007, which caused her response to be untimely according to the Procedures. Panel A, accordingly, acted within its authority in treating her failure to respond as an admission of the factual allegations in the complaint. We affirm the Committee on this point.

II. Request for Reconsideration

Donovan also contends that Panel A erred in denying her motion for reconsideration because of excusable neglect. The Committee answers that Panel A did not err because Donovan failed to present compelling and cogent evidence for why she did not timely respond to the formal complaint, as required by section 9(C)(4)(a) of the Procedures.

Panel A's findings in denying Donovan's petition for reconsideration will be upheld unless they are clearly against the preponderance of the evidence. *See Lewellen v. Supreme Court Comm. on Prof'l Conduct*, 353 Ark. 641, 646, 110 S.W.3d 263, 266 (2003). Moreover, as already noted, a panel of the Committee will grant a

petition for reconsideration if the attorney presents compelling and cogent evidence of unavoidable circumstances sufficient to excuse or justify the failure to respond within the required twenty-day period. Ark. Sup. Ct. P. Regulating Prof'l Conduct § 9(C)(4)(c). This court gives deference to the panel's superior position to determine the credibility of the evidence and the weight it is to be accorded. *See Lewellen*, 353 Ark. at 646, 110 S.W.3d at 266.

Donovan's petition for reconsideration in the instant case first alleged that her request for an extension was not untimely. As discussed in the first point on appeal, that argument is without merit. The petition for reconsideration also contained allegations regarding her various personal difficulties during the time in which the formal complaint was served. She states that her home was sold in a non-judicial foreclosure sale on October 2, 2007; that she had a doctor's appointment which resulted in her receiving an MRI; that she was in communication with the Judges and Lawyers Assistance Program with respect to her depression; that her sister-in-law was diagnosed with terminal cancer; and that her brother was diagnosed with skin cancer. On appeal, she makes a conclusory statement that "[s]urely illness requiring a MRI of one's brain, cancer in the family, and other factors of this magnitude will qualify as unavoidable casualty or circumstances, and excusable neglect."

While the circumstances in Donovan's life may have given her valid grounds for requesting an extension of the initial twenty-day response period if she had done so within that time period, we agree with Panel A that they do not present cogent and compelling evidence for why she failed to request the extension before the twenty-day period elapsed. We hold that Panel A's finding that Donovan's personal circumstances did not present cogent and compelling evidence for her failure to respond was not clearly against the preponderance of the evidence.[4]

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[4] In her reply brief, Donovan asserts that the Committee's brief failed to comply with this court's abstracting requirements in Supreme Court Rule 4-2. She argues that the Committee should have abstracted the April 5, 2007 hearing before Judge Taylor, rather than including the transcript in its supplemental addendum. However, the hearing transcript was part of Exhibit A, which also included Judge Taylor's letter referring Donovan to the Committee. As an exhibit, the Committee was permitted to include the transcript in its supplemental addendum. Ark. Sup. Ct. R. 4-2(a)(8) (2008).

III. Mandamus

Donovan has also filed a petition for writ of mandamus directing the Committee to grant her petition for reconsideration or afford her a new hearing before an alternate panel or both.

A writ of mandamus is appropriate only when a petitioner shows a clear and certain right to relief sought in the absence of another adequate remedy. *Hanely v. Ark. State Claims Comm'n*, 333 Ark. 159, 970 S.W.2d 198 (1998). More specifically, we have said that to be adequate, the alternative remedy must be "plain and complete and as practical and efficient to the ends of justice and its proper administration as the remedy invoked." *Id.* at 164, 920 S.W.2d at 200 (quoting *Gran v. Hale*, 294 Ark. 563, 745 S.W.2d 129 (1988)).

In the instant case, Donovan has such an alternative, adequate remedy in the form of an appeal, which is now before this court. For this reason, we deny the petition for writ of mandamus.

Affirmed. Petition for writ of mandamus denied.

Emilia DUKE *v.* Joseph Edward SHINPAUGH
and Rebekah Shinpaugh Ogle

08-311 290 S.W.3d 591

Supreme Court of Arkansas
Opinion delivered January 15, 2009

Legal Aid of Arkansas, by: *W. Marshall Prettyman*, for appellant.

Penix and Taylor, by: *Stephen L. Taylor*, for appellees.

PAUL E. DANIELSON, Justice. In this consolidated appeal, appellant Emilia Duke appeals from the circuit court's order in CV-2006-848-1, setting aside her warranty deed to certain property, and the circuit court's order in CV-2006-1169-1, finding that her actions constituted unlawful detainer and rendering possession of the residence and property at issue to appellees Joseph Edward Shinpaugh and Rebekah Shinpaugh Ogle, as administrators of the Estate of Calvin Leeroy Shinpaugh, Deceased (hereinafter "the Estate"). Our court of appeals affirmed in part and reversed in part the circuit court's orders in a 4-1-4 decision, *see Duke v. Shinpaugh*, 101 Ark. App. 331, 276 S.W.3d 713 (2008), and the Estate petitioned this court for review, which we granted. When we grant a petition for review, we consider the appeal as though it had originally been filed in this court. *See Pest Mgmt., Inc. v. Langer*, 369 Ark. 52, 250 S.W.3d 550 (2007). On appeal, Ms. Duke asserts three points of error: (1) that the circuit court erred in disallowing testimony of statements made by the decedent; (2) that the circuit court erred in finding that her power of attorney was procured by undue influence; and (3) that the circuit court erred in finding the agreement testamentary in nature and in applying the undue-influence presumption. We affirm the circuit court's orders.

In 1997, Emilia Duke moved into the home of her mother, Francis Shinpaugh, and her stepfather, the decedent, Leeroy Shinpaugh. Ms. Duke cared for her mother, who was ill, and also attended to matters for her stepfather. After her mother's death on May 15, 2005, Ms. Duke became worried about her living situation. For that reason, she met with her stepfather, and, subsequently, on May 24, 2005, while in the hospital, Mr. Shinpaugh executed the following statement, entitled "AGREEMENT:"

I, Calvin Leroy [sic] *Shinpaugh, residing at 3275 N. Wagner Road, Fayetteville, AR 72704, Being of sound mind and competent this 24th Day of May 2005 date* [sic]*; I give to Emilia Duke one acre of land adjacent to the north of the one acre at the corner of Wagner Road and Weir Road. I also bequeath the household objects belonging to her mother and her father, James Duke, which consists* [sic] *of; two rocking chairs, a Black gum desk, a Morracan* [sic] *tray, and various other objects of furniture and plants. Not included is an Acrosonic piano. I also give to her the contents of the bank box located in the Bank of Elkins, Elkins, AR, which belonged to Francis Shinpaugh, her mother. In the box are items such as; a seventeen hundreds* [sic] *coin, an ivory Buddha, a diamond ring and other items.*

Emilia has lived at 3275 N. Wagner Road for eight years. We invited her to live here. In the duration she was a caregiver for my wife Francis for four years at six to eight hours a day with no holidays. She has cleaned, maintained three acres, did landscaping and gardening and various othetr [sic] *tasks.*

Emilia, at the time of this will, was a twenty-four hour caregiver to Francis, an eighty-five year old stroke patient. Emilia changed her diaper, spoon-fed her, lifted her, changed her clothes, gave her sponge baths and all personal hygiene. She is also doing the yard work, running errands, cooking, washing dishes and at the time of this writing, taking us to doctors appointments.

In the duration of the time that Emilia has been living with us, she has supported herself by building furniture and selling it to local businesses. Supplementary to this, she helped support Calvin Duke, our grandson and parented him. Calvin Duke was present part-time for eighteen years.

This is my only will to date. This document is not revocable. I, Calvin Leroy [sic] *Shinpaugh, am a primary beneficiary.*

This document under contest will not be my will as is made clear and concise what I wanted at signing.

signature *Calvin Leroy* [sic] *Shinpaugh*

_____ *Witness*

_____ *Witness* 5/24/05 *Date of signing*

signature *Notary*

The following day, on May 25, 2005, Mr. Shinpaugh, with his counsel, executed a general durable power of attorney, naming Ms. Duke as his "true and lawful attorney in fact and agent."

On February 8, 2006, Ms. Duke, "Under Power of Attorney dated May 25, 2005," executed a warranty deed, granting to herself, one acre of the 2.9 acres owned by Mr. Shinpaugh, in consideration of the sum of $1. Almost one month later, Mr. Shinpaugh died, and his son and daughter from a previous marriage were appointed administrators of his estate.

On April 24, 2006, the Estate filed a complaint in circuit court, CV-2006-848-1, alleging that Ms. Duke breached her fiduciary duty as attorney in fact when she conveyed the one acre of Mr. Shinpaugh's property to herself. It further asserted that due to Ms. Duke's breach, the deed should be set aside and that an accounting should be provided.

On June 7, 2006, the Estate filed a separate complaint in forcible entry and detainer in the circuit court, CV-2006-1169-1. In it, the administrators of the Estate asserted that Ms. Duke was guilty of forcible entry and detainer and that they were entitled to possession of the Shinpaugh residence. In response, Ms. Duke counterclaimed, alleging that the administrators of the Estate converted her property after a writ of possession was issued.

On December 29, 2006, a bench trial was held on both cases with testimony presented and arguments made by both parties. At the conclusion of the hearing, the circuit court ruled orally, and its ruling was memorialized in two separate orders. In CV-2006-848-1, the circuit court's order made several findings:

- that the agreement, despite its title, was testamentary rather than contractual in nature;
- that a confidential relationship existed between Mr. Shinpaugh and Ms. Duke at the time that the agreement and the power of attorney were signed by Mr. Shinpaugh;
- that the existence of a confidential relationship created a presumption that Mr. Shinpaugh signed the agreement and power of attorney while under the undue influence of Ms. Duke;
- that Ms. Duke failed to meet her burden of proving by evidence beyond a reasonable doubt that Mr. Shinpaugh executed the two documents free from Ms. Duke's undue influence;
- that the power of attorney signed by Mr. Shinpaugh was void;

- that, even if the power of attorney were found to be valid, Ms. Duke "exceeded her authority and powers granted under the terms of the power of attorney in conveying the property to herself and that she breached her fiduciary duty not to engage in self-dealing in so doing"; and
- that the warranty deed, by which Ms. Duke under power of attorney, conveyed the one acre should be, and was set aside.

In CV-2006-1169-1, the circuit court found that Ms. Duke's actions in failing to vacate the Shinpaugh residence, after the circuit court's issuance of a writ of possession to the Estate, constituted unlawful detainer. In addition, the circuit court found that the Estate was entitled to permanent possession of the residence and property and that Ms. Duke's counterclaim was moot. Ms. Duke now appeals.

While Ms. Duke initially challenges the circuit court's exclusion of testimony, a proper analysis requires this court to first examine the validity of the power of attorney, which was her second point on appeal. With respect to the validity of the power of attorney, Ms. Duke argues that the circuit court erred in finding that the power of attorney was the product of undue influence, where the Estate did not challenge the validity of the power of attorney. She further asserts that because the Estate's attorney prepared the power of attorney for Mr. Shinpaugh to sign, the Estate's attorney would have been a necessary witness had the power of attorney been challenged. The Estate responds that the circuit court did not err because it did not find that the power of attorney had been procured by undue influence, but that Ms. Duke had failed to meet her burden of proving that the decedent had signed the power of attorney free of undue influence. It further points to the circuit court's alternative finding that if the power of attorney were valid, Ms. Duke exceeded her authority by conveying to herself the property and urges this court to affirm the circuit court's orders.

Our standard of review on appeal from a bench trial is not whether there was substantial evidence to support the finding of the circuit court, but whether the circuit court's findings were clearly erroneous or clearly against the preponderance of the evidence. *See Omni Holding & Dev. Corp. v. C.A.G. Invs., 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. *See id.* Facts in dispute and determinations of credibility are within the province of the fact-finder. *See id.*

That being said, we are precluded from addressing Ms. Duke's assertion of error regarding the validity of the power of attorney, because she failed to challenge both independent grounds for the circuit court's decision. Here, in addition to its ruling that the power of attorney was void, the circuit court alternatively ruled that, if the power of attorney were found to be valid, Ms. Duke "exceeded her authority and powers granted under the terms of the power of attorney in conveying the property to herself and that she breached her fiduciary duty not to engage in self-dealing in so doing." While Ms. Duke challenges the circuit court's finding that the power of attorney was void, she does not challenge the circuit court's alternative finding on appeal and has given us no basis for holding that it was clearly erroneous or clearly against the preponderance of the evidence.[1] A review of Ms. Duke's brief reveals no argument that she did not exceed the authority of the power of attorney, that she did not self deal, or that she did not breach her fiduciary duty.[2] *See Duke v. Shinpaugh*, 101 Ark. App. at 339 n.5, 276 S.W.3d at 719 n.5 (acknowledging that Ms. Duke did not specifically challenge the circuit court's finding that she exceeded the scope of her authority under the power of attorney).

■ We have held that where the circuit court based its decision on two independent grounds and appellant challenges

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[1] As further evidence that Ms. Duke does not challenge the circuit court's alternative ruling on appeal, Ms. Duke states in the conclusion of her brief that the case should be "reversed or at the very least reversed and remanded for consideration of the excluded testimony and the effect of proper findings as to the Power of Attorney." Here, the circuit court did make the "proper finding," albeit an alternative one, that if the power of attorney was valid, Ms. Duke exceeded her authority under it. As noted, Ms. Duke does not acknowledge that finding, nor does she challenge this alternative ruling by the circuit court in her arguments on appeal.

[2] While Ms. Duke may make some of these arguments in her supplemental brief to this court, she makes this argument for the first time in that brief, and the permission to file a supplemental brief and reply does not give an appellant permission to raise points on appeal that were not originally submitted to the court of appeals for review. *See Rodriguez v. Arkansas Dep't of Human Servs.*, 360 Ark. 180, 200 S.W.3d 431 (2004). Were we to consider additional arguments in cases on review from the court of appeals, it would permit an appellant a so-called "second bite at the apple," after the appellant has had the benefit of the court of appeals' opinion. We, therefore, are precluded from considering any point on appeal raised in a supplemental brief that was not originally submitted to the court of appeals. *See id.*

only one on appeal, the appellate court will affirm without addressing either. *See, e.g.*, *Coleman v. Regions Bank*, 364 Ark. 59, 216 S.W.3d 569 (2005); *Pearrow v. Feagin*, 300 Ark. 274, 778 S.W.2d 941 (1989). In this case, the circuit court provided two clearly independent grounds on which it based its decision to set aside the deed: (1) because the power of attorney was void; or (2) because, even if the power of attorney was valid, Ms. Duke exceeded her authority under it by conveying the property to herself, thereby breaching her fiduciary duty by self dealing. Because Ms. Duke failed to challenge the latter, independent ground for setting aside the deed, that finding stands and the circuit court's order in CV-2006-848-1 must be affirmed. Because we affirm the circuit court's order on this basis, we affirm the circuit court's order of possession and judgment in CV-2006-1169-1 as well, and there is no need to address Ms. Duke's remaining arguments.

Affirmed.

Kenneth Dana BREWTON *v.* STATE of Arkansas

CR 08-1042 290 S.W.3d 605

Supreme Court of Arkansas
Opinion delivered January 15, 2009

David L. Dunagin, for appellant

No response.

PER CURIAM. Appellant Kenneth Dana Brewton, by and through his counsel David L. Dunagin, moves this court for leave to file a belated brief.[1] Brewton's brief was due in this court on October 14, 2008. After no brief was filed, the State filed a motion to dismiss on December 8, 2008. Thereafter, Brewton tendered his brief and filed the instant motion requesting to file the belated brief.

We will accept a criminal appellant's belated brief to prevent an appeal from being aborted. *See Brown v. State*, 373 Ark. 453, 284 S.W.3d 481 (2008) (per curiam). However, good cause must be shown to grant the motion. *See Strom v. State*, 356 Ark. 224, 147 S.W.3d 689 (2004) (per curiam) (holding that appellate counsel's admitted failure to timely file the brief constituted good cause to grant motion for belated brief).

Here, Brewton's attorney accepts full responsibility and admits fault for failing to timely file Brewton's brief. Accordingly, we grant the motion to file a belated brief and refer the matter to the Committee on Professional Conduct.

[1] Appellant's motion is captioned as one for rule on clerk, but we will treat it as a motion for belated brief.

Marcus D. YOUNG *v.* STATE of Arkansas

CR 07-628 290 S.W.3d 605

Supreme Court of Arkansas
Opinion delivered January 15, 2009

William M. Howard, Jr., for appellant.

No response.

PER CURIAM. Appellant Marcus D. Young, by and through his attorney, William M. Howard, Jr., has filed a motion for rule on clerk. In 2004, Appellant pled guilty to the charge of committing a terroristic act and was sentenced to 240 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed the trial court's final order on April 13, 2005, *Young v. State*, CACR 04-925 (Ark. App. Apr. 13, 2005) (unpublished), and Appellant subsequently filed a petition for relief under Arkansas Rule of Criminal Procedure 37.1. On April 3, 2007, the trial court entered an order denying Appellant relief under Rule 37.1. Appellant filed a motion for reconsideration on May 1, 2007, and on June 6, 2007, he filed a notice of appeal as to the denial of the motion for reconsideration. Upon motion of the State of Arkansas, this court dismissed Appellant's appeal on April 17, 2008, on the grounds that Appellant's notice of appeal was not timely perfected, as

it did not properly reference the trial court's order denying relief under Rule 37.1. *Young v. State*, 373 Ark. 264, 283 S.W.3d 188 (2008) (per curiam).

On December 19, 2008, Appellant filed this motion for rule on clerk, in which Appellant's counsel explains that he erroneously believed that the time to file a notice of appeal was tolled when he filed a motion to reconsider the trial court's order denying Appellant's Rule 37 petition. Mr. Howard acknowledges that the appeal was not timely perfected due to an error on his part.

We must first note that Mr. Howard has improperly filed a motion for rule on clerk where he should have filed a motion for belated appeal. *See McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). Where a motion for rule on clerk is filed in error, it will be treated as a motion for belated appeal. *Id.* Belated appeals in criminal cases are governed by Rule 2(e) of the Arkansas Rules of Appellate Procedure–Criminal. *Bennett v. State*, 362 Ark. 411, 208 S.W.3d 775 (2005). The rule provides in pertinent part:

> The Supreme Court may act upon and decide a case in which the notice of appeal was not given or the transcript of the trial record was not filed in the time prescribed, when a good reason for the omission is shown by affidavit. However, no motion for belated appeal shall be entertained by the Supreme Court unless application has been made to the Supreme Court within eighteen (18) months of the date of entry of judgment or entry of the order denying postconviction relief from which the appeal is taken.

Ark. R. App. P.–Crim. 2(e).

[redacted] Here, the trial court entered its order denying Appellant postconviction relief on April 3, 2007. After failing to timely perfect an appeal, Appellant's appeal in this case was dismissed. Mr. Howard filed this motion for rule on clerk on December 19, 2008, over twenty months after judgment was entered. Due to Mr. Howard's failure to satisfy the eighteen-month rule set forth in Rule 2(e), Appellant's appeal from the April 3, 2007 order can not be entertained by this court. This court must, therefore, deny Appellant's motion. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion to file belated appeal denied.

Kevin Lynn DAVIS, Jr. *v.* STATE of Arkansas

CR 08-148 291 S.W.3d 164

Supreme Court of Arkansas
Opinion delivered January 22, 2009

Daniel D. Becker, for appellant.

Dustin McDaniel, Att'y Gen., by: *Deborah Nolan Gore*, Ass't Att'y Gen., for appellee.

JIM HANNAH, Chief Justice. Kevin Lynn Davis, Jr., appeals his conviction for capital murder and sentence of life without parole imposed in the death of Patricia Young. He asserts that the trial court erred in (1) denying his motion to dismiss based on violation of his right to a speedy trial, (2) admitting evidence excluded by an agreement or stipulation of the State, (3) failing to hold a hearing and make a finding on fitness to proceed, and (4) failing to instruct the jury on a prior inconsistent statement. We affirm the circuit court. Our jurisdiction on appeal is pursuant to Ark. Sup. Ct. R. 1-2(a)(2).

Speedy Trial

Davis argues that the circuit court erred in denying his motion to dismiss for violation of his right to a speedy trial. Pursuant to Arkansas Rules of Criminal Procedure 28.2, a criminal defendant is entitled to have the criminal charges dismissed with an absolute bar to prosecution if the case is not brought to trial within twelve months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Ark. R. Crim. P. 28.3. Davis was arrested on November 3, 2005, and tried on June 27, 2007, 601 days after his arrest. He thus showed that his trial took place outside the twelve-month period of Rule 28.2. Once a criminal defendant shows that the trial will take place more than twelve months after the date of arrest, the burden shifts to the

State to show that the delay was the result of the defendant's conduct or was otherwise justified. *State v. Crawford*, 373 Ark. 95, 281 S.W.3d 736 (2008). "[T]his court has consistently and repeatedly held that a defendant is not required to bring himself to trial or 'bang on the courthouse door' to preserve his right to a speedy trial; rather, the burden is on the courts and the prosecutors to see that trials are held in a timely fashion." *Jolly v. State*, 358 Ark. 180, 193, 189 S.W.3d 40, 46 (2004).

Davis filed two motions to dismiss based on speedy trial. Both were denied. The record shows that this case was continued five times. It was first continued from March 7, 2006, to September 21, 2006, then from September 21, 2006, to December 7, 2006, then from December 7, 2006, to April 16, 2007, and finally from April 16, 2007, to June 27, 2007.

A. *March 7, 2006 to September 21, 2006*

Davis first argues that the circuit court erred in excluding the 204-day period from March 2, 2006, to September 21, 2006, as time attributable to him for his mental evaluation. As a preliminary matter, the State asserts that Davis's argument on speedy trial is foreclosed by the failure to make a contemporaneous objection. The contemporaneous-objection rule requires a defendant to apprise the court of alleged error "prior to making its decision." *Marta v. State*, 336 Ark. 67, 80, 983 S.W.2d 924, 931 (1999). Davis could not apprise the court of any alleged error in exclusion of time for the mental evaluation prior to the circuit court making its decision because no hearing was held at which he could object. The contemporaneous-objection rule does not apply under these facts.

In the present case, the circuit court simply excluded time on its own motion by issuance of an order. We addressed this situation in *Tanner v. State*, 324 Ark. 37, 42-43, 918 S.W.2d 166, 169 (1996):

> In this case, the appellant's motion to dismiss was made before trial, and, under the circumstances of this case, *he was not required to challenge the court-ordered exclusion of time immediately upon issuance of the court's order.* As we stated earlier, it is the burden of the prosecution and the courts to see that a defendant is brought to trial on time.

(Emphasis added.) In *Tanner*, the circuit court reset Tanner's trial date on its own motion. Nothing in the record reflected that Tanner or his

counsel were present when the decision was made, and the order indicated that the prosecutor and Tanner's counsel were notified of the continuance by mail. The circuit court in *Tanner*, on its own motion, as in the present case, "filed an order which purported to exclude the period . . . from speedy trial computation." *Tanner*, 324 Ark. at 39, 918 S.W.2d at 167. Before a criminal defendant may be required to state a contemporaneous objection to the exclusion of time under speedy trial, the excludability of the period must be discussed "during a hearing where the defendant and his counsel were present." *Deasis v. State*, 360 Ark. 286, 292, 200 S.W.3d 911, 915 (2005). If there had been a hearing, where counsel was present, and at which the propriety of the excluded period was raised and decided, an objection would have been required. *See Mack v. State*, 321 Ark. 547, 905 S.W.2d 842 (1995). We reject the State's argument that a contemporaneous objection could have been or had to be made in this case where there was no hearing on the excludability of the period.

As noted, Davis argues that the circuit court erred in excluding 204 days due to the mental evaluation. He asserts that only a portion of those 204 days may be attributed to the mental evaluation and cites us to *Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998), where this court discussed the period excludable due to a mental evaluation. *Morgan* provides that time is excluded from the "date the exam is ordered to the report's file date." *Id.* at 299, 971 S.W.2d at 222. Davis agrees the time required for the mental exam as defined in *Morgan* is excludable and attributable to him. He asserts, however, that only the thirty-four-day period of February 21, 2006, to March 27, 2006 is attributable to him. Pursuant to *Morgan*, the time attributable to Davis for the mental evaluation concluded on the date the report was filed. While the record does not reveal when the report was filed, the State bears the burden of showing that any delay is attributable to the defendant or otherwise legally justified. *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004). While the report cover letter transmitting the report to the court is dated March 27, 2006, the State has not shown when the report was filed. Because the report could not have been filed prior to its mailing, we accept the cover letter date of March 27, 2006, as the last date of exclusion attributable to Davis on the mental evaluation. This means that thirty-four days are excluded.

The remaining 170 days, of the total 204 days excluded by the circuit court, are not excludable based on the mental evaluation. Nothing indicates that the 170-day delay was attributed to any other cause. As already noted, and as we have repeatedly held, the burden is on the courts and the prosecutors to see that trials are held in a timely fashion. *Jolly, supra.* A contemporaneous record must reveal that a delay is attributable to the defendant or the time will not constitute an excludable period. *Moody v. Ark. County Circuit Court*, 350 Ark. 176, 85 S.W.3d 534 (2002). There is nothing in the record that reveals that this delay was properly attributed to Davis; therefore, it is not excludable. Subtracting thirty-four days from 601 leaves 567 days from the date of arrest to the date of trial.

B. *September 21, 2006, to December 7, 2006*

Davis argues that the circuit court erred in excluding the period of September 21, 2006, to December 7, 2006. As with the prior excluded period, the State again argues that Davis is precluded from arguing the circuit court erred because he failed to make a contemporaneous objection. Six days before trial, on September 15, 2006, the State moved for a continuance of the September 21, 2006 trial date on the ground that it had submitted evidence to the Arkansas Crime Laboratory for testing, and that "the Crime Lab has not completed the requested analysis and it will not be available by September 21, 2006."

As with the order on the first excluded period, the circuit court did not hold a hearing. The State's motion to continue, as well as the order granting a continuance and excluding the time, were filed on September 15, 2006. The certificate of service on the motion indicates that the motion for continuance was mailed to Davis's counsel on the same day, September 15, 2006. Thus, the State argues that even though no hearing was held, Davis had to make a contemporaneous objection to the exclusion of time entered in an order granting a motion that he did not even know had been filed. For the same reasons as discussed under the first excluded period, we reject the State's argument that Davis had to make a contemporaneous objection.

Davis next argues that the circuit court erred in excluding the seventy-seven-day period of September 21, 2006, to December 7, 2006. The circuit court excluded the time, noting

that the delay was because the Arkansas Crime Laboratory "report was not available." Davis notes that Arkansas Rule of Criminal Procedure 28.3(d)(1) requires that due diligence has been exercised to obtain the evidence; however, no argument is developed. We are offered this mere conclusion and are not cited to a single case.[1] We are not even told by Davis how there was a lack of due diligence. The failure to develop an argument precludes review on appeal. *Flowers v. State*, 373 Ark. 119, 282 S.W.3d 790 (2008). Thus, the seventy-seven days must be excluded. Subtracting seventy-seven from 567 leaves 490 days between the date of arrest and the date of trial.

C. *December 7, 2006, to April 16, 2007*

Davis next asserts that the circuit court erred in excluding the 130-day period of December 7, 2006, to April 16, 2007. The order resetting the trial to April 16, 2007, states that the trial was continued to accommodate a request for three trial days. The previous December 7, 2006 trial date was for a one-day trial. The continuance to April 16, 2007, was ordered when Davis sent a letter to the circuit court case coordinator stating that "because of the nature of the offense and the number of witnesses, the defense requests that the trial in this matter be scheduled for a minimum of three days." The circuit court interpreted this as a request for a continuance to the first date the circuit court's docket was free for three days. Trial was then reset for April 16-18, 2007. Davis states that the court misinterpreted the letter, and he asserts that he never asked for a continuance. The letter is unclear. The letter does not request that the December 7, 2006 trial date be retained and additional days granted, but it does request a three-day trial. We cannot say that the circuit court abused its discretion in concluding that Davis sought to continue his case to the next three open trial days on the court's docket. *See, e.g.*, *White v. State*,

[1] We note that the evidence was timely submitted to the Arkansas Crime Laboratory. What diligence was exercised by the State thereafter is not revealed by the record. However, like the Arkansas State Hospital, the crime lab is not part of the judiciary. In *Mack v. State*, 321 Ark. 547, 550, 905 S.W.2d 842, 844 (1995) (quoting *Collins v. State*, 304 Ark. 587, 590, 804 S.W.2d 680, 681 (1991)), we stated of the Arkansas State Hospital that, "delays caused by its operations would not be subject to the same level of scrutiny as delays caused by the criminal justice system itself." Likewise, we will not subject delays caused by operations of the crime lab to the same level of scrutiny as delays caused by the criminal justice system itself.

330 Ark. 813, 958 S.W.2d 519 (1997) (no abuse of discretion on the part of the trial court in excluding the time attributed to the unavailability of a witness).

Finally, Davis argues that the circuit court erred in excluding this time based on court congestion. Because we conclude there was no error in finding a request for a continuance, we need not address this argument. Subtracting 130 days from 490 days leaves 360 days between the date of arrest and the date of trial. Thus, trial occurred within the twelve-month period allowed. The circuit court did not deny Davis his right to a speedy trial.

Additional periods of time were excluded by the circuit court. We need not analyze whether these periods were excludable because we have concluded that trial occurred within 360 days of arrest; however, we note for the benefit of the bench and bar that the additional periods of exclusion suffer the same problems with the docket and record as noted above. Congestion of the court docket was noted and relied on without explanation in a court order. Motions were filed and orders were entered on the same day without any hearing in court. In one instance, the certificate of service indicated that the motion was mailed to Davis's counsel on the day the motion was filed and the order was entered. The circuit court in its order denying the Motion to Dismiss on speedy trial grounds noted that there was no objection to the delay. It would be hard for the defendant to object to a delay before his counsel even received notice the motion that would cause the delay was being filed.

Stipulation to Exclude Evidence of Other Crimes, Wrongs, or Acts

Davis argues that the circuit court erred in refusing to enforce a stipulation that he entered into with the State that no evidence of other crimes, wrongs, or acts would be offered in this case. The circuit court found that no stipulation existed and analyzed admission of evidence of other crimes, wrongs, or acts under Arkansas Rule of Evidence 404(b). The circuit court admitted some evidence and excluded other evidence. Davis concedes that the circuit court correctly determined admissibility of the evidence under Rule 404(b) but asserts that no evidence of other crimes, wrongs, or acts could be admitted due to the stipulation he reached with the State. Davis asserts that the stipulation was entered into at the oral argument on his motion to disclose evidence of other crimes, wrongs, or acts. The question presented

then is whether Davis and the State entered into a stipulation that no evidence of other crimes, wrongs, or acts would be offered at trial.

This court defined a stipulation in *McClard v. Crain Management Group, Inc.*, 313 Ark. 472, 476, 855 S.W.2d 929, 931 (1993):

> A stipulation is a "name given to any agreement made by the attorneys engaged on opposite sides of a cause (especially if in writing) regulating any matter incidental to the proceedings or trial, which falls within their jurisdiction." *Black's Law Dictionary* 1269 (5th ed. 1979). The "stipulations" filed by McClard and Stacks were not signed by both sides. Absent agreement between the attorneys to stipulate, Freeway Ford was within its rights to supplement the record if appropriate.

Thus, a stipulation may be made in writing. A stipulation can also be reached where both parties or their counsel appear before the court to make an oral stipulation official. *See, e.g.*, *Smith v. Washington*, 340 Ark. 460, 10 S.W.3d 877 (2000).

Davis's motion asked the State to disclose any evidence of other crimes, wrongs, or acts, and in oral argument the prosecutor stated it had no "404(b) evidence,"[2] and did not intend to offer any. The circuit court then asked, "Anything further on that motion . . . ?" Davis's counsel responded, "No." While this statement by the prosecutor may be argued to be a representation to the circuit court of what evidence the State had that might be subject to Arkansas Rule of Evidence 404(b), and perhaps what evidence it intended to offer, it does not constitute an agreement with Davis that no evidence of other crimes, wrongs, or acts would be offered. Davis offers no other evidence that a stipulation was made.[3]

A decision of the circuit court on whether the parties have stipulated is a finding of fact reviewed under the clearly erroneous

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[2] Clearly, there was evidence of other crimes, wrongs, or acts as evidenced by the circuit court's analysis and admission of evidence under Arkansas Rule of Evidence 404(b). We note that the State at trial indicated that after Davis's motion to disclose evidence was decided, it learned of evidence it did wish to offer. The issue of what representation, if any, that the State made to the circuit court regarding evidence at the time of the motion to disclose was not litigated below and is not at issue on this appeal.

[3] The circuit court did find that if the State agreed in open court to forbear offering evidence, the State would be held to that agreement. The State requested and was allowed to

standard. *See, e.g., City of Rockport v. City of Malvern*, 356 Ark. 393, 155 S.W.3d 9 (2004) (finding of fact on a stipulation). "A finding is clearly erroneous when, although there was 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." *R.M.W. v. State*, 375 Ark. 1, 6, 289 S.W.3d 46, 50 (2008). The circuit court found that the parties entered into no stipulation to exclude from trial all evidence of other crimes, wrongs, or acts. The circuit court was not clearly erroneous in reaching this decision. Thus, there was no error in the court analyzing what evidence of other crimes, wrongs, or acts was admissible, and again we note that Davis agrees that the evidence admitted was properly admitted under Ark. R. Evid. 404(b).

Fitness to Proceed

Davis asserts that the circuit court erred in failing to sua sponte hold a hearing on competency. Although Davis asked for and received a mental evaluation, no hearing on his mental fitness was requested and none was held. Where a mental evaluation is undertaken, and neither party contests the evaluation, a hearing need not be held. *Green v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998): "A defendant in a criminal case is ordinarily presumed to be mentally competent to stand trial, and the burden of proving incompetence is upon the defendant." *Mask v. State*, 314 Ark. 25, 32, 869 S.W.2d 1, 5 (1993).

However, a circuit court must order a hearing on competency sua sponte when there is "reasonable doubt about the defendant's competency to stand trial." *Jacobs v. State*, 294 Ark. 551, 553, 744 S.W.2d 728, 729 (1988) (citing *Campbell v. Lockhart*, 789 F.2d 644 (8th Cir. 1986)). It was Davis's burden to prove there was reasonable doubt about Davis's competency to stand trial. There was no duty on the circuit judge to sua sponte order a competency hearing under the facts in this case.

Arkansas Model Jury Instruction Criminal 202

Davis alleges the circuit court erred in refusing to instruct the jury with Arkansas Model Jury Instruction Criminal 202 (prior inconsistent statements by a witness other than the

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make additional argument to the circuit court. The circuit court found that the additional evidence to be offered through the testimony of Gracie Darby was not evidence the State had agreed to withhold from trial.

accused) when after deliberations began, the jury requested to review witness Marcia Flores Sperry's testimony. This instruction may be given when a witness testifies at trial inconsistently with testimony provided by that witness prior to trial and should be given at the time the inconsistent testimony is admitted into evidence. *See* AMI Criminal 2d 202 note.

Sperry testified that she lied to police and gave them false details such as where she was at the time of the crime; however, her statements that she saw Davis kill Young remained consistent. Davis made no request for the instruction at the time Sperry testified at trial and did not request it when the jury was instructed. A trial court's ruling on whether to submit a jury instruction will not be reversed absent an abuse of discretion. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). We find no abuse of discretion.

Rule 4-3(h) Review

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

Affirmed.

LARRY HOBBS FARM EQUIPMENT, INC. d/b/a Hobbs Farm Implement and Hobbs Farm Equipment *v.* CNH AMERICA, LLC d/b/a Case IH, successor in interest to DMI, Inc.

08-1056 291 S.W.3d 190

Supreme Court of Arkansas
Opinion delivered January 22, 2009

Easley and Houseal, P.A., by: *B. Michael Easley*, and *Dady & Garner, P.A.*, by: *John D. Holland*, for petitioner.

Foley and Lardner LLP, by: *Michael J. Lockerby* and *Brian W. McGrath*, and *Womack, Landis, Phelps & McNeill, P.A.*, by: *J. V. Phelps*, for respondent.

Friday, Eldredge & Clark, LLP, by: *Kevin A. Crass*, and *Peter B. Rutledge*, for amici curiae Association of Equipment Manufacturers and National Association of Manufacturers.

JIM HANNAH, Chief Justice. This case involves three questions of law certified to this court by the United States District Court for the Eastern District of Arkansas in accordance with Arkansas Supreme Court Rule 6-8 (2008) and accepted by this court on September 18, 2008. *See Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC*, 374 Ark. 268, 287 S.W.3d 550 (2008) (per curiam). The questions certified are the following:

1. Under the facts of this case, whether the market withdrawal of a product or of a trademark and trade name for the product constitutes "good cause" to terminate a franchise under Arkansas Code Annotated § 4-72-204(a)(1).

2. Under the facts of this case, whether liability under Arkansas Code Annotated § 4-72-310(b)(4) is created when a manufacturer terminates, cancels, fails to renew, or substantially changes the competitive circumstances of the dealership agreement based on re-branding of the product or ceasing to use a particular trade name or trademark for a product while selling it under a different trade name or trademark.

3. Under the facts of this case, whether the sole remedies for a violation of the Arkansas Farm Equipment Retailer Franchise Protection Act (AFERFPA) are: (1) the requirement that the manufacturer repurchase inventory for a termination without good cause, and (2) damages, costs, and attorneys' fees that result from the failure to purchase inventory as provided in Ark. Code Ann. § 4-72-309, or whether other remedies are also available.

As to the first question, we conclude that the answer is no. As to the second question, we also conclude that the answer is no. With respect to the third question, we conclude that other remedies are available.

The certified questions arise from an action filed in district court on April 17, 2008, by Hobbs Farm Equipment (Hobbs) after the termination of a dealer agreement between Hobbs and CNH America (CNH). CNH moved to dismiss the complaint, and the district court granted the motion to dismiss on all claims except the claims pertaining to the legal issues certified to this court. For purposes of CNH's motion to dismiss and the district court's certification order, the district court assumed the following facts to be true.

Hobbs and DMI, Inc., entered into an agreement enabling Hobbs to sell DMI products in June 1993. In early 1995, Hobbs executed a new dealer agreement with DMI, which enabled Hobbs to be a nonexclusive dealer of DMI products, specifically its tillage and soil management equipment, in its trade area.

In November 1998, Case Corporation, a predecessor of CNH, acquired DMI. Both Hobbs and each of DMI's successors, including CNH, continued to perform under the 1995 agreement until August 2007.

According to the complaint, in late 2004 or 2005, CNH began to supply Hobbs's competitor, Heartland Equipment, Inc., of East Arkansas (Heartland), with the DMI tillage and soil management equipment that Hobbs Farm Equipment had distributed since 1993. However, instead of bearing the DMI trademark and trade name, the equipment supplied to Heartland bore the Case IH trademark and name. Case IH is a trademark owned by and the name of a division of CNH. The equipment supplied to Heartland was painted red like other Case IH products, whereas DMI products were painted blue. Stated differently, CNH engaged in dual branding of identical tillage and soil management equipment originally distributed in blue paint under the DMI brand name but, beginning in 2004 or 2005, also distributed in red paint under the Case IH brand name.

On August 14, 2007, Hobbs received a letter from CNH that included the following:

> CNH America LLC ("The Company") wishes to provide you with advance notice of its decision to withdraw from the DMI-branded tillage business effective in 2008. As a result, Hobbs Farm Equipment Co. Inc.'s last ordering period for wholegoods will run through August 31, 2007. After that date, the Company will no longer accept orders for any DMI-branded tillage wholegoods

> products. However, Hobbs Farm Equipment Co. Inc. will be able to continue to purchase DMI-branded replacement parts through August 31, 2008.
>
> The Company will continue to provide you with retail programs throughout 2007 and the first half of 2008 to assist you in retalling [sic] these products prior to August 31, 2008. If any DMI-branded wholegoods remain at your dealership by that date, the Company will repurchase those products in accordance with the terms of your dealer agreement and company policy, or state law. The Company will also repurchase your remaining DMI replacement parts according to state law or company policy.

CNH decided that effective August 31, 2008, it would no longer sell equipment bearing the DMI trademark and trade name but would do so under the Case IH trademark and trade name.

Good Cause

In its brief before us, Hobbs contends that, under the plain language of the Arkansas Franchise Practices Act (AFPA), specifically, Arkansas Code Annotated section 4-72-204(a)(1) (Repl. 2001), neither the market withdrawal of a product nor the withdrawal of a trademark or trade name for a product constitutes "good cause" to terminate a franchise. For its part, CNH contends that the AFPA's requirement of "good cause" for terminating an Arkansas franchise does not prevent market withdrawal. CNH states that, while the AFPA prohibits discriminatory termination of a franchise, the Act does not prohibit nationwide discontinuation of a product line or brand.

The basic rule of statutory construction is to give effect to the intent of the legislature. *Ward v. Doss*, 361 Ark. 153, 205 S.W.3d 767 (2005). Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. *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. *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. *Id.*

Arkansas Code Annotated section 4-72-204(a)(1) provides that "[i]t shall be a violation of [the AFPA] to terminate or cancel a franchise without good cause." Pursuant to Arkansas Code Annotated section 4-72-202(7) (Repl. 2001), "good cause" is defined in the AFPA as:

> (A) Failure by a franchisee to comply substantially with the requirements imposed upon him or her by the franchisor, or sought to be imposed by the franchisor, which requirements are not discriminatory as compared with the requirements imposed on other similarly situated franchisees, either by their terms or in the manner of their enforcement; or
>
> (B) The failure by the franchisee to act in good faith and in a commercially reasonable manner in carrying out the terms of the franchise; or
>
> (C) Voluntary abandonment of the franchise; or
>
> (D) Conviction of the franchisee in a court of competent jurisdiction of an offense, punishable by a term of imprisonment in excess of one (1) year, substantially related to the business conducted pursuant to the franchise; or
>
> (E) Any act by a franchisee which substantially impairs the franchisor's trademark or trade name; or
>
> (F) The institution of insolvency or bankruptcy proceedings by or against a franchisee, or any assignment or attempted assignment by a franchisee of the franchise or the assets of the franchise for the benefit of the creditors; or
>
> (G) Loss of the franchisor's or franchisee's right to occupy the premises from which the franchise business is operated; or
>
> (H) Failure of the franchisee to pay to the franchisor within ten (10) days after receipt of notice of any sums past due the franchisor and relating to the franchise.

Hobbs points out that the franchise was not terminated for any of these reasons and that the plain language of the statute, coupled with the canon of statutory construction *expressio unius est exclusio alterius*, prohibits an interpretation of the AFPA's list of

circumstances constituting "good cause" for termination that includes circumstances not specifically listed in section 4-72-202. The phrase *expressio unius est exclusio alterius* is a fundamental principle of statutory construction that the express designation of one thing may be properly construed to mean the exclusion of another. *MacSteel v. Ark. Okla. Gas Corp.*, 363 Ark. 22, 210 S.W.3d 878 (2005).

Hobbs's argument is well taken. "Good cause" is clearly defined by the plain language of section 4-72-202(7). In that section, the General Assembly listed several examples of good cause for termination, and market withdrawal was not included as an example of good cause. Had the legislature intended to include market withdrawal as good cause for termination, it could have done so.

We also note that the United States Court of Appeals for the Fourth Circuit construed section 4-72-202(7) in *Volvo Trademark Holding Aktiebolaget v. Clark Machinery Co.*, 510 F.3d 474 (2007). In *Volvo*, the Fourth Circuit held that the enumerated occurrences in section 4-72-202 are the exclusive means by which a franchisor can terminate a franchise for "good cause." Decisions of the federal circuit courts are not binding on this court; however, we find the Fourth Circuit's interpretation of section 4-72-202 to be persuasive. The *Volvo* court wrote:

> The Arkansas Act includes a list of eight occurrences that constitute "good cause" for termination or cancellation of a franchise. *See* Ark. Code Ann. § 4-72-202 (West 2007). The district court held, adopting Clark's position, that this list constituted the exclusive means by which a franchisor may terminate a franchise for good cause under the Arkansas Act. Volvo acknowledges that it did not terminate Clark's Dealer Agreement for any of the specific reasons provided for in the Arkansas Act, but contends that those eight occurrences are not an exclusive list of what constitutes good cause for termination of a franchise. Appurtenant to this contention,Volvo maintains that its reasons for termination, i.e., "Volvoization" and "Dealer Rationalization," also constitute good cause for a franchise termination under the Arkansas Act.
>
> As the district court aptly recognized, Volvo's contention presents an issue of statutory construction, and a federal court sitting in diversity is obliged to apply state law principles to resolve such a question, utilizing such principles as enunciated and applied by the state's highest court. *See Volvo Trademark*, 416 F. Supp. 2d at 410

> (citing *Cooper Distrib. Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 274 (3d Cir. 1995)). The Arkansas Supreme Court has not resolved the statutory issue raised by Volvo, and we are therefore obliged to interpret the Arkansas Act by applying the principles of statutory construction that would guide an Arkansas court in making such a decision. *See CTI/DC, Inc. v. Selective Ins. Co. of Am.*, 392 F.3d 114, 118 (4th Cir. 2004).
>
> The district court made a thorough explanation of its ruling on this issue. According to the applicable Arkansas legal principles, if a statute is clear, it is to be given its plain meaning, and courts are not to search for any legislative intent. *See Volvo Trademark*, 416 F. Supp. 2d at 411 (citing *Hinchey v. Thomasson*, 292 Ark. 1, 727 S.W.2d 836 (1987)). Arkansas also subscribes to the legal principle of expressio unius est exclusio alterius, meaning " 'that the express designation of one thing may properly be construed to mean the exclusion of another.' " *Id.* (quoting *Gazaway v. Greene County Equalization Bd.*, 314 Ark. 569, 864 S.W.2d 233, 236 (1993)).
>
> Applying these controlling principles to the Arkansas Act, the district court concluded that good cause for termination of a franchise under the Act is limited to the eight occurrences specifically enumerated therein. *See Volvo Trademark*, 416 F. Supp. 2d at 412. The court deemed the Arkansas Act to be clear on its face, and determined that the express designation of those eight occurrences precluded any other circumstance from constituting good cause for a franchise termination. *Id.* at 411. As a result, the court concluded that the Arkansas Supreme Court would have held that the "circumstances constituting 'good cause' for termination under the [Arkansas Act] are limited to those expressly designated in" the Act and, because Volvo's actions did not fall under one of the enumerated occurrences, it had terminated Clark's Dealer Agreement in violation of the Arkansas Act. *Id.* at 412, 416-17.

Volvo, 510 F.3d at 482-83 (footnote omitted).

We agree with the reasoning set forth in the *Volvo* decision. We hold that the plain language of the statute, along with the canon of statutory construction *expressio unius est exclusio alterius*, prohibits an interpretation of the AFPA's list of circumstances constituting "good cause" for termination that includes circumstances not specifically listed in section 4-72-202. Accordingly, we answer the first certified question in the negative. The market withdrawal of a product or of a trademark and a trade name for the

product does not constitute "good cause" to terminate a franchise under Arkansas Code Annotated section 4-72-204(a)(1).

Before leaving this point, we note that in its brief before this court, CNH claims that by interpreting the statutory prohibition against termination of a franchise without "good cause" as not applying to market withdrawals, this court can avoid the prospect of a state-imposed "exit toll" that would raise Commerce Clause concerns. At our discretion, we answer questions of law certified to us by order of a federal court of the United States. *See* Ark. Sup. Ct. R. 6-8. The "exit toll" issue is not within the question of law we accepted, and we decline to address it.

Liability Under Arkansas Code Annotated section 4-72-310(b)(4)

The second question certified to this court is whether, under the facts of this case, liability under Arkansas Code Annotated § 4-72-310(b)(4) (Repl. 2001) is created when a manufacturer terminates, cancels, fails to renew, or substantially changes the competitive circumstances of the dealership agreement based on re-branding of the product or ceasing to use a particular trade name or trademark for a product while selling it under a different trade name or trademark.

Section 4-72-310(b)(4) provides that it is a violation of the Farm Equipment Retailer Franchise Protection Act for a manufacturer to:

> *Attempt or threaten to* terminate, cancel, fail to renew, or substantially change the competitive circumstances of the dealership agreement based on the result of a natural disaster, including a sustained drought in the dealership market area, labor dispute, or other circumstances beyond the dealer's control.

(Emphasis added.)

Thus, it is clear that section 4-72-310(b)(4) proscribes only *attempts* or *threats* to terminate, cancel, fail to renew, or substantially change the competitive circumstances of the dealership agreement. *Actual* termination, cancellation, failure to renew, or substantially changing the circumstances of the dealership agreement are not addressed in this section; therefore, no liability is created for those actions under section 4-72-310(b)(4). Accordingly, we answer the second certified question in the negative and hold that no liability under section 4-72-310(b)(4) is created when

a manufacturer terminates, cancels, fails to renew, or substantially changes the competitive circumstances of the dealership agreement based on re-branding of the product or ceasing to use a particular trade name or trademark for a product while selling it under a different trade name or trademark.

Remedies Under the AFERFPA

The final question this court must consider is whether, under the facts of this case, the sole remedies for a violation of the AFERFPA are: (1) the requirement that the manufacturer repurchase inventory for a termination without good cause, and (2) damages, costs, and attorneys' fees that result from the failure to purchase inventory as provided in Arkansas Code Annotated section 4-72-309 (Repl. 2001), or whether other remedies are also available.

Section 4-72-309 provides:

> If any wholesaler, manufacturer, or distributor fails or refuses to repurchase any inventory covered under the provisions of this subchapter within sixty (60) days after shipment of the inventory, he or she shall be civilly liable for one hundred percent (100%) of the current net price of the inventory, plus any freight charges paid by the retailer, the retailer's attorney's fees, court costs, and interest on the current net price computed at the legal interest rate from the sixty-first day after shipment.

Hobbs states that the 1991 amendments to the AFERFPA, adding section 4-72-310, created new rights not tied to a manufacturer's inventory repurchase rights. Hobbs avers that the AFERFPA contains two sets of rights for dealers — rights that exist during or after the term of the dealership agreement and rights that exist only upon termination of the dealership agreement. Hobbs further states that, while the legislature provided farm equipment dealers with new rights, the legislature failed to specify any particular remedy for violation of these new rights. Still, Hobbs asserts that it is not without a remedy because article 2, section 13 of the Arkansas Constitution requires that there be a remedy for every right created by the legislature. That section provides:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase; completely, and without denial; promptly and without delay; conformably to the laws.

Ark. Const. art. 2, § 13.

Hobbs correctly states the law, but it appears to suggest that this constitutional provision means that it is entitled to money damages. Article 2, section 13 provides that one wronged is entitled to a "certain remedy," but it does not state that the remedy must be in the form of money damages. "In the absence of a statutory provision expressly authorizing it, damages cannot be recovered by either party." *White River Land & Timber Co. v. Hawkins*, 128 Ark. 277, 279, 194 S.W. 9, 10 (1917). There is no language in section 4-72-310 authorizing money damages. Therefore, the remedies available under that section are limited to remedies other than money damages, such as injunctive relief and declaratory relief. As such, we answer the third question in the negative. The sole remedies for a violation of the AFERFPA are not those provided in section 4-72-309; parties may also seek remedies other than money damages.

Certified questions answered.

Howard H. NEAL, Jr. *v.* STATE of Arkansas

CR 08-859 291 S.W.3d 160

Supreme Court of Arkansas
Opinion delivered January 22, 2009

William R. Simpson, Jr., Public Defender, *Kent C. Krause*, Deputy Public Defender, and *Bret Qualls*, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

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

DONALD L. CORBIN, Justice. Appellant Howard H. Neal, Jr., appeals his conviction for capital murder and kidnapping in the Pulaski County Circuit Court. Appellant's sole point on appeal is that the trial court abused its discretion in refusing to allow a witness to testify on the basis that Appellant failed to disclose in a timely manner to the State that the witness would be testifying. As Appellant was sentenced to a term of life imprisonment, our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(a)(1). We affirm.

As Appellant does not challenge the sufficiency of the evidence supporting his conviction, a brief recitation of the facts will suffice. On October 23, 2005, Jacquelyn Polk left her five-year-old daughter, Jasmine Peoples, at the home of Polk's friend, Shavonda Perry. Polk was taking Perry to visit a relative in a nursing home, while Ronald Redden and others stayed with Jasmine and another child. While Jasmine was asleep in the front room, and the second child was asleep in a bedroom, Appellant walked in the front door of the apartment and exited out the back door, where he spent about fifteen minutes wandering around the

backyard, talking to himself. Appellant then reentered the apartment stating, " 'I want all you M-F-ers to get out of my house.' " He then told Redden, " 'I'm going to kill every last one of y'all, and I'm going to start with your ass.' " Appellant then attacked Redden, stabbing him in the neck. Redden and the others fled the apartment, inadvertently leaving behind the two children.

The Jacksonville Police Department was called to the scene, and by the time officers arrived, Appellant had barricaded himself in the apartment. Sergeant Chris Burrough attempted to make contact with Appellant. He tried to convince Appellant to release the two children, but Appellant refused to do so. Because the apartment's front door was blocked by furniture, the department's entry team, a group of officers specifically trained in making entry into high-risk situations, was called. The entry team ultimately accessed the apartment through the back door and took Appellant into custody. Captain Kenny Boyd, a member of the entry team, began searching for the two children. After moving an overturned couch and televison set, Captain Boyd discovered a child's body lying face down underneath the furniture. The child, who also had an extension cord around her neck, was later identified as Jasmine. The second child was found unharmed. An autopsy of Jasmine revealed numerous blunt-force and sharp-force injuries, but the ultimate cause of her death was compressional asphyxia, which was consistent with a heavy object or objects being placed on top of her chest.

Appellant was charged with capital murder and kidnapping.[1] He was tried before a jury, convicted and sentenced to life imprisonment without the possibility of parole on the charge of capital murder and twenty-two years' imprisonment on the charge of kidnapping, with the sentences to be served concurrently. This appeal followed.

As his sole point on appeal, Appellant argues that the trial court abused its discretion in refusing to allow a witness, Melody Perry, to testify on behalf of the defense at trial. Appellant concedes that he violated Ark. R. Crim. P. 18.3, in that Ms. Perry's name was not provided to the State in a timely manner. He argues, however, that the sanction for such a violation is left to the discretion of the trial court, and here the trial court abused that

[1] Appellant was also charged with battery in the first degree relating to his attack on Redden, but this charge was later dismissed upon motion by the State.

discretion by denying Appellant's request that Ms. Perry be allowed to testify. In support of this contention, Appellant avers that there was no evidence that he deliberately violated Rule 18.3, as he learned of Ms. Perry's testimony the morning of trial. Moreover, Appellant argues it was an abuse of discretion because (1) Ms. Perry was the only known witness who could cast doubt on the State's theory of the case; (2) the State would not have been surprised by Ms. Perry's testimony as they cross-examined her during the defense proffer of her as a witness; (3) the State could have easily rebutted Ms. Perry's causation testimony; and (4) it was for the jury, not the judge, to decide if Ms. Perry's testimony was credible.

The State counters that no mention was ever made of Rule 18.3 at trial. The State objected to Ms. Perry testifying on the basis that she was not named as a witness during voir dire and that the State had not subpoenaed witnesses who could rebut Ms. Perry's testimony, as there was no indication that the entry into the apartment would be an issue at trial. The State contends therefore that it was within the trial court's discretion to preclude Ms. Perry from testifying. As to Appellant's contention that the trial court abused its discretion in judging Ms. Perry's credibility, the State argues that this court can affirm the trial court's ruling for any reason. Finally, the State avers that Appellant cannot demonstrate prejudice resulting from the trial court's ruling, as he all but concedes that Ms. Perry's testimony was not to be believed.

Matters pertaining to the admissibility of evidence are left to the sound discretion of the trial court, and we will not reverse such a ruling absent an abuse of that discretion. *Spring v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006); *McEwing v. State*, 366 Ark. 456, 237 S.W.3d 43 (2006). Furthermore, this court will not reverse absent a showing of prejudice, as prejudice is not presumed. *Id.*

In the present case, after the jury was selected, but prior to any opening statements, Appellant's counsel notified the trial court and the State that it had just learned of a witness with potentially exculpatory information. Specifically, Melody Perry, who had originally been approached by an investigator for the defense regarding any knowledge she might have of the location of another potential witness, came forward and notified Appellant's counsel that she was present at the time that officers from the Jacksonville Police Department entered the apartment through the front door, pushing over the furniture that had been piled against the front door. Appellant requested that he be allowed to call Perry as a

defense witness. The State objected, arguing that the jury had already been seated and those members were selected based on whether they knew anyone involved with the case and that it had based its witness list on the announced witnesses. The trial court announced that it was taking the matter under advisement.

At the end of the first day of trial, Appellant was allowed to proffer Perry as a witness. Perry stated that she approached defense counsel and stated that she was standing in front of the apartment during the standoff and could see inside through a slit in the curtain. Inside she saw furniture barricading the front door. Perry stated that after about an hour or an hour-and-a-half, police "started barging in the front door and the back door." Upon cross-examination, Perry admitted that Appellant was her first cousin. At the conclusion of Perry's proffered testimony, the trial court ruled that it was not going to allow her to testify at trial since she had come forward at the last minute and had no credibility.

Under Rule 18.3,

> [s]ubject to constitutional limitations, the prosecuting attorney shall, upon request, be informed as soon as practicable before trial of the nature of any defense which defense counsel intends to use at trial and the names and addresses of persons whom defense counsel intends to call as witnesses in support thereof.

Discovery in criminal cases, within constitutional limitations, must be a two-way street. *See McEwing*, 366 Ark. 456, 237 S.W.3d 43. This interpretation promotes fairness by allowing both sides the opportunity for full pretrial preparation, preventing surprise at trial, and avoiding unnecessary delays at trial. *Id.* In *McEwing*, this court held that a trial court did not abuse its discretion in prohibiting an alibi witness from testifying on behalf of the appellant when the appellant attempted to call the witness the morning of trial. In so ruling, this court stated that the trial court's decision to exclude the witness was based on a determination that it would be unfair to the State to allow the witness when the appellant sought to call her the morning of trial. *Id.*

[redacted] While *McEwing* is distinguishable on the basis that there was a blatant violation of Rule 18.3 involved there, the underlying principle that it would be unfair to the State under Rule 18.3 to allow a witness who comes forward the morning of trial to testify is the same in both cases. Even though in the present

case it is clear that Appellant was unaware of Ms. Perry and her potential testimony, we still cannot say that the trial court abused its discretion in excluding her as a witness. While the trial court improperly ruled on Ms. Perry's credibility, as credibility matters are within the province of the jury, *see, e.g.*, *Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008), this court can affirm the trial court if it reached the right result even for the wrong reason. *See Jarrett v. State*, 371 Ark. 100, 263 S.W.3d 538 (2007). Accordingly, there is no merit to Appellant's argument on appeal.

Affirmed.

Linda STOKES *v.* STATE of Arkansas

CR 08-86 291 S.W.3d 155

Supreme Court of Arkansas
Opinion delivered January 22, 2009

Matthew Lunde, for appellant.

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

JIM GUNTER, Justice. This appeal arises from a decision of the Conway County Circuit Court denying Appellant Linda Stokes's motion to suppress. We reverse and remand.

On July 31, 2007, Appellant and a passenger, Amy Howard, were traveling along Interstate 40 when Officer Eric Lee noticed that the vehicle was traveling below the speed limit at 60 miles per hour. Officer Lee testified that once he got behind the vehicle, it

made a hasty exit off of the interstate into Plumerville. Officer Lee could see Appellant and the passenger watching him out of the mirrors. According to Lee, "the vehicle turned left and went North on Highway 92 to Plumerville." He followed the vehicle and it eventually came to a complete stop in the road. He testified that it seemed like they were looking for a place to turn, which piqued his interest. The vehicle continued on Highway 92 and turned left on Ballpark Road. Lee's interest was piqued again because Ballpark Road is an all-black neighborhood with a dead-end street and the occupants of the vehicle were two white females. He ran the vehicle's tag, and discovered that it was registered in Arizona. He continued down Highway 92 past Ballpark Road and observed in his mirror that the vehicle was backing down Ballpark Road. He turned around and the vehicle began driving down the road again. Lee then got behind the vehicle and initiated a traffic stop.

Lee testified that he stopped Appellant's vehicle for careless driving because the vehicle had backed down a city street. When Lee approached the vehicle, he observed that Appellant was "visibly shaking" and did not have identification on her. She told Lee that she did not have identification because her license was suspended. Lee returned to his vehicle and discovered that Appellant had a suspended driver's license out of Arizona and an expired license out of California. Lee then approached the vehicle again and asked Appellant to step out of the vehicle. He began asking her questions about where they were going and what they were doing in the area. He also asked Howard questions and testified that "the stories they were giving me were not matching up and I didn't feel comfortable with both of them out there at that point." He placed Appellant under arrest for driving on a suspended license. As he was placing her in the back of his car, he asked her if they were transporting anything illegal. He testified that Appellant would not make eye contact with him and looked away when he asked her if there were any drugs in the car. He then began speaking to Howard, who had the same reaction as Appellant.

Lee called a tow truck to tow the vehicle because neither Appellant nor Howard had driver's licenses. Another officer arrived and contacted the rental company about the vehicle. According to the rental company, the vehicle was not supposed to be taken out of Arizona, and neither Appellant nor Howard was listed as the actual renter of the vehicle. Lee then conducted an inven-

tory of the vehicle and found marijuana in the trunk. Lee did not issue a citation for careless driving.

Appellant was charged with possession of marijuana with intent to deliver. On September 13, 2007, Appellant filed a motion to suppress the evidence found in the rental vehicle. The circuit court denied the motion to suppress. Appellant entered a guilty plea conditioned on the appeal of the motion to suppress. Appellant now brings this appeal.

This case was certified to us from the Arkansas Court of Appeals because it involves a perceived inconsistency in the decisions of the Arkansas Supreme Court, issues needing clarification or development of the law or overruling of precedent, and issues of substantial public interest pursuant to Arkansas Supreme Court Rule 1-2(b)(2), (4), and (5) (2008).

For her sole point on appeal, Appellant asserts that the circuit court erred in denying Appellant's motion to suppress. Specifically, Appellant contends that (1) the evidence was obtained during an unlawful stop of Appellant's vehicle and (2) even if there was probable cause to initiate the traffic stop, "the evidence obtained as a result of Appellant's arrest for a misdemeanor, rather than the issuance of a summons, was in direct violation of Arkansas Rules of Criminal Procedure 7.1 and should be deemed fruit of the poisonous tree."

The State responds, asserting that Appellant lacks standing to challenge the suppression of the evidence. In the alternative, the State contends that (1) there was probable cause to initiate the traffic stop; (2) Appellant did not obtain a ruling regarding her argument that a summons was not issued for her arrest; (3) even if there were a ruling, Rule 7.1(b) has no application here; and (4) the circuit court correctly refused to suppress the evidence seized from the car because the marijuana would have inevitably been discovered through the inventory search even if there were no arrest.

In her reply brief, Appellant asserts that the State cannot raise its standing argument for the first time on appeal. In the alternative, Appellant contends that she does have standing, citing *Brendlin v. California*, 551 U.S. 249 (2007).

In reviewing the denial of a motion to suppress evidence, this court conducts a de novo review based upon the totality of the circumstances, reversing only if the circuit court's ruling is clearly

against the preponderance of the evidence. *Koster v. State*, 374 Ark. 74, 286 S.W.3d 152 (2007). Issues regarding the credibility of witnesses testifying at a suppression hearing are within the province of the circuit court. *Id.* Any conflicts in the testimony are for the circuit court to resolve, as it is in a superior position to determine the credibility of the witnesses. *Id.*

I. Standing

We must first address whether the State's standing argument can be raised for the first time on appeal. We have held that the issue of standing to challenge the legality of a search and seizure is not a jurisdictional issue that can be raised for the first time on appeal. *See State v. Houpt*, 302 Ark. 188, 788 S.W.2d 239 (1990). In *Houpt*, however, the State, as appellant, raised the issue of the appellee's standing to challenge the legality of a search and seizure in order to obtain a reversal. We have never held that an appellee cannot raise an issue for the first time on appeal in an effort to obtain an affirmance. *See Ramage v. State*, 61 Ark. App. 174, 966 S.W.2d 267 (1998). We have a long-standing rule that we may affirm the result reached by the trial court, if correct, even though the reason given by the trial court may have been wrong. *See Mamo Transp., Inc. v. Williams*, 375 Ark. 97, 289 S.W.3d 79 (2008). Here, the State is asking us to affirm the circuit court's denial of Appellant's motion to suppress, therefore, we hold that the State can raise the issue of standing for the first time on appeal.

We now turn to the issue of whether Appellant has standing to contest the legality of the search and seizure. We have held that an appellant must have standing to assert Fourth Amendment rights because those rights are personal in nature. *State v. Bowers*, 334 Ark. 447, 976 S.W.2d 379 (1998); *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997); *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). Whether an appellant has standing depends upon whether he manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognized that expectation as reasonable. *Littlepage, supra.*

In *Littlepage*, the appellant was driving a rental vehicle when he was stopped by police. We said that in order for the appellant to assert his Fourth Amendment rights, he must show that he gained possession from the owner or someone with authority to grant possession. *Id.* According to the rental agreement, the vehicle was rented to a third party, and neither Littlepage nor his passenger was

authorized to use the vehicle. We held that the appellant had no standing to challenge the officer's search as unconstitutional because he had no expectation of privacy in the car. *Id.*

In *Bowers*, we held that the appellant who was a passenger in a vehicle had standing to contest the search of the vehicle after an illegal stop. None of the parties contested the fact that the initial stop was illegal. We distinguished *Bowers* from *Littlepage* and our other previous cases in that *Bowers* involved an illegal stop, and the search for and seizure of the drugs directly followed the stop. We said that the search on the heels of an illegal stop presents a different issue with respect to occupants of a vehicle. *Id.* (citing *Dixon v. State*, *supra*). "Similarly, the occupants of a vehicle have standing to assert their own Fourth Amendment rights, independent of the owner's, such as a challenge to the initial stop, or the seizure of their person." *Id.* (quoting *Dixon*).

[redacted] Appellant relies on *Brendlin v. California*, 551 U.S. 249 (2007), for her assertion that she has standing to challenge the legality of the stop. In *Brendlin*, officers stopped a car to check its registration without reason to believe that it was being operated unlawfully. The United States Supreme Court held that a passenger, like the driver, of an automobile that was pulled over by a police officer for a traffic stop was "seized" under the Fourth Amendment from the moment the automobile came to a halt on the roadside and, therefore, was entitled to challenge the constitutionality of the traffic stop. *Id.* Here, in determining whether Appellant was seized, the relevant inquiry is whether a reasonable person in Appellant's position when the car stopped would have believed herself free to "terminate the encounter" between the police and herself. *Brendlin*, 551 U.S. at 255. Under the facts in this case, a reasonable person in Appellant's position would not have believed that she was free to terminate the encounter between Officer Lee and herself. Because Appellant was seized for Fourth Amendment purposes, she has standing to challenge the stop's constitutionality.

This case was certified to us because of a perceived inconsistency between our holding in *Littlepage* and the holdings in *Bowers* and *Brendlin*. There is no conflict between the decisions because the issue of standing as it relates to the seizure of a person was not an issue in *Littlepage*. Rather, the issue in *Littlepage* was whether the appellant had standing to challenge the search of a vehicle, which involved the seizure of *property* and the expectation

of privacy. Because the issues related to standing in *Littlepage* and the issues related to standing in *Bowers* and *Brendlin* were different, we find no inconsistency in the decisions.

II. Traffic Stop

Appellant asserts that the evidence obtained was the result of an illegal and unconstitutional traffic stop and should be deemed fruit of the poisonous tree. In order for a police officer to make a traffic stop, he must have probable cause to believe that the vehicle has violated a traffic law. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004); *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001); *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998). Probable cause is defined as "facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected." *Burks v. State*, 362 Ark. 558, 210 S.W.3d 62 (2005). In assessing the existence of probable cause, our review is liberal rather than strict. *Laime, supra.* Whether a police officer has probable cause to make a traffic stop does not depend on whether the driver was actually guilty of the violation which the officer believed to have occurred. *Id.*

Here, Officer Lee testified that the vehicle driven by Appellant was driving 60 miles an hour, which was below the posted speed limit. The vehicle then made a "hasty exit" off the 112 off-ramp into Plumerville. Lee could see both Appellant and the passenger watching him though their mirrors. Lee said it looked like they were trying to decide which way to turn. After the vehicle turned, Lee followed the vehicle and it "almost made a complete stop in the road and again it looked like they were looking for a place to turn." The vehicle turned left on Ballpark Road. Lee said this piqued his interest because it was an all-black neighborhood and the occupants of the vehicle were two white women. Lee ran the tag on the vehicle and discovered it was from Arizona. He continued past Ballpark Road and observed in his mirror that the vehicle was backing down Ballpark Road. When Lee turned his car around, the vehicle began driving back down the road. Lee then pulled the vehicle over.

Lee testified that he pulled the car over for careless driving. Arkansas Code Annotated § 27-51-104 (Supp. 2007) covers careless and prohibited driving, stating in pertinent part:

> (a) It shall be unlawful for any person to drive or operate any vehicle in such a careless manner as to evidence a failure to keep a

> proper lookout for other traffic, vehicular or otherwise, or in such a manner as to evidence a failure to maintain proper control on the public thoroughfares or private property in the State of Arkansas.

[redacted] The State contends that Appellant violated subsection (a) because she operated the vehicle "in such a careless manner as to evidence a failure to keep a proper lookout for other traffic, vehicular or otherwise" by driving her car in reverse down the street. With regard to whether backing down a street was careless, Officer Lee testified, "I don't believe any cars were coming. There were no cars behind me. There is always a danger. In the absence of any other vehicles around I wouldn't say there necessarily was a danger." Based on Officer Lee's testimony that there were no other vehicles around, and there was not "necessarily a danger," we cannot say that the facts or circumstances within the officer's knowledge were sufficient to permit a person of reasonable caution to believe that Appellant failed to keep a proper lookout for other traffic by backing down the road.

The State contends that, even if Lee did not have probable cause to stop Appellant for careless driving, he did have probable cause to stop her for violating Ark. Code Ann. § 27-51-1309(a) (Supp. 2007), which provides that "[t]he driver of a vehicle shall not back a vehicle upon any roadway, unless the movement can be made with reasonable safety and without interfering with traffic." Once again, we cannot say that the facts within the officer's knowledge were sufficient to permit a person of reasonable caution to believe that the vehicle could not be backed down the road "with reasonable safety and without interfering with traffic."

Accordingly, we hold that there was no probable cause to believe that Appellant was committing a traffic violation and that the circuit court therefore clearly erred in denying the motion to suppress. We therefore reverse and remand. In view of our holding that there was no probable cause to make the stop, we need not address Appellant's remaining arguments.

Reversed and remanded.

Rufus Homer ADAMS *v.* ARKANSAS DEPARTMENT of HEALTH and HUMAN SERVICES

08-806 291 S.W.3d 172

Supreme Court of Arkansas
Opinion delivered January 22, 2009

Val P. Price, for appellant.

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

PAUL E. DANIELSON, Justice. The instant case is a no-merit appeal from an order of long-term protective custody filed by counsel for appellant Rufus Homer Adams. The order awarded long-term custody of Mr. Adams to appellee Arkansas Department of Health and Human Services (DHS). Mr. Adams's brief presents this court with an issue of first impression, that is, whether a court-appointed attorney for an alleged endangered, indigent adult can file an *Anders* no-merit appeal from an order of long-term custody in an adult-protective case. Assuming that an *Anders* no-merit appeal is

possible, counsel for Mr. Adams asserts that the circuit court did not err when it awarded custody of Mr. Adams to DHS. We adopt herein the *Anders* no-merit procedures for appeals by indigent adults subject to orders of long-term custody, and we affirm the circuit court's order and grant counsel's motion to withdraw.

On February 22, 2008, DHS filed a petition for emergency custody, asserting that it should be granted custody of Mr. Adams because

> the circumstances or conditions of [Mr. Adams] are such that returning to or continuing at [his] place of residence or in the care and custody of a parent, guardian, or other person responsible for [his] care presents imminent danger to [his] health or safety. [Mr. Adams] lacks the capacity to comprehend the nature and consequences of remaining in a situation that presents imminent danger to [his] health or safety.

Attached to the petition was an affidavit from Adult Protective Services, stating, in part, that Mr. Adams had been evaluated and was found to be incapable "of managing his medications or his finances and was not capable of independent living." The affidavit stated that Mr. Adams suffered from Type 2 Diabetes, coronary artery disease, and hypertension, and that Mr. Adams admitted difficulty with his memory, due to a stroke a few years prior. It further provided that Mr. Adams continued to "be confused and have memory problems" and appeared "to have little understanding of the consequences of his actions." As a result of the petition, the circuit court issued an ex parte order of emergency custody.

On March 3, 2008, the circuit court filed a probable-cause order, in which the circuit court declared Mr. Adams indigent, appointed counsel, and set a hearing on long-term custody for March 24. Following that hearing, the circuit court filed an order for long-term protective custody, awarding DHS custody of Mr. Adams. In its order, the circuit court found that

> [r]espondent lacks the capacity to comprehend the nature and consequences of remaining in a situation that presents an imminent danger to his health or safety. More specifically: Mr. Adams has been diagnosed with Type 2 Diabetes, coronary artery disease, and hypertension. Dr. Jim Pang states that in his opinion Mr. Adams is not capable of managing his medications or his finances and not capable of independent living. Mr. Adams does not have any family

> willing or able to assist him with independent living nor does he believe he needs assistance. Mr. Adams claims to have an apartment in Osceola ready to move in but has been unable to tell anyone the address.
>
> 4. Respondent is unable to provide for his own protection from abuse, neglect, or exploitation.
>
> 5. That the Respondent did not have a caregiver, responsible for his protection, care, or custody.

The circuit court then found by clear and convincing evidence that Mr. Adams was in need of placement and awarded long-term custody of Mr. Adams to DHS. On April 22, 2008, Mr. Adams filed his notice of appeal, and counsel for Mr. Adams has presented this court with the instant no-merit brief and a motion to withdraw. Mr. Adams was given thirty days to respond to his counsel's no-merit brief, and various documents from Mr. Adams were received September 19, 2008. We turn now to the instant appeal.

I. Adoption of No-Merit Procedures

For the first point on appeal, counsel for Mr. Adams, citing to this court's recent adoption of a no-merit procedure for dependency-neglect cases, urges this court to adopt a no-merit procedure for appeals from orders of long-term custody under the Arkansas Adult Maltreatment Act, Arkansas Code Annotated §§ 9-20-101—9-20-121 (Repl. 2008). Specifically, counsel requests that "the Court adopt a No Merit procedure, accept this No Merit brief as compliant with a No Merit procedure, [r]ule on the merits of the case and allow him to withdraw." DHS responds, requesting that counsel's motion to withdraw be granted and the appeal be dismissed.

In *Anders v. California*, 386 U.S. 738 (1967), the United States Supreme Court, in an effort to protect an indigent defendant's right to counsel on appeal, adopted the following procedure for counsel's withdrawal, where counsel has conscientiously determined that the appeal contains no meritorious issues:

> [Counsel's] role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw.

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

386 U.S. at 744. The question presented in the instant appeal is whether the no-merit *Anders* procedures should be applied to appeals from orders of long-term custody pursuant to the Adult Maltreatment Custody Act.[1]

The purpose of the Adult Maltreatment Custody Act is to:

> (1) Protect a maltreated adult or long-term care facility resident who is in imminent danger; and
>
> (2) Encourage the cooperation of state agencies and private providers in the service delivery system for maltreated adults.

Ark. Code Ann. § 9-20-102 (Repl. 2008). To that extent, the Act gives jurisdiction to the probate division of the circuit court over proceedings for custody, temporary custody for purposes of evaluation, court-ordered protective services, or an order of investigation pursuant to the Act. *See* Ark. Code Ann. § 9-20-108(a)(1) (Repl. 2008). The Act further sets forth the procedures to be followed under the Act.

In *Linker-Flores v. Arkansas Department of Human Services*, 359 Ark. 131, 194 S.W.3d 739 (2004), this court adopted the *Anders* no-merit procedures for appeals by indigent parents, which stem from termination-of-parental-rights proceedings. In *Linker-Flores*, we observed that, pursuant to statute and relevant case law,

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[1] We recently declined to consider whether the no-merit *Anders* procedures should apply to appeals from civil-commitment orders, finding that the appeal at issue was moot. *See Dickinson v. State*, 372 Ark. 62, 270 S.W.3d 863 (2008).

indigent parents in Arkansas had a right to counsel on appeal.[2] Given that right, we then examined the "extent of counsel's obligations when counsel believes the appeal is frivolous." 359 Ark. at 138, 194 S.W.3d at 745. After reviewing a variety of jurisdictions that had addressed both sides of the issue, we concluded that "[b]ecause . . . the benefits from the *Anders* protections to the indigent parent's right to counsel outweigh the additional time such procedures require, the *Anders* procedures shall apply in cases of indigent parent appeals from orders terminating parental rights." *Id.* at 141, 194 S.W.3d at 747.

In the same vein, we must initially determine whether an indigent adult subject to an order of long-term custody has a right to counsel on appeal. Indeed, such an adult is entitled to counsel during the proceedings against him in the probate court, pursuant to the Act itself. Under the Adult Maltreatment Custody Act, the adult subject to custody shall be served a copy of the petition for custody, as well as notice of the hearing to be held on the petition. *See* Ark. Code Ann. § 9-20-111(a), (b)(1) (Repl. 2008). In addition, the pleadings served on the adult shall "include a statement of the right to: (1) Effective assistance of counsel; (2) Be present at the hearing; (3) Present evidence on the respondent's own behalf; (4) Cross-examine witnesses who testify against him or her; (5) Present witnesses in the respondent's own behalf; (6) Remain silent; and (7) View and copy all petitions, reports, and documents retained in the court file." Ark. Code Ann. § 9-20-111(c). Further evidence regarding the adult's right to counsel is found in Ark. Code Ann. § 9-20-116(b)(1) (Repl. 2008), which directs the probate court, at the probable-cause hearing, to make certain inquiries of the adult regarding counsel, including:

> (A) Whether the maltreated adult has the financial ability to retain counsel; and
>
> (B) If the maltreated adult does not have the financial ability to retain counsel, whether the maltreated adult is indigent.

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[2] The pertinent statute provided:

> In all proceedings to remove custody from a parent or guardian or to terminate parental rights, the parent or guardian shall be advised in the dependency-neglect petition or the ex parte emergency order and the first appearance before the court of the right to be represented by counsel *at all stages of the court proceedings and the right to be appointed counsel if indigent.*

Ark. Code Ann. § 9-27-316(h)(1) (Supp. 2003) (emphasis added).

In addition, the court shall inform the adult of the right to effective assistance of counsel and, if the adult is indigent, appoint counsel for the adult. *See* Ark. Code Ann. § 9-20-116(b)(2). The Act, thus, makes clear that an adult, subject to a petition for custody pursuant to the Act, is entitled to effective assistance of counsel during the probate-court proceedings.

While it is clear that the adult subject to the Act is entitled to counsel in the proceedings before the probate court, no mention is made in the Act regarding the adult's entitlement to counsel on appeal, which was the guiding principle for our decision in *Linker-Flores*. Nonetheless, it would defy logic were we to hold that such adults ordered into long-term custody under the Act, who were entitled to counsel during the probate-court proceedings, were not entitled to counsel on appeal. Here, Mr. Adams was entitled to counsel during the proceedings before the probate court, he was entitled to appeal the order of the probate court,[3] and, therefore, we hold, he is entitled to counsel on appeal.

Because an indigent adult subject to the Act is entitled to counsel on appeal, it is evident to this court that the *Anders* no-merit procedures would best protect Mr. Adams's interests, or those of any indigent adult subject to the Act, when counsel believes there is no issue of arguable merit for appeal. Accordingly, we hold that the *Anders* no-merit procedures apply to appeals by indigent adults from long-term custody orders under the Adult Maltreatment Custody Act. In doing so, we further hold that appointed counsel for an indigent adult, subject to the Adult Maltreatment Custody Act, on a first appeal from an order of long-term custody may petition this court to withdraw as counsel if, after a conscientious review of the record, counsel can find no issue of arguable merit for appeal. Counsel's petition must be accompanied by a brief discussing any arguably meritorious issue for appeal. The indigent adult must be provided with a copy of the brief and notified of his or her right to file points for reversal within thirty days. If this court determines, after a full examination of the record, that the appeal is frivolous, the court may grant counsel's

[3] There is no question that an adult subject to the Act can appeal the order of the probate court, as Ark. Code Ann. § 28-1-116 (Repl. 2004) specifically permits an appeal of probate orders, except an order removing a fiduciary for failure to give a new bond or to render an account as required by the court or an order appointing a special administrator.

motion and dismiss the appeal. If, however, we find any of the legal points arguable on their merits, we will appoint new counsel to argue the appeal.

Because Mr. Adams's counsel has filed a no-merit *Anders* brief and a motion to withdraw in accordance with the procedures set forth above, we will consider the instant no-merit appeal.

II. Order of Long-Term Custody

Mr. Adams's counsel next asserts that the probate court did not err in granting DHS's petition for custody. Stating that the case is one of first impression, counsel urges this court to adopt the same standard of review used in termination-of-parental-rights cases, that of clear and convincing evidence. He further contends that the evidence presented supports the circuit court's order of long-term custody.[4]

Our standard of review for probate orders is well established. This court reviews probate proceedings de novo, and the decision of the probate court will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the probate court to determine the credibility of witnesses. *See Buchte v. State*, 337 Ark. 591, 990 S.W.2d 539 (1999) (reviewing an order of involuntary commitment). *See also Campbell v. State*, 51 Ark. App. 147, 912 S.W.2d 446 (1995) (observing, in review of an involuntary-commitment order, that when the burden of proof in the trial court was by clear and convincing evidence, the standard of review was whether the trial court's finding is clearly erroneous). After reviewing the evidence in the instant case, we cannot say that the circuit court clearly erred in granting the petition for long-term custody.

Pursuant to the Act, the probate court may order long-term custody with DHS if the court determines that:

> (1) The adult lacks the capacity to comprehend the nature and consequences of remaining in a situation that presents an imminent danger to his or her health or safety;

[4] As already noted, in compliance with the *Anders* no-merit procedures, Mr. Adams was notified of his right to file points for reversal. Mr. Adams did file some documents for our review, but no *actual* points for reversal were filed.

> (2) The adult is unable to provide for his or her own protection from maltreatment; and
>
> (3) The court finds clear and convincing evidence that the adult to be placed is in need of placement as provided in this chapter.

Ark. Code Ann. § 9-20-117(c) (Repl. 2008). Here, the circuit court made the requisite findings. Thus, the question presented is whether the circuit court's findings were clearly erroneous. They were not.

A review of the hearing before the circuit court reveals the following testimony. Sunny Rutledge, an Adult Protective Services case worker, testified that on February 13, 2008, DHS was contacted and informed by a senior-care facility in Forrest City that Mr. Adams was ready to leave the facility, "and that they didn't believe that he was able to leave on his own." Ms. Rutledge stated that while Mr. Adams did not want to be discharged to a nursing home, the facility did not think him able to take care of himself, and, further, he had no family willing to take care of him. Ms. Rutledge testified that prior to that, Mr. Adams had been in a nursing home in Harrisburg, and that, upon leaving against medical advice, Mr. Adams went to Cross County, where he was incarcerated for writing hot checks.[5] She stated that while in jail, Mr. Adams went off all of his medications, and upon being concerned when Mr. Adams's legs began to turn black, the jail sent Mr. Adams to the senior-care facility.

Ms. Rutledge testified that, while at the senior-care facility, Mr. Adams was evaluated by Dr. Jerry Pang. In a letter by Dr. Pang, which was submitted to the circuit court as an exhibit, he stated that

> [a]fter evaluating Mr. Adams, it is my opinion that Mr. Adams lacks capacity to fully comprehend the consequences of his behavior. Mr. Adams is an insulin dependent diabetic and also has coronary artery disease and hypertension. He requires close supervision to ensure that he takes medications as they are prescribed and that he receives proper nutrition for his diabetes. Furthermore, he lacks the capacity to manage financial matters as has already been demonstrated by his writing the checks with insufficient funds.

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[5] The hot-check charges stemmed from Mr. Adams's attempts to purchase both a truck and a house, using checks from accounts that had been closed for approximately two years.

Ms. Rutledge further testified that Mr. Adams had admitted to having problems with his short-term memory, and that in an evaluation, also submitted to the circuit court, he was diagnosed with dementia.

Ms. Rutledge stated that, while in a Manila nursing home, Mr. Adams struck a nurse and was asked to leave. She said that no such problems had occurred at Mr. Adams's current facility, but that he had called her before the hearing, sounding delusional and stating that he did not want to go to court in Mississippi County because "his ex-wife was having sex with the Judge." Ms. Rutledge testified that some of the consequences posed to Mr. Adams by not taking his medications as needed were a very high risk of having another stroke and the possibility of losing his legs due to severe complications from his diabetes. Ms. Rutledge recommended that Mr. Adams remain in nursing-home care. She further testified that she did not feel that he was able to protect himself from abuse or neglect; that if he was on his own, he did not have the capacity to understand that he was putting himself in a situation that would be putting him in imminent danger; that she believed that he should remain in his current facility and that it was the least restrictive alternative for him; and that his son and daughter would still be able to visit Mr. Adams at that facility.

Ms. Janice Woods, an Adult Protective Services nursing consultant and a registered nurse, testified that she had conducted a two-hour assessment of Mr. Adams's mental status and performed a mini-mental status examination. She stated that while he was aware of the type of medications that he was taking, she did not think he fully grasped the concept of what would happen if he did not take his medication. Specifically, she stated that upon not taking his medications for two months and being admitted to the hospital,

> his blood sugar was 264 and a normal value would be anywhere from 80 to 110 depending on the machine that you were using to calibrate it. His urine creatine level was 1.9, which with high blood sugars sometimes you can wind up with renal failure. He had a white count of 11.17 indicating that he had an infectious process going on. And his blood pressure was 173 over 83. He had a three plus pitting edema in his legs. They were very swollen and he also had cellulitis and was placed on antibiotics for that.

She commented that in those circumstances, renal failure, amputations due to the cellulitis, or another stroke due to heart dysrhythmias could result. She further related to the court the following:

> Anytime he's been out of the nursing home and even in the nursing home he's had either legal issues or issues with combative behavior. I believe one of the nursing homes he struck a residen[t] there. At the Manila nursing home he argued with the nurse, according to the records, because he was insistent that he was not taking his furosemide, which is Lasix and when the nurse tried to explain it to him, he argued that he wasn't taking it and the nurse turned around to leave and he grabbed the nurse in a head-lock and started hitting the nurse in the back of the head multiple times.

Finally, she testified that she believed that it was in Mr. Adams's best interest to remain where he was currently placed, and that based on her evaluations of him, she did not think that he had "the capacity to understand that he would be placed in a situation that might cause eminent danger to himself[.]"

Mr. Adams then testified in his own behalf and disputed the testimony of the prior witnesses. He testified that he did not try to write a check for a house and that he was going to borrow money from "the nursing home," who "had a plot" for him and "also a monument and it was eleven hundred and something dollars." He later clarified his statement, based on a certificate from Roller Funeral Home, saying that he believed the funeral home was going to give him money to cover his check. He further admitted that there were pending hot-check charges against him.

After reviewing the evidence before the circuit court, we cannot say that the circuit court clearly erred in awarding long-term custody of Mr. Adams to DHS. Accordingly, we affirm the circuit court's order. We further grant, pursuant to the *Anders* no-merit procedures adopted in this opinion, counsel's motion to withdraw.

Affirmed; Motion to withdraw granted.

Wesley and Tina SETH *v.*
ST. EDWARD MERCY MEDICAL CENTER

07-1348 291 S.W.3d 179

Supreme Court of Arkansas
Opinion delivered January 22, 2009

McHenry, McHenry & Taylor, by: *Donna McHenry*, *Robert McHenry*, and *Greg Taylor*, for appellants.

Thompson and Llewellyn, P.A., by: *William P. Thompson*, for appellee.

ELANA CUNNINGHAM WILLS, Justice. Wesley and Tina Seth appeal from an order of the Sebastian County Circuit Court granting St. Edward Mercy Medical Center's (St. Edward) motion for summary judgment on the basis of the charitable immunity doctrine. The Seths first argue that the trial court erred because St. Edward waived any claim of charitable immunity from suit or liability and that the principle of estoppel prevents application of the defense to St. Edward. Second, the Seths argue that the trial court erred in retroactively applying this court's decision in *Low v. Insurance Co. of North America*, 364 Ark. 427, 220 S.W.3d 670 (2005), and by refusing to allow amendment of their complaint to name St. Edward's pooled liability fund owner and/or its commercial liability insurer as proper party defendants.

On February 18, 2004, the Seths filed a medical negligence suit against St. Edward, Arkansas Heart Center, Emergency Medicine Associates, and two doctors. The complaint also named St. Edward's unknown insurer in the event that St. Edward asserted a charitable immunity defense, and stated in paragraph seven of the complaint that St. Edward "may claim immunity from suit or tort liability as a charitable or non-profit entity," and "in such case, John Doe Insurance Company would be the appropriate Defendant under the Arkansas direct action statute." St. Edward filed an

answer to the Seth's complaint on March 16, 2004, averring that it was a nonprofit corporation, denying negligence or causation, and asserting certain affirmative defenses. However, St. Edward specifically responded to paragraph seven of the Seths' complaint in its answer by stating, "No response from this defendant is required to paragraph 7 of the Complaint. To the extent any response is required, the allegations in paragraph 7 are denied."[1]

The Seths filed a motion for partial summary judgment on November 28, 2005, asserting that no factual issues remained to preclude determination of St. Edward's negligence. St. Edward filed a response to the answer on December 30, 2005, contending that genuine issues of material fact remained, but once again did not raise the defense of charitable immunity.[2] The trial court denied the Seths' motion.

On January 24, 2007, St. Edward filed an amended answer to the Seths' complaint, asserting for the first time that it was entitled to charitable immunity from liability and suit. On the same date, St. Edward also filed a motion for summary judgment, requesting that the trial court dismiss the complaint against it because it was a charitable entity as a matter of law and, therefore, immune from tort liability. The Seths filed a response to St. Edward's motion for summary judgment, arguing that Arkansas law at the time the action arose and the complaint was filed required St. Edward to be named as a defendant because it was not immune from suit. Further, the Seths contended that St. Edward never asserted the defense of immunity from *suit* in its original answer or the amended answer, thus waiving such defense under Ark. R. Civ. P. 8 and 12 and under the principle of estoppel.[3] The Seths also argued that "[n]ew law," presumably *Low, supra*, should not be applied retroactively to this case. Alternatively, the Seths argued

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[1] St. Edward also reserved the right to "file additional pleadings or amendments to its pleadings," and to "assert additional defenses or claims."

[2] This court issued the decision in *Low, supra*, on December 15, 2005, that held charitable entities are immune from suit and, therefore, the proper party defendant in a claim against a charitable entity is the entity's liability insurer. A petition for rehearing was filed in *Low* on January 3, 2005, and the court issued its mandate on January 19, 2005.

[3] St. Edward claimed both immunity from suit and liability in its amended answer. In its motion for summary judgment and brief in support, St. Edward asserted that it is immune from liability rather than *suit*. However, St. Edward did cite *Low, supra*, in its brief in support and *Low*'s holding that a charitable entity is immune from liability *and* suit.

that if St. Edward was dismissed from the complaint, the court should allow substitution of Sisters of Mercy, a Missouri corporation that managed a pooled liability fund for St. Edward, and/or St. Edward's separate commercial liability insurer as proper party defendants under the direct-action statute. The Seths also argued that they should be allowed to amend their complaint to add the individual employees of St. Edward as defendants under Ark. R. Civ. P. 15. The Seths did not file a separate motion to strike St. Edward's amended answer as provided by Rule 15(a).

The trial court issued an order on May 9, 2007, granting St. Edward's motion for summary judgment "[p]ursuant to the case law as set forth in *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206 (1999); *Low v. Insurance Co. of North America, et al.*, 364 Ark. 427 (2005); and *Sowders v. St. Joseph's Mercy Health Center*, 06-414 (Ark. 1-18-2007) and the cases and authorities cited in the respective cases." The Seths filed a timely notice of appeal after the trial court granted the Seths' motion to voluntarily dismiss all remaining defendants.

This court's standard of review for summary judgment has been often stated as follows:

> 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. After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable minds might reach different conclusions from those undisputed facts. 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 question of 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.

Sykes v. Williams, 373 Ark. 236, 239-40, 283 S.W.3d 209, 213 (2008).

The Seths first argue that the trial court erred in granting St. Edward's motion for summary judgment on the basis of charitable immunity because St. Edward waived any defense based on its

charitable status.[4] Specifically, the Seths' complaint stated that St. Edward "may claim immunity from suit or tort liability as a charitable or non-profit entity," and "in such case, John Doe Insurance Company would be the appropriate Defendant under the Arkansas direct action statute." After asserting that it was a nonprofit corporation, St. Edward responded to this paragraph of the complaint by stating, "No response from this defendant is required to paragraph 7 of the Complaint. To the extent any response is required, the allegations in paragraph 7 are denied." Accordingly, the Seths assert that St. Edward denied that it would claim immunity from either suit or liability as a charitable entity, thus waiving the charitable immunity defense it later raised in the amended answer.

Under Ark. R. Civ. P. 8(c), "an affirmative defense must be set forth in the defendant's responsive pleading." *Poff v. Brown*, 374 Ark. 453, 454, 288 S.W.3d 620, 622 (2008). Although Rule 8 lists a number of affirmative defenses, "the list is not exhaustive and includes 'any matter constituting an avoidance or affirmative defense.' " *Id.* The "failure to plead an affirmative defense can result in the waiver and exclusion of the defense from the case." *Felton v. Rebsamen Med. Ctr.*, 373 Ark. 472, 284 S.W.3d 486 (2008). This court has clearly stated that "charitable immunity is an affirmative defense that must be specifically pled." *Neal v. Sparks Reg'l Med. Ctr.*, 375 Ark. 46, 289 S.W.3d 8 (2008) (citing *Felton, supra*).

St. Edward did not affirmatively plead charitable immunity in its original answer, but contends that it may amend its answer under Ark. R. Civ. P. 12 and 15, because Rule 15 allows a pleading to be amended at any time, and charitable immunity is not a defense that is waived if not asserted in an original responsive pleading under Rule 12(h)(1).[5]

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[4] The Seths, "for the purposes of this appeal," do not challenge St. Edward's status as a charitable entity.

[5] Ark. R. Civ. P 12(h)(1) (emphasis added) provides in pertinent part:

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or pendency of another action between the same parties arising out of the same transaction or occurrence *is waived* (A) if

Neal, supra, involved a similar situation as that presented in this case. The appellants in *Neal* filed a medical negligence action against Sparks Regional Medical Center (Sparks) in 2005. Under Arkansas precedent at the time the suit was filed against Sparks, a charitable entity was immune from liability but not suit; therefore, the appellants were required to file suit against Sparks, rather than against Sparks and its liability carrier. *See Clayborn v. Bankers Standard Ins. Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002); *see also Scamardo v. Jaggers*, 356 Ark. 236, 149 S.W.3d 311 (2004) (declining to overrule *Clayborn*). Sparks filed an answer on September 8, 2005, stating that it was a "not-for-profit Arkansas corporation," but did not assert that it was a charitable entity or assert the defense of charitable immunity as to either liability or suit.

In December 2005, this court handed down its decision in *Low, supra,* holding that a qualified charitable entity was immune from *suit* as well as liability, and that the Arkansas direct-action statute, Ark. Code Ann. § 23-79-210, required an action to be filed against the charitable entity's liability carrier. On January 26, 2007, Sparks filed an amended answer stating for the first time that it was entitled to charitable immunity. The appellants responded by filing a motion to strike Sparks's amended answer as prejudicial, but the trial court denied the motion, concluding that the amended answer did not raise any additional defenses, and was not, therefore, prejudicial. Sparks then filed a motion for summary judgment, and the appellants responded by requesting that they be allowed to substitute Sparks's liability carrier as the proper party defendant in an amended complaint. The trial court denied the request under Ark. R. Civ. P. 15(c) because the appellant had not proven that the liability carrier had knowledge of the suit within 120 days after it was filed, nor that it knew or should have known that the appellants would have brought the suit against it but for a mistake concerning the identity of the proper party.[6]

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omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in the original responsive pleading.

[6] Rule 15(c) provides that:

An amendment of a pleading relates back to the date of the original pleading when:

(1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

On appeal, this court first held that the trial court erred in ruling that Sparks's amended answer did not raise any new defenses, stating that "[m]erely asserting its status as a not-for-profit corporation is not equivalent to specifically raising the affirmative defense of charitable immunity, as not all not-for-profit organizations will be immune under the doctrine" *Neal*, 375 Ark. at 51, 289 S.W.3d at 11. We therefore held that charitable immunity had not been affirmatively pled in the original answer. This court further held that the trial court erred in allowing the amended answer because it resulted in prejudice to the appellants. At the time Sparks filed its original answer, "the appellants were still within the 120-day period for notifying [Sparks's liability carrier] of the suit for relation-back purposes under Ark. R. Civ. P. 15(c)." *Id.* However, when Sparks filed its amended answer asserting charitable immunity for the first time, it was too late to substitute the liability carrier as the proper party.

The primary distinguishing factor between *Neal* and this case is that in *Neal*, the appellants filed a motion to strike Sparks's amended answer because it was prejudicial. Under Ark. R. Civ. P. 15(a) (emphasis added), "[w]ith the exception of defenses mentioned in Ark. R. Civ. P. 12(h)(1), a party may amend his pleadings at any time without leave of the court," unless, "*upon motion of an opposing party*, the court determines prejudice would result." If the court finds that prejudice results, it may strike the amended pleading. Thus, charitable immunity is an affirmative defense that must be specifically asserted in a responsive pleading under Ark. R. Civ. P. 8. Because it is not a defense listed in Rule 12(h)(1), however, it may be raised in an amended answer under Ark. R. Civ. P. 15, unless there is a motion to strike the pleading, and the court finds that prejudice results. Here, when St. Edward filed its amended answer and motion for summary judgment on the same day, asserting charitable immunity for the first time, the Seths only filed a response to the motion for summary

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(2) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (1) is satisfied and, within the period provided by Rule 4(i) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

judgment. They did not file a motion to strike the amended answer as prejudicial. Accordingly, waiver of the defense of charitable immunity does not result under our Rules of Civil Procedure.

In addition to waiver, the Seths argue in their first point for reversal that St. Edwards was estopped from asserting the charitable immunity defense based on the Seths' reliance on St. Edward's failure to assert charitable immunity in its original answer. However, this argument is not well developed. It consists of one sentence in the Seths' brief and includes no citations to authority or discussion of specific application of the factors of estoppel. This court has repeatedly held that "something more than a mere assertion of an argument in the pleadings is required to preserve an issue for appellate review," *Shelter Mut. Ins. Co. v. Kennedy*, 347 Ark. 184, 188, 60 S.W.3d 458, 461 (2001), and that we will not consider arguments without convincing argument or citations to authority, *Kelly v. State*, 350 Ark. 238 (2002).

For their second point on appeal, the Seths argue that "the trial court erred when it determined it would apply *Low v. Insurance Co. of North America*, 364 Ark. 427, 220 S.W.3d 670 (2005) retroactively." However, this one sentence is the extent of the argument. For the same reasons cited above on the issue of estoppel, we will not consider this argument. The Seths also argue that the trial court erred by refusing to allow them to amend their complaint to name Sisters of Mercy and/or St. Edwards commercial excess liability insurer as proper party defendants.[7] The trial court never ruled on this issue, raised in the Seths' response to the motion for summary judgment, and this court "will not review an issue where the circuit court has not first decided it." *Sowders v. St. Joseph's Mercy Health Ctr.*, 368 Ark. 466, 477, 247 S.W.3d 514, 522 (2007).

Affirmed.

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[7] Ark. R. Civ. P. 15(a) provides that "a party may amend his pleadings at any time without leave of the court," with the exception of the defenses listed in Ark. R. Civ. P. 12(h)(1).

Ledell LEE *v.* STATE of Arkansas

CR 08-160 291 S.W.3d 188

Supreme Court of Arkansas
Opinion delivered January 22, 2009

Durrett & Coleman, by: *Gerald A. Coleman*, for appellant.

PER CURIAM. In a per curiam opinion, handed down on November 13, 2008, we ordered the appellant, Ledell Lee, to file a substituted brief because the brief he had filed did not comply with Ark. Sup. Ct. R. 4-2(a) (2008). Lee, through his attorneys, has filed a substituted brief; however, it still does not comply with our rules.

This case has a long procedural history before this court, which we detailed in the November 13, 2008 opinion. To restate, Lee was convicted of capital murder in 1993 and was sentenced to death. This court affirmed his conviction and sentence in *Lee v. State*, 327 Ark. 692, 942 S.W.2d 231, *cert. denied*, 522 U.S. 1002 (1997). Lee filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37, alleging that his trial attorneys rendered

ineffective assistance of counsel, during both the guilt and penalty phases of his trial. After holding hearings, in January and March 1999, the circuit court denied Lee's petition. This court affirmed in *Lee v. State*, 343 Ark. 702, 38 S.W.3d 334 (2001). In 2006, we granted a motion by Lee to recall the mandate in that case because the record indicated that he had received ineffective assistance of counsel during the first Rule 37 proceeding. *Lee v. State*, 367 Ark. 84, 238 S.W.3d 52 (2006). We remanded the case for a new hearing on Lee's Rule 37 petition.

The circuit court held another Rule 37 hearing on August 28, 2007, at which Lee was represented by newly appointed counsel. On November 21, 2007, the circuit judge entered findings of fact and conclusions of law, again denying Lee's petition for postconviction relief. That order specifically relied on testimony from the August 28, 2007 hearing; stipulated testimony from the hearings held in January and March 1999; testimony introduced during the guilt and penalty phases of the trial; Lee's pleadings; the record of the case; and the arguments of counsel. Lee appealed the November 21, 2007 findings of fact and conclusions of law to this court, and we ordered that Lee file a substituted brief in conformance with our rules. *Lee v. State*, 375 Ark. 124, 289 S.W.3d 61 (2008).[1]

Our rules require an appellant to abstract all 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) (2008). Furthermore, on a second or subsequent appeal, the abstract must include a condensation of all pertinent portions of the transcript filed on any prior appeal. *Id.* Our rules also require that the appellant include all relevant orders, pleadings, exhibits, and documents in the addendum portion of his brief. *Id.* R. 4-2(a)(8).

Lee's substituted brief does not include a copy of the Rule 37 petition on which the circuit judge ruled in his November 21, 2007 order. Furthermore, the abstract in the substituted brief does not appear to include the relevant testimony from all of the

[1] We specifically noted that Lee had failed to abstract all relevant portions of the guilt and penalty phases of his underlying criminal trial or the relevant testimony from the first Rule 37 proceeding. Lee's brief was deficient also because the addendum did not include a copy of his amended Rule 37 petition.

postconviction hearings.[2] While the substituted brief did include abstracted testimony from the guilt and penalty phases of the trial, Lee also abstracted various pleadings, exhibits, and orders from the underlying trial. Our rules make clear that "true and legible photocopies of the order . . . 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" must be included in the addendum, not in the abstract portion of the brief. *Id.* According to our rules:

> 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).

Ark. Sup. Ct. R. 4-2(b)(3) (2008).

Accordingly, we again order Lee to file a substituted brief, curing the deficiencies in the abstract and addendum, within fifteen days from the date of entry of this order. To be clear, Lee's brief must, at a minimum, abstract the following: All relevant testimony from the guilt and penalty phases of the trial, all relevant testimony from the January and March 1999 evidentiary hearings, and all relevant testimony from the January 28, 2007 Rule 37 hearing. Also, again at a minimum, Lee's brief must include photocopies of the following documents in his addendum: The November 21, 2007 findings of fact and conclusions of law, the Rule 37 petition on which the Pulaski County Circuit Court ruled in its November 21, 2007 order, and Lee's notice of appeal. The addendum must also contain photocopies of any other pleadings, exhibits, or documents relevant to this court's understanding of the issues on appeal.

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[2] Lee abstracted testimony from the "Rule 37 Hearing." However, the brief does not indicate which Rule 37 hearing was abstracted. Lee must abstract all relevant testimony from the January and March 1999 hearings, as well as from the August 28, 2007 hearing.

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

Because this is the second time this court has been forced to order rebriefing in this case, we refer the defense attorneys to the Committee on Professional Conduct.

Rebriefing ordered.

Walter Dewayne RAMSEY, Administrator of the Estate of Norma Louise Ramsey; Walter Dewayne Ramsey; Wanda Grace Ramsey; and Joyce Ann Westfall *v.* BEVERLY ENTERPRISES, INC.; Beverly Enterprises-Arkansas, Inc.; Perennial Health Care Management, LLC; West Memphis Healthcare Center, LLC; Johnnie Belinda Looney; Trent P. Pierce; Bertram D. Kaplan; Frank G. Witherspoon, Jr.; and Memphis Dermatology Clinic, P.A.

08-1476 291 S.W.3d 185

Supreme Court of Arkansas
Opinion delivered January 22, 2009

Duncan E. Ragsdale, for appellants.

Womack, Landis, Phelps & McNeill, P.A., by: *Paul McNeill* and *Dustin H. Jones*, for appellee Trent P. Pierce.

Thomason, Hendrix, Harvey, Johnson & Mitchell, by: *J. Kimbrough Johnson* and *Claire M. Cissell*, for appellee Bertram M. Kaplan.

PER CURIAM. Appellee Dr. Trent P. Pierce has filed a motion to dismiss this appeal from the Crittenden County Circuit Court on the grounds that there has not been a final judgment entered in the case. We grant the motion and dismiss the appeal because not all of the claims against all the parties have been resolved and there has been no certification pursuant to Arkansas Rule of Civil Procedure 54(b) (2008) that there is no need for delay in deciding the case with respect to the parties now before us.

Appellants filed suit against the appellees on July 7, 2006. In an order dated September 28, 2008, the trial court granted motions to dismiss as to appellees Frank G. Witherspoon, Jr. and Memphis Dermatology Clinic. The trial court also granted summary judgment to appellees Trent P. Pierce (as to the claim asserted by the Estate of Norma Louise Ramsey only) and Bertram D. Kaplan on October 8, 2008, and October 15, 2008, respectively. Appellants filed a notice of appeal of the orders granting the motions to dismiss as well as the order granting summary judgment to Trent P. Pierce, on September 30, 2008, and filed an amended notice of appeal on November 5, 2008, to include the orders granting summary judgment.

In the notice of appeal, appellants claim to be appealing pursuant to Rule 2(a)(11) of the Arkansas Rules of Appellate Procedure–Civil; however, Rule 2(a)(11) states that an appeal may be taken from:

> An order or other form of decision which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in a case involving multiple claims, multiple parties, or both, if the circuit court has directed entry of a final judgment as to one or more but fewer than all of the claims or parties and has made an express determination, supported by specific factual findings, that there is no just reason for delay, and has executed the certificate required by Rule 54(b) of the Rules of Civil Procedure[.]

In this case, the individual claims filed by appellants were not dismissed in Pierce's grant of summary judgment, and there are still several claims against the remaining defendants that remain pending. And there is no evidence in the record that a Rule 54(b) certificate was requested of or issued by the trial court. The failure to comply with Rule 54(b) presents a jurisdictional issue in this court, and absent compliance with the Rule, we dismiss the appeal for lack of a final order. *Ashmore v. Paccar, Inc.*, 315 Ark. 490, 868 S.W.2d 80 (1994).

Motion granted; appeal dismissed.

Shelton WORMLEY *v.* STATE of Arkansas

CR 08-1344 291 S.W.3d 186

Supreme Court of Arkansas
Opinion delivered January 22, 2009

Donald E. Warren, Sr., for appellant.

No response.

PER CURIAM. Appellant Shelton Wormley, by and through his attorney, Donald E. Warren, Sr., has filed a motion for rule on clerk. Mr. Warren represented the appellant in the trial court and filed a notice of appeal on his behalf on June 12, 2008. The record in this matter was untimely, as it was tendered on November 18, 2008.

This court denied an earlier motion for rule on clerk filed by John L. Kearney. Mr. Kearney was appointed counsel for the appellant by the trial court after the notice of appeal was filed. We

found that the trial court lacked jurisdiction to relieve Mr. Warren and substitute Mr. Kearney as counsel for appellant. *Wormley v. State*, 375 Ark. 247, 289 S.W.3d 463 (2008) (per curiam). Under Arkansas Rule of Appellate Procedure–Criminal 16(a), once the notice of appeal has been filed, the appellate court has exclusive jurisdiction to relieve counsel and appoint new counsel. *Id.* Consequently, this court would not consider the motion for rule on clerk filed by Mr. Kearney. *Id.* Because Mr. Warren was not relieved as counsel of record, we directed that he file a motion for rule on clerk. *Id.*

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

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

356 Ark. at 116, 146 S.W.3d at 891 (footnote omitted).

While this court no longer requires an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where he or she has erred and is responsible for the failure to perfect the appeal. *See id.* When it is plain from the motion, affidavits, and record that relief is proper under either rule based on error or good reason, the relief will be granted. *See id.* If there is attorney error, a copy of the opinion will be forwarded to the Committee on Professional Conduct. *See id.*

Although Mr. Warren does not expressly acknowledge that the record was tendered untimely due to an error on his part, it is plain from the record that he erred. Pursuant to *McDonald v. State*, *supra*, we grant Wormley's motion for rule on clerk and forward a copy of this opinion to the Committee on Professional Conduct.

Motion granted.

ARKANSAS ANNUAL CONFERENCE of the AME CHURCH, INC., and African Methodist Episcopal Church, Inc. *v.* NEW DIRECTION PRAISE & WORSHIP CENTER, INC., Daryl Bailey, Lloyd Worthy, and Vivian Nooner

08-167 291 S.W.3d 562

Supreme Court of Arkansas
Opinion delivered January 30, 2009

David O. Bowden and *Mercer Law Firm*, by: *Christopher C. Mercer, Jr.*, for appellants.

Lax, Vaughan, Fortson, McKenzie & Rowe, P.A., by: *Roger D. Rowe* and *Jennie L. Clingan*, for appellee.

JIM HANNAH, Chief Justice. This appeal involves a dispute over the ownership of church property located at 2311 Bailey Road, in Little Rock. Appellants Arkansas Annual Conference of the African Methodist Episcopal Church, Inc. (Arkansas AME) and African Methodist Episcopal Church, Inc. (National AME), collectively referred to as AME, appeal the judgment of the Pulaski County Circuit Court granting a petition to quiet title in appellee New Direction Praise and Worship Center (New Direction) and ordering the return of personal property, including a 1999 Dodge van. AME

also appeals the circuit court's denial of its motion for supersedeas bond. We affirm the circuit court.

The real property that is the subject of this dispute is described as follows:

> Starting at the existing NW corner of the NE 1/4 of the NW 1/4, Section 21, Township 1 South, Range 12 West, Pulaski County, Arkansas, and run thence East 158.7 feet to the point of beginning; from the point thus established run thence South 208.7 feet; thence East 158.7 feet; thence North 208.7 feet; thence West 158.7 feet to the point of beginning, containing 3/4 acres, more or less.

On December 27, 1969, Will Bailey, the owner of the real property, contracted to sell the real property to the Sand Hill AME Church (Sand Hill) for the price of $750, of which $500 was paid at the time of the contract of sale and $250 was payable in three years. On July 15, 1971, Geraldine Jones, as the administratrix of the Estate of Will Bailey, Deceased, conveyed by deed the real property to "George Bailey, Fred Jones, and Harris Bailey as Trustees of the Sand Hill AME Church, and to their successors in office."

In 1971, the membership of Sand Hill consisted of members of the Bailey family. Will Bailey was the uncle of Geraldine Jones, the administratrix of his estate. Two of the trustees named as grantees in the administratrix deed, George Bailey and Harris Bailey, were nephews of Will Bailey and brothers of Geraldine Jones. The remaining trustee named as grantee in the administratrix deed, Fred Jones, was the husband of Geraldine Jones.

Between 1971 and 1981, the members of Sand Hill saved to build a meeting house on the real property. Through the volunteer labor of relatives of the Bailey family, a concrete block meeting house was constructed in 1981. Vivian Nooner and Brenda Kay Webb, who were members of the congregation between 1971 and 1981, both testified that they could not recall any financial assistance from the Arkansas AME or the National AME for the purchase of the real property or the construction of the meeting house. Revered Eugene Brannon, the presiding elder of the Little Rock District of the AME, testified that he recalled a rally of area congregations of AME churches to raise funds for the purchase of the real property at issue and a second rally for the construction of the meeting house. Reverend Brannon stated that he could not, however, recall the amount of funds raised for the benefit of Sand Hill.

In 1981, the membership of Sand Hill still consisted of members of the Bailey family. According to Nooner, of the trustees of Sand Hill shown on the cornerstone of the meeting house constructed in 1981, all were members of the Bailey family. Nooner stated that of the stewards listed on the cornerstone, all but one, the pastor's wife, were members of the Bailey family.

No testimony or documents were introduced by any party regarding the formation of Sand Hill or its initial connection with the National AME. Nooner testified that, while Sand Hill accepted pastors from Arkansas AME, it did not associate exclusively or even primarily with other AME churches. She stated that many of the churches with which Sand Hill associated were Baptist churches.

Between 1971 and 1995, the membership of Sand Hill numbered approximately ten to twelve members. Beginning in 1995 and continuing until 2004, the presence of a new pastor, Reverend Bowers, significantly increased the membership, and the number of members eventually grew to between fifty and sixty. When Reverend Bowers left Sand Hill in 2004, the membership again decreased to approximately ten to twelve members.

By August 2005, Sand Hill was encountering financial difficulties. AME policy requires AME churches to pay assessments on a quarterly basis, with the amount of assessments based on the number of members. Although its membership had decreased following Reverend Bowers's departure, the Arkansas AME did not reduce Sand Hill's quarterly financial obligations. By August 31, 2005, Sand Hill had only $1.26 left in its bank account.

On October 9, 2005, ten members of Sand Hill met and voted unanimously to disassociate from the AME. Thereafter, the members continued to meet for worship service in the meeting house on the real property. The members also met again to organize a new church and voted unanimously to incorporate a new church. The trustees of the congregation incorporated New Direction Praise and Worship Center, Inc., on November 15, 2005. The members also voted unanimously to deed to New Direction title to the real property and to transfer title in a 1999 Dodge van to New Direction. A quitclaim deed was prepared by the trustees of New Direction on November 17, 2005, and the deed was filed of record on November 18, 2005. The members were unable to find the title to the Dodge van, so title was not then transferred to New Direction.

On November 26, 2005, the members of New Direction invited Reverend Brannon, the presiding elder of the Little Rock District of the AME, to meet with them at the property. They delivered a written notice to Reverend Brannon, informing him that the members of the congregation formerly known as Sand Hill AME Church were no longer affiliated or associated with AME. Reverend Brannon asked for a key to the building, and one of the members gave him a key. Other members retained their keys, but when they later returned to the meeting house, they found that their keys no longer opened the door. Arkansas AME subsequently sent an AME minister in training to conduct services in the meeting house. New Direction then brought a civil action for ejectment, quiet title, and replevin. The circuit court found in New Direction's favor, and AME now brings this appeal.

Subject-Matter Jurisdiction and the Neutral-Principles Approach

The first issue that must be decided is whether the circuit court had subject-matter jurisdiction to resolve this dispute over church property. AME claims that the circuit court was without subject-matter jurisdiction because this matter could not be decided by neutral principles of law without resort to interpretation of church religious beliefs, practices, customs, organization, and polity. AME contends that the circuit court's decision is in violation of the Establishment Clause of the United States Constitution, as well as the similar guarantees of article 2, sections 24 and 25 of the Arkansas Constitution. New Direction asserts that the circuit court properly exercised jurisdiction over this dispute about church property because the dispute could be decided by applying neutral principles of law.

Where the existence of subject-matter jurisdiction is a question of constitutional interpretation, the standard of review is de novo. *Viravonga v. Wat Buddha Samakitham*, 372 Ark. 562, 279 S.W.3d 44 (2008); *Weiss v. McLemore*, 371 Ark. 538, 268 S.W.3d 897 (2007). In *Viravonga*, we stated:

> Both the United States Constitution and the Arkansas Constitution prohibit the courts from becoming involved in disputes between members of a religious organization that are "essentially religious in nature," because the resolution of such disputes "is more properly reserved to the church." *Gipson v. Brown*, 295 Ark. 371, 374, 749 S.W.2d 297, 298 (1988).

Nonetheless, "[i]t is unquestionably the duty of the courts to decide legal questions involving the ownership and control of church property." *Holiman v. Dovers*, 236 Ark. 211, 219, 366 S.W.2d 197, 204 (1963) (supplemental opinion denying rehearing). As the United States Supreme Court has noted, "[t]he State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Jones v. Wolf*, 443 U.S. 595, 602 (1979). Yet, even when a property dispute is involved, courts must refrain from settling the dispute "on the basis of religious doctrine and practice" and instead apply only "neutral principles of law." *Id.* at 602-03; *see also Ark. Presbytery of Cumberland Presbyterian Church v. Hudson*, 344 Ark. 332, 339, 40 S.W.3d 301, 306 (2001) (expressly adopting the United States Supreme Court's neutral-principles approach); *Gipson*, 295 Ark. at 377, 749 S.W.2d at 300 (applying the neutral-principles-of-law analysis to determine whether there was jurisdiction over an internal church dispute).

. . . .

While "it is impermissible for the civil courts to substitute their own interpretation of the doctrine of a religious organization for the interpretation of the religious organization," *Belin*, 315 Ark. at 67, 864 S.W.2d at 841, a court may nonetheless have to examine documents of a partially religious nature, such as church constitutions, in resolving a property dispute. *Jones*, 443 U.S. at 604. For example, a court can look at "(1) the language of the deeds; (2) the terms of the local church charters; (3) the state statutes governing the holding of church property; and (4) the provisions in the constitution of the general church concerning the ownership and control of church property" in determining whether a local church or one of its governing bodies holds title to church property. *Hudson*, 344 Ark. at 338, 40 S.W.3d at 306 (citing *Jones*, 443 U.S. 595).
. . .

The United States Supreme Court has acknowledged that applying the neutral-principles approach to an examination of documents relating to a religious institution is not "wholly free of difficulty." *Jones*, 443 U.S. at 604. In performing its examination, the court must be careful to scrutinize such documents in "purely secular terms," deferring to the religious institution itself for the resolution of doctrinal issues. *Id.*; *see Hudson*, 344 Ark. at 339, 40 S.W.3d at 306-07.

Viravonga, 372 Ark. at 568-71, 279 S.W.3d at 49-50 (footnotes omitted).

While it is clear that civil courts have subject-matter jurisdiction to hear cases involving church property disputes, courts must settle the dispute by applying neutral principles of law. We must now determine whether the circuit court did so in this case.

The first element of the neutral-principles approach is to review the language of the deed. When we are called upon to construe deeds and other writings, we are concerned primarily with ascertaining the intention of the parties, and such writings will be examined from their four corners for the purpose of ascertaining that intent from the language employed. *Hudson, supra.* In reviewing instruments, our first duty is to give effect to every word, sentence, and provision of a deed where possible to do so. *Id.* We will not resort to rules of construction when a deed is clear and contains no ambiguities, but only when its language is ambiguous, uncertain, or doubtful. *Id.* Here, the language of the deed indicates that the local trustees of Sand Hill hold title to the property. As previously stated, on July 15, 1971, Geraldine Jones, as the administratrix of the Estate of Will Bailey, Deceased, conveyed by deed the real property to "George Bailey, Fred Jones, and Harris Bailey as Trustees of the *Sand Hill AME Church*, and to their successors in office." (Emphasis added.) Nothing in the language of the deed reflects that Sand Hill was held in trust for Arkansas AME or National AME.

As to the second element, the terms of local church charters, AME states that the 1968 edition of *The Doctrine and Discipline of the African Methodist Episcopal Church* (*Book of Discipline*) functions as both its charter and its general church constitution; therefore, our review of the second element will also serve as our review of the fourth element.[1] Section 2 of the *Book of Discipline*, titled General Church Property, provides, in relevant part:

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[1] The 1968 edition was in effect at the time of the 1971 conveyance to Sand Hill. According to the testimony of Reverend Brannon, National AME's plan of title and governance of property of the local AME congregations was essentially carried forward without change in the editions of the *Book of Discipline* that were published every four years after 1968. At oral argument, counsel for AME stated that, while the 1968 edition of the *Book of Discipline* may have governed the original transaction, the *Book of Discipline* was later amended to include a provision stating that all local church property would be held in trust for

1. For the security of our meeting houses and the premises belonging thereunto, let the following plan of a deed of settlement be brought into effect in all possible cases wherever the law will permit it in a State.

2. If necessary, each Annual Conference may make such modifications in the deed as may be required by the laws of any State, so as to firmly secure the premises to the African Methodist Episcopal Church.

3. No personal or real property whatsoever of the A.M.E. Church in any foreign district or parts thereof shall be purchased, disposed of, sold, or otherwise encumbered except by the written consent of the presiding bishop and trustees elected by the Annual Conference in which the property is located.

4. The incorporation of all our churches, where the law will permit it, should be attended to as soon as possible. And in every corporation of the A.M.E. Church the pastor shall be president of the corporation and of the board of trustees, and the method of electing trustees shall be the same as prescribed in the Book of Discipline. Every pastor shall see that the provision is a part of the articles of incorporation.

Also included in Section 2 is a form for a trust deed for local church property that provided the property was to be held in trust for the use of the members of the National AME under the rules of the *Book of Discipline*. In addition, the form for a trust deed provided:

> Whereas some of the states and territories (and countries) have special acts on their statue [sic] book governing religious bodies, therefore the meaning and intent of this chapter wherever it refers to the law of the State or Territory is to be subject to the said state law and not to any individual church corporation that is now or may be incorporated.

The record reveals that Sand Hill was not incorporated. National AME did not introduce any evidence that it was involved in the purchase of the property. Arkansas AME did not

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the National AME. Counsel asserted that the members of Sand Hill "consented to the amendment" by their silence. Nevertheless, counsel conceded that AME did not make this argument before the circuit court.

introduce any evidence that it approved Sand Hill's purchase of the real property in 1969, at the time of the contract of sale, or in 1971, at the time of the delivery of the administratrix deed. In addition, the administratrix deed did not follow the form of the trust deed included in the *Book of Discipline*.

We next consider the third element, Arkansas statutes governing the holding of church property. Arkansas Code Annotated section 18-11-201 (Repl. 2003) provides:

> All lands and tenements, not exceeding forty (40) acres, that have been, or hereafter may be, conveyed by purchase to any person as trustee in trust for the use of any religious society within this state, either for a meeting house, burying ground, campground, or residence for their preacher, shall descend with the improvements and appurtenances in perpetual succession in trust to the trustee or trustees as shall, from time to time, be elected or appointed by any religious society, according to the rules and regulations of the society.

Likewise, Arkansas Code Annotated section 18-11-202 (Repl. 2003) provides:

> The trustee or trustees of any religious society shall have the same power to defend and prosecute suits at law or in equity and do all other acts for the protection, improvement, and preservation of trust property as individuals may do in relation to their individual property.

New Direction points to statutory law regarding trusts. Pursuant to Arkansas Code Annotated section 28-73-402(a) (Supp. 2007), a trust is created only if:

> (1) the settlor has capacity to create a trust;
>
> (2) the settlor indicates an intention to create the trust;
>
> (3) the trust has a definite beneficiary or is:
>
> (A) a charitable trust;
>
> (B) a trust for the care of an animal, as provided in § 28-73-408; or

(C) a trust for a noncharitable purpose, as provided in § 28-73-409;

(4) the trustee has duties to perform; and

(5) the same person is not the sole trustee and sole beneficiary.

The language of the 1971 deed indicates that Will Bailey intended to create a trust for *Sand Hill AME Church*, see Arkansas Code Annotated section 28-73-402(a), which he was authorized to do pursuant to Arkansas Code Annotated section 18-11-201 (Repl. 2003). Nothing in the language of the deed suggests that Will Bailey had the intention of creating a trust in favor of either the National AME or the Arkansas AME. Neither the National AME nor the Arkansas AME had an ownership interest in the property at the time of the conveyance, and neither was a party to the transaction.

Based upon the application of our neutral-principles approach and based upon our de novo review of the language of the 1971 deed, the provisions in the *Book of Discipline*, and Arkansas statutory law governing property and trusts, we hold that the circuit court did not err in quieting title in favor of New Direction, ordering AME's ejectment, and concluding that New Direction was entitled to replevin of the personal property located on the real property and the 1999 Dodge van.

Validity of the 2005 Deed

AME next contends that, even assuming that the trustees of Sand Hill had the authority to convey the property to New Direction, the conveyance must fail because the deed was invalid. The circuit court concluded, and we agree, that AME had no right, title, or interest in the real property at issue. Accordingly, AME lacks standing to challenge the November 2005 conveyance of the property to New Direction. As such, we do not address AME's arguments on this point.

Supersedeas Bond

AME contends that the circuit court erred in denying AME's posttrial motion for setting of a supersedeas bond to stay proceeding pending appeal. Because we affirm the circuit court's

judgment in favor of New Direction, AME's argument regarding the setting of a supersedeas bond is moot.

Motions for Award of Costs and Attorneys' Fees on Appeal

New Direction filed a Motion for Award of Costs and Attorneys' Fees Incurred By Reason of Appellants' Insufficient Abstract and Addendum. AME filed a response and, additionally, it filed a Motion for Award of Costs and Attorneys' Fees Incurred by Reason of Appellee's Insufficient Abstract and Addendum. Pursuant to Arkansas Supreme Court Rule 4-2(b)(1) (2008), "[w]hen the case is considered on its merits, the Court may upon motion impose or withhold costs, including attorney fees, to compensate either party for the other party's noncompliance with this Rule." After considering the merits of this case, we do not believe that either of the parties' abstracts and addendums are insufficient to the extent that costs should be imposed by this court. Accordingly, we deny both motions.

Affirmed.

CITY of CENTERTON *v.* CITY of BENTONVILLE

08-380 291 S.W.3d 594

Supreme Court of Arkansas
Opinion delivered January 30, 2009

Slinkard Law Firm, by: *Andrew R. Huntsinger*, for appellant.

Clark & Spence, by: *George R. Spence*, Bentonville City Attorney, for appellee.

JIM HANNAH, Chief Justice. The City of Centerton appeals a judgment of the Benton County Circuit Court declaring as invalid its annexation of surrounded land described as "West Island." Centerton argues that the circuit court erred in finding that the appellees City of Bentonville, a municipal corporation, George and Nancy Huber, Daniel and Ruby Davies, Sandra and Gary Townsend, and the Lois Peters Revocable Trust (collectively referred to as "Bentonville") satisfied their burden of proof to show that Center-

ton's annexation of West Island failed to meet the requirements of Arkansas Code Annotated section 14-40-302(a) (Supp. 2005). We affirm the decision of the circuit court. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(b)(5).

Centerton annexed two areas of unincorporated and surrounded land known as "West Island" and "East Island." Both sections of land are completely surrounded by the neighboring municipalities of Centerton and Bentonville. Only West Island is at issue in this appeal.

As permitted under Arkansas Code Annotated section 14-40-501 (Supp. 2005), Centerton, as the municipality with the greatest distance of city limits adjoining West Island, passed an ordinance to annex West Island. At about the same time, Bentonville annexed West Island by petition of adjoining landowners, as permitted under Arkansas Code Annotated section 14-40-601 (Repl. 1998). Bentonville sued Centerton, alleging that West Island failed to comply with the requirements qualifying the land for annexation by Centerton under Arkansas Code Annotated section 14-40-302(a). A judgment was entered declaring Centerton's annexation invalid.

Admission by Bentonville

Centerton argues first that Bentonville's annexation of West Island by petition constitutes an admission by Bentonville that West Island met not only the requirements for annexation by Bentonville, but also for annexation by Centerton. Based on this alleged admission, Centerton argues that Bentonville may not assert that Centerton's annexation was invalid. An admission is an acknowledgment or concession of a fact. *See Ferguson v. State*, 362 Ark. 547, 210 S.W.3d 53 (2005).

Centerton asserts that "Mr. Peters' signature on that petition is an admission that the Trust's property met at least one of the five criteria set out in A.C.A. § 14-40-302(a)." Peters is an owner of property in West Island in an area referred to as the land south of Motley Road. He, among other landowners, petitioned to be annexed into Bentonville. Centerton cites us to *City of Marion v. Guaranty Loan & Real Estate Co.*, 75 Ark. App. 427, 58 S.W.3d 410 (2001), for the proposition that annexations by petition under section 14-40-601 must satisfy at least one of the listed criteria for annexation set out in section 14-40-302(a) before an area may be annexed. Centerton further argues that only when the land to be

annexed meets at least one of the criteria set out in section 14-40-302(a) is the petition "right and proper" as required for annexation by petition in Arkansas Code Annotated section 14-40-603(a) (Repl. 1998).

With regard to whether the criteria of section 14-40-302(a) apply to annexation by petition of adjoining landowners, even though section 14-40-302(a) is not mentioned in the statutes on annexation by petition, Ark. Code Ann. §§ 14-40-601 to -606 (Repl. 1998), this court in *City of Jacksonville v. City of Sherwood*, 375 Ark. 107, 111, 289 S.W.3d 90, 93 (2008), stated that "the criteria apply regardless of whether the annexation proceeding was initiated by the city or by adjoining landowners." *See also Town of Houston v. Carden*, 332 Ark. 340, 965 S.W.2d 131 (1998).[1] Where at least one of the criteria of section 14-40-302(a) is met, the petition of adjoining landowners is "right and proper" under section 14-40-603(a). *Id.*

We agree that Bentonville in the landowners' petition asserted that the annexation of West Island was right and proper, and that implicit within that petition is an assertion that West Island met at least one of the criteria of section 14-40-302(a) with respect to the annexation by Bentonville. However, the landowners' petition makes no assertion, implicit or otherwise, that West Island met at least one of the criteria of section 14-40-302(a) with respect to the annexation by Centerton. That West Island met a criterion with respect to Bentonville does not necessarily mean that it met that same criterion or any other criteria with respect to Centerton. For example, the actual growth of one municipality surrounding an island might be moving into an island while the actual growth of another surrounding municipality might not. *See* Ark. Code Ann. § 14-40-302(a)(3). In the landowners' petition, neither Bentonville nor the petitioners make an admission that West Island met the requirements for annexation by Centerton.

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[1] Centerton argues that the circuit court erred in finding that the criteria of Arkansas Code Annotated section 14-40-302(a) (Supp. 2005) do not apply to annexation by petition of adjoining landowners under Arkansas Code Annotated section 14-40-601 (Supp. 2005). The circuit court erred. *See City of Jacksonville v. City of Sherwood*, 375 Ark. 107, 111, 289 S.W.3d 90, 93 (2008). However, this error does not require reversal in this case because Bentonville also showed that none of the section 14-40-302(a) criteria were met.

Prima Facie Presumption of Compliance With Section 14-40-302(a)

Citing Arkansas Code Annotated section 14-40-503(a)(2) (Repl. 1998), Centerton next argues that when the majority of its governing body voted for annexation, a prima facie case of annexation was established that Bentonville had to overcome in its suit challenging the annexation. Section 14-40-503(a)(2) provides, "If a majority of the total number of members of the governing body vote for the proposed annexation ordinance, then a prima facie case for annexation shall be established, and the city shall proceed to render services to the annexed area." A decision to annex becomes final in thirty days unless challenged in circuit court. Ark. Code Ann. § 14-40-503(b) (Repl. 1998). The burden rests on those objecting to the annexation to produce sufficient evidence to defeat the prima facie case, and that means that they must show that the area should not be annexed. *Gay v. City of Springdale*, 298 Ark. 554, 769 S.W.2d 740 (1989). The party challenging the ordinance bears the burden of proving the annexation was improper. *Id.* However, this court has noted that "by the very nature of this type of litigation, there is a wide latitude for divergence of opinion and, consequently, a high degree of reliance must be placed upon the findings of the trial judge." *Id.* at 557, 769 S.W.2d at 741. A finding by a circuit court on annexation will not be reversed unless it is clearly erroneous. *Town of Houston, supra.*

Annexation is proper where any one of the criteria set out in section 14-40-302(a) is met. *Lee v. City of Pine Bluff*, 289 Ark. 204, 710 S.W.2d 205 (1989). However, "[i]f a part of the proposed area does not meet one of the five requirements, the annexation of the entire area is void in toto." *Town of Houston*, 332 Ark. at 348, 965 S.W.2d at 135. Section 14-40-302(a)[2] provides as follows:

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[2] Arkansas Code Annotated section 14-40-302(a) (Supp. 2005) sets out what are sometimes referred to as the "*Vestal* criteria." *See Utley v. City of Dover*, 352 Ark. 212, 221, 101 S.W.3d 191, 194 (2003); *Chastain v. Davis*, 294 Ark. 134, 142, 741 S.W.2d 632, 636 (1987). This court in *Vestal v. Little Rock*, 54 Ark. 321, 16 S.W. 291 (1891), discussed the criteria that could be met to satisfy the requirements of the then applicable statutes on annexation. *See* 29 Mansfield Digest §§ 916-923, at 324-25 (1884). Annexation is a special statutory proceeding. *Posey v. Paxton*, 201 Ark. 825, 147 S.W.2d 39 (1941). Thus, annexation is defined by statute. *See Rooker v. City of Little Rock*, 234 Ark. 372, 352 S.W.2d 172 (1967); *Grayson v. Arrington*, 225 Ark. 922, 286 S.W.2d 501 (1956). The criteria set out in *Vestal* were modified and adopted into the current statutes as section 14-40-302(a).

(a) By vote of two-thirds (2/3) of the total number of members making up its governing body, any municipality may adopt an ordinance to annex lands contiguous to the municipality if the lands are any of the following:

(1) Platted and held for sale or use as municipal lots;

(2) Whether platted or not, if the lands are held to be sold as suburban property;

(3) When the lands furnish the abode for a densely settled community or represent the actual growth of the municipality beyond its legal boundary;

(4) When the lands are needed for any proper municipal purposes such as for the extension of needed police regulation; or

(5) When they are valuable by reason of their adaptability for prospective municipal uses.

After all the evidence was admitted, the circuit court issued a decision and stated that there was no indication that Centerton "looks at that property as meeting any of these factors in 14-40-302." The circuit court went on to state that it had carefully considered the criteria in section 14-40-302(a), and that while the court was reluctant to overturn an action of the Centerton city council, the "Peters property and the property below the road [Motley] on the south simply don't meet any of the criteria of 14-40-302." The evidence supports this decision. Centerton Mayor Ken Williams testified that the Peters' land south of Motley Road was annexed because, "in order to take in the whole island we had to take it in." Williams made no reference to any requirement of section 14-40-302(a). The land south of Motley Road was annexed because to get the land Centerton wanted, Centerton had to annex the land south of Motley Road as well. Nonetheless, Centerton argues that there was no proof that West Island did not meet the requirements of section 14-40-302(a)(3)-(5) (Supp. 2005).

Section 14-40-302(a)(3) provides that lands may be annexed "when the lands furnish the abode for a densely settled community or represent the actual growth of the municipality beyond its legal boundary." Mayor Williams testified that the area south of Motley

Road in West Island was not densely populated. He also testified that to his knowledge, "there are no municipal plans or uses for the property south of Motley Road." Williams did make reference to a "small subdivision" that would be in the area south of Motley Road, but the annexation did not represent the actual growth of Centerton beyond its legal boundary. Further, the circuit court found that the only evidence regarding the use of the Peters property south of Motley Road was that is was used for farming. Agricultural and horticultural lands are not to be annexed when their highest and best use is agriculture or horticulture. *Town of Houston, supra.*

Section 14-40-302(a)(4) provides that lands may be annexed when "the lands are needed for any proper municipal purposes such as for the extension of needed police regulation." In an October 7, 2005 letter providing notice of an annexation hearing on West Island and East Island, Centerton stated plainly that the annexation was necessary to protect Centerton's loans, funding, and plans for water service. No other reason for annexation was offered. Mayor Williams was asked in cross-examination to confirm that "the sole reason for this island annexation was to preserve water customers for the City of Centerton." He responded, "Correct." He then testified that the area south of Motley Road was not part of the water service area the annexation was to protect. Clearly, the land south of Motley Road was only annexed to obtain the "whole island." Bentonville showed that there was no municipal purpose in annexing the property south of Motley Road. When part of the annexed land fails to meet at least one of the five criteria of section 14-40-302(a), the entire annexation is void in toto.

Section 14-40-302(a)(5) provides that lands are subject to annexation "[w]hen they are valuable by reason of their adaptability for prospective municipal uses." Mayor Williams was asked, "To your knowledge, do you have any municipal plans, municipal uses for this property south of Motley Road?" He responded, "No, we don't." Centerton now argues that other municipal services such as fire and police constitute evidence that the presumption arising from the prima facie case was not overcome; however, as the circuit court noted, Centerton was asked about municipal services and responded that water service was the sole reason for annexation.

The circuit court stated that it had looked carefully at the section 14-40-302(a) criteria and that not one of the criteria was met as to the land lying south of Motley Road. In reviewing this matter with a high degree of reliance placed upon the findings of the trial judge, we find no basis for Centerton's allegation that the circuit court's decision declaring the annexation invalid was clearly erroneous.

Affirmed.

Katie Zimmerebner STEHLE *v.*
Ernest William ZIMMEREBNER

08-610 291 S.W.3d 573

Supreme Court of Arkansas
Opinion delivered January 30, 2009

Lynn Frank Plemmons, for appellant.

Scarlett R. Melikian, for appellee.

ROBERT L. BROWN, Justice. Appellant Katie Zimmerebner Stehle ("Katie") appealed the order of the circuit judge denying her motion for change of custody of her daughter, KZ, to the court of appeals.[1] That court reversed the circuit judge's decision and held that Katie should have primary custody of KZ based on a material change of circumstances. The appellee, KZ's father, Ernest William ("Billy") Zimmerebner, petitioned this court for review, and we granted his petition. We affirm the circuit judge's order, and we reverse the decision of the court of appeals.

On October 4, 2001, Katie and Billy divorced, and Katie was awarded primary custody of KZ. On August 27, 2003, the circuit judge held a hearing on Billy's motion to change custody of KZ to him. That motion was granted by an order entered on November 10, 2003, which gave Billy primary custody of KZ, subject to visitation by Katie. On July 25, 2006, Katie moved to change custody back to her and asserted that there had been a material change of circumstances. Those circumstances, she contended, were based on these alleged facts: (1) Billy and his then-wife, now Amber Robertson ("Amber"), had been in a physical altercation, and Amber had filed for divorce;[2] (2) KZ and her stepbrother had to "lay on top of" Amber to "get [Billy] to stop attacking her"; (3) Billy and KZ had been living in Billy's parents' home since March 2006, and the sleeping arrangements were inadequate because KZ and Billy shared a room; (4) Billy did not have his own transportation, but used his employer's vehicle to transport KZ; (5) KZ had been in four different schools since 2003;

[1] KZ was born on September 9, 1998, and was eight-and-a-half years old when the judge's order was entered.

[2] Billy married Amber on October 19, 2001, and they divorced on December 20, 2006. Billy and Amber separated in March 2006.

and (6) on July 2, 2006, Billy dropped KZ at Katie's house for summer visitation with insufficient asthma medication and failed to respond to Katie's calls regarding the matter.

The circuit judge heard Katie's motion on March 20, 2007, and, on March 23, 2007, he issued a letter opinion, giving his reasons for denying it. On April 16, 2007, an order was entered to the same effect. Katie appealed, and on May 21, 2008, a three-judge panel of the court of appeals, in three separate opinions, reversed the circuit judge's order and held that Katie should have primary custody of KZ.

The following facts in the instant case are undisputed. When Billy and Katie divorced in 2001, KZ was age three and under school age. After custody was awarded to Katie, KZ lived with her in Conway. When Billy was awarded custody of KZ in 2003, he enrolled KZ in school in Greenbrier. Toward the end of the school year in 2004, Billy enrolled KZ in a magnet school in Maumelle, where she completed kindergarten and first grade. Shortly after she started the second grade, Billy and Amber moved to Cabot, and KZ attended public school there for the remainder of her second-grade year. KZ returned with her father to Maumelle, after Billy and Amber's marriage dissolved in 2006. KZ was enrolled in the third grade at Academics Plus Charter School in Maumelle, the school she attended at the time of the hearing on the change-of-custody petition.

At the hearing before the circuit judge on March 20, 2007, regarding her motion to change custody, Katie testified to the following:

- Despite her many efforts, she was unable to communicate with Billy about KZ because he would not answer her telephone calls or share information with her regarding KZ's educational or medical issues.

- She attended KZ's parent-teacher conferences, class parties, and field trips when she was able and regularly visited KZ at school during lunchtime; Billy did not attend KZ's school functions; rather, Amber had handled those matters.[3]

[3] Two of KZ's previous teachers testified that Katie was involved with them in KZ's education, and that Billy was not.

- KZ was on the honor roll and got As and Bs at school.[4]
- She had often been delinquent in paying Billy court-ordered child support but had paid her arrearages and was current at the time of the hearing.
- On one occasion, Billy dropped KZ off for visitation with inadequate medication, and she had to pay to have it refilled because KZ was no longer receiving medical insurance through the state-funded AR Kids program.
- When she filed the motion, Billy only had one vehicle, insured for work purposes, and, therefore, lacked adequate means to transport KZ.[5]
- After Billy and Amber separated, KZ remained with Amber for six weeks, and Katie was not notified.
- She had remarried and had another child since custody was awarded to Billy.
- She and her husband had recently purchased a newly-constructed house in Vilonia, where KZ had her own room.
- KZ had bonded with her younger half-sister.
- If granted custody, Katie would allow KZ to finish the current school year at the charter school in Maumelle and would consider transferring her to public schools in Vilonia the following year.
- She worked two blocks from the Maumelle charter school, and it would be convenient for KZ to remain enrolled there.
- KZ would attend daycare after school and would return with Katie to Vilonia when she finished work.
- If granted custody, she would keep Billy updated regarding KZ's school and health information.

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[4] Katie initially said that KZ's grades were "mediocre" and then acknowledged during cross-examination that she had made honor roll.

[5] On cross-examination, Katie testified that she lacked personal knowledge that Billy's work vehicle was insured only for work purposes.

Amber testified at the same hearing as follows:

- When she and Billy were married, she provided the day-to-day care for KZ and her other children.
- She went to KZ's parent-teacher conferences and other school events without Billy.
- She was responsible for communicating with Katie.
- Billy and his parents, but especially his mother, said bad things about Katie in KZ's presence.
- During the marriage, Billy was abusive to her, and KZ witnessed these acts of violence.[6]
- KZ would sometimes "throw a fit" before going to Katie's house, and once returned "with a large part of her hair missing."
- She had previously testified against Katie and had since changed her mind about Katie's fitness as a mother.

Billy also took the stand and testified as follows:

- He worked as a plumbing contractor and lived with his parents in their three-bedroom house, in which KZ had her own room.
- His mother took KZ to school each morning, and his father picked her up from school every afternoon.
- He returned most evenings about 30 minutes after KZ got home from school, and then the two of them worked on her homework and read together.
- KZ had always been an honor roll student.
- After finishing her school work, KZ had chores and then often played with her best friend who lived across the street.

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[6] Amber recounted one specific incident in which Billy allegedly threw her against the wall, after which KZ and her step brother "threw themselves over" her, and KZ said "don't hurt my mamma anymore."

- He played on the trampoline with KZ and was teaching her to ride a bike.
- He often did not answer the phone when Katie called because she would call as many as "30 times" in a row and would "threaten" him when he answered.
- He had not said bad things about Katie in KZ's presence and had admonished Amber when she had done so.
- KZ returned many times from Katie's house without having brushed her teeth.
- KZ had "resisted" going to Katie's house and had acted unhappy when she returned from visitation.
- Amber "gets pretty crazy when she gets mad," and he was never violent toward Amber except as necessary to defend himself.
- He owned a vehicle in addition to his work truck and was insured to use both for personal use.
- When he told Amber he would request custody of their two children, she told him she would testify on Katie's behalf in the instant custody proceeding.[7]

Billy's mother, Debbie Zimmerebner, testified that:

- Billy was very active with KZ and his other two children; KZ and Billy read together every night, played on the trampoline together, and went bike riding.
- Billy made sure KZ was clean and that she had brushed her teeth.
- She had never heard Billy make negative remarks about Katie in front of KZ and he had stopped Amber from doing so.
- Katie called her house "non-stop," after Amber and Billy separated.

[7] He testified that he responded to her by saying, "After all the times you've bad mouthed [Katie] in court and bad mouthed her to teachers?" According to Billy, her response was, "You're right. The gloves are off."

- On one occasion, she met Katie in a parking lot to retrieve something KZ needed, and Katie screamed foul language at her.

- Sometimes she referred to Katie as "the witch" but never in KZ's presence.

- KZ had her own bedroom at their house, decorated in "all pink cause that's [KZ's] favorite color."

Finally, Billy's father, David Zimmerebner, told the court under oath that:

- He picked KZ up after work each day, and she would change her clothes, get a snack, and start working on her homework.

- He would help her occasionally with her assignments, but sometimes she would "save[ ] it" for when Billy returned from work because "she wanted him to work with her."

- Billy provided the day-to-day necessities for KZ.

- Billy tucked KZ in at night.

After hearing all the testimony, the circuit judge observed from the bench that he was concerned about the lack of stability in KZ's life. He said that it bothered him that Billy had moved with KZ so often and "always seems to find his way back to his mamma and daddy's." He also expressed concern that Katie only paid her child support when she "decided to bring somebody back to court." He concluded the hearing by telling the parties that he was going to "weigh some of this credibility and some of the testimony" and would then make a decision regarding the motion for change of custody.

On March 23, 2007, the circuit judge filed his letter order, outlining his decision to deny Katie's motion. The judge said that he "had an opportunity to review [his] notes, the exhibits, and to reflect" about the best interest of the child in the instant case. He noted his concern that, despite the fact that there are times when Billy does engage and assist with the care of KZ, "if there is somebody else who will do it he is more than willing to turn that task over." The judge commented on Billy's tendency to "abdicate his responsibility as a parent." He made it clear that "there is no question that while the child has been in his custody she has

continued to thrive, is a good student, and in spite of the conflicts that have arisen not only between her mother and father but her extended family she has continued to do well."

With respect to Katie, the judge said that she "has stepped up to the plate" and paid the court-ordered child support "when she was in a position to seek relief from the Court." He found that Katie is engaged in KZ's life, attends school functions when she knows of them, and meets KZ for lunch on a frequent and consistent basis. The judge also noted that he was "proud to see that she has since our last hearing taken on a regular job." He found that Katie and her husband had improved their financial situation, bought a house, and made "a home for themselves and" their other child.

The circuit judge next addressed each of the issues Katie raised in her motion for change of custody. With respect to the allegations of violence between Billy and Amber, he said that, while it was "absolutely not" a good situation at the time, there was no testimony that any violence was directed toward KZ, and the "situation has been diffused in that the ex-wife [Amber] is no longer involved." He found that KZ's sleeping arrangements were adequate at Billy's parents' house, and the only concern he had regarding Billy and KZ's living situation was Billy's "tendency to disengage." The judge found Katie's complaint regarding Billy's automobile to be a "nonissue" and was similarly unconcerned with Katie's allegations that Billy brought KZ to her house with inadequate medicine.[8]

The judge noted that "another significant issue in [his] mind" was how many times KZ had moved with Billy since the last order. He observed that when he awarded custody to Billy, "the motivating factor in [his] decision to change custody was the stability Billy seemed to show over Katie." He then said that Billy's "advantage" had "disappeared" due to the frequent moves. Nevertheless, he concluded that "the child seems to have adjusted and is currently doing well in the Academic's Plus charter school in Maumelle," and that "her grades seem to speak well of her family's commitment to her education." The judge also noted that the school was close to where KZ was living and to where Katie was working. After laying out his findings, the judge concluded that

[8] The judge specifically found that it was an "isolated event" and it was not "threatening to the child, so long as Katie took action and spent money."

while he was "not terribly impressed with the parenting skills of either party," it was his "determination that [Katie] has failed to prove that a change of circumstances exists which would justify changing custody of the minor child at this point." Following that, the judge filed an order to that effect on April 16, 2007.[9]

When this court grants a petition for review of a court of appeals decision, we review the case as though it had originally been filed with this court. *See, e.g.*, *Hamilton v. Barrett*, 337 Ark. 460, 462, 989 S.W.2d 520, 521 (1999). It is well settled in Arkansas that a judicial award of custody will not be modified unless it is shown that the circumstances have changed such that a modification of the decree would be in the best interest of the child. *See, e.g.*, *Campbell v. Campbell*, 336 Ark. 379, 383, 985 S.W.2d 724, 727 (1999). In order to avoid the relitigation of factual issues already decided, the courts will restrict evidence on a custodial change to facts arising since the issuance of the prior order. *Id.* at 384, S.W.2d at 727. This court has stated that courts generally impose more stringent standards for modification in custody than for initial determinations of custody in order to promote stability and continuity in the life of the child. *See Alphin v. Alphin*, 364 Ark. 332, 340, 219 S.W.3d 160, 165 (2005). The party seeking modification of the custody order has the burden of showing a material change in circumstances. *Id.*

We have summarized our standard of review for equity cases, and specifically child custody cases, with regard to de novo review and the clearly erroneous standard:

> We review chancery cases *de novo*, but will only reverse if the chancellor's findings were clearly erroneous or clearly against the preponderance of the evidence. A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. We give due deference to the chancellor's superior position to determine the credibility of the witnesses and the weight to be given their testimony. In cases involving child custody, great deference is

[9] In addition to denying Katie's motion, the judge ordered that both Billy and Katie enroll in and complete a parenting class within six months. He also directed them to attend an anger management class within six months and ordered that a mutual retraining order, prohibiting the parties from calling each other names and degrading each other, be continued. The judge ordered that the parties must "communicate regarding the needs of this child in writing, preferably by email" and the emails should be "short and to the point."

> given to the findings of the chancellor. This court has held that there is no other case in which the superior position, ability, and opportunity of the chancellor to observe the parties carries a greater weight than one involving the custody of minor children. The best interest of the child is the polestar in every child custody case; all other considerations are secondary.

See Ford v. Ford, 347 Ark. 485, 491, 65 S.W.3d 432, 436 (2002) (citations omitted).

We take this opportunity to clarify further our standard of review for child custody cases, as well as other equity cases, and to dispel any confusion that may exist concerning de novo review and our clearly erroneous standard.

Equity cases are reviewed de novo. *See ConAgra, Inc. v. Tyson Foods, Inc.*, 342 Ark. 672, 30 S.W.3d 725 (2000). This means the whole case is open for review. *Id.* This does not mean, however, and we emphasize this point, that findings of fact by the circuit judge in equity cases are simply dismissed. They are not. The clearly erroneous standard, cited above and set out in our rules of civil procedure, governs if the circuit judge has made findings of fact. As Rule 52(a) states:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the circuit court to judge the credibility of witnesses.

Ark. R. Civ. P. 52(a) (2008).

In determining whether the circuit judge clearly erred in a finding, the appellate court may look to the whole record to reach that decision. *See ConAgra*, 342 Ark. at 674, 30 S.W.3d at 727 (on de novo review of record, court held chancery court clearly erred in finding information at issue qualified as a trade secret); *Ferguson v. Green*, 266 Ark. 556, 587 S.W.2d 18 (1979) (chancery court reached erroneous conclusion based on de novo review of entire record). But, to reiterate, to reverse a finding of fact by a circuit judge, that judge must have clearly erred in making that finding of fact, which means the reviewing court, based on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Ford*, 347 Ark. at 491, 655 S.W.3d at 436.

To summarize, de novo review does not mean that the findings of fact of the circuit judge are dismissed out of hand and

that the appellate court becomes the surrogate trial judge. What it does mean is that a complete review of the evidence and record may take place as part of the appellate review to determine whether the trial court clearly erred in either making a finding of fact or in failing to do so.

In the instant case, it is abundantly clear to this court that the circuit judge's findings, supporting his denial of Katie's motion for change of custody, were not clearly erroneous. We acknowledge, and it is beyond dispute, that some circumstances have changed since Billy was awarded custody. Billy moved frequently with KZ, he and Amber divorced following alleged physical conflict in their marriage, and Katie remarried and improved her financial situation. Despite these facts, the circuit judge found that they did not constitute a material change in circumstances so as to militate a grant of physical custody of KZ to Katie. To repeat, the judge specifically found that, while the parenting skills of both Katie and Billy needed improvement, KZ "has continued to thrive" in Billy's custody and was "adjusted and is currently doing well" in school. He also observed that the school is "close to where the child is living and is also close to where the child's mother works."

What is particularly meaningful to this court is that the circuit judge has had these parties before him for many years, going back to Katie and Billy's divorce in 2001. He has heard from the various witnesses on multiple occasions and was in a much better position than this court to observe their demeanor and assess their credibility. *See Ford*, 347 Ark. at 491, 65 S.W.3d at 436 (in custody cases it is especially important to give great weight to the trial court's superior position to observe the parties). In the instant case, the judge dutifully took the matter under advisement in order to review his notes, the exhibits, and to reflect on the testimony in order to determine whether the motion should be granted. The resulting letter order specifically responded to each of Katie's concerns and directed the parties to take various actions to "improve the situation."

In sum, we hold that the circuit judge did not clearly err in finding that Katie failed to prove a material change of circumstances so as to justify a change of custody for KZ. We are particularly swayed by the circuit judge's finding that KZ has continued to thrive in Billy's custody and is a good student despite conflicts between Billy and Katie.

We affirm the order of the circuit judge and reverse the court of appeals.

Affirmed. Court of appeals reversed.

Arthur Douglas CHAVIS, III, as Guardian for and Next Friend of Arthur D. Chavis, IV *v.* Jill Frances BRACKENBURY

08-473 291 S.W.3d 570

Supreme Court of Arkansas
Opinion delivered January 30, 2009

[Rehearing denied March 5, 2009.*]

* BROWN, J., not participating.

Cullen & Co., PLLC, by: *Tim Cullen* and *Tasha C. Taylor*, for appellant.

No response.

JIM GUNTER, Justice. Appellant appeals the dismissal of his complaint for an accounting from his ex-wife, who was the custodian of two bank accounts established in their child's name, both of which were closed approximately fifteen years ago. Appellant asserts that the trial court erred in finding that (1) the child, who has now reached the age of majority, was a necessary party to the action, and (2) the complaint was barred by laches. We granted appellant's motion to transfer this case to our court; therefore, we have jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(b). We find that appellant's arguments are procedurally barred and therefore affirm.

The parties in this case were divorced on September 14, 1992, and had one child, Arthur, who was four at the time of the divorce. Appellee had custody of Arthur until September 7, 2001, when custody was given to appellant in an agreed order. Litigation continued between the parties on various matters, and on July 11, 2003, the court issued an order declining to exercise jurisdiction over appellant's request for an accounting of two bank accounts previously established in the child's name with appellee as the caretaker of the accounts. One of the accounts, the "Worthen Bank" account, was opened in 1990 and closed in 1991; the other account, the "Shearson Lehman" account, was opened in 1992 and closed in 1996. The court did note, however, that appellant could pursue his request for an accounting in a separate proceeding.

On March 9, 2006, appellant filed a complaint for an accounting of the funds in the above-mentioned accounts and requested that appellee be ordered to repay the funds from the accounts with interest. In pleadings filed April 14, 2006, and July 26, 2006, appellee denied any wrongdoing, raised various affirmative defenses including laches, and made a motion to dismiss the complaint.

Arthur's eighteenth birthday occurred on August 30, 2006. On May 2, 2007, appellee filed a motion to dismiss or substitute parties due to the child reaching the age of majority. A hearing on the matter was held on August 3, 2007. After hearing arguments from counsel, the court orally ruled that the claim was barred by laches and the lack of a necessary party before the court. The court found that even if the request for an accounting was granted, the person entitled to receive any funds, Arthur, was not before the court. Prior to the entry of the court's order, appellant filed a motion to reconsider on November 27, 2007, asserting that the court had erred in applying the doctrine of laches, as appellee had failed to show a detrimental change in position due to defendant's delay, and that the court had erred in ruling that Arthur was no longer a minor and appellant could not act on his behalf, because under the Uniform Transfers to Minor Act (UTMA), a child is considered a minor until he or she reaches the age of twenty-one. The court entered its final order dismissing the complaint on December 20, 2007. The order stated that the complaint was dismissed because "Arthur has reached the age of eighteen (18) years and is a necessary party because any relief would go from Ms. Brackenbury to Arthur. The Court also finds the complaint is barred by laches as Ms. Brackenbury cannot be required to produce records from 1991 forward." Appellant filed a notice of appeal from this order on January 18, 2008.

Appellant first argues that the trial court erred in relying on the general statutory age of majority, eighteen, in deciding that Arthur was a necessary party, instead of the specific statutory provision of the UTMA, which defines any person under the age of twenty-one as a minor. Ark. Code Ann. § 9-26-201(11) (Repl. 2008). Appellant also argues that the court erred in finding that appellant was not the proper party to bring the complaint, as Ark. Code Ann. § 9-26-219 clearly allows the minor's guardian or an adult member of the minor's family to petition the court for an accounting, and there is no requirement that the minor be joined as a party. And finally, appellant acknowledges that only one of the disputed accounts, the "Shearson Lehman" account, was expressly created under the UTMA but argues that both it and the "Worthen Bank" account should be dealt with under the UTMA.

The problem with these arguments, however, is that they are not the arguments that were presented below to the trial court.[1]

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[1] As to appellant's argument concerning whether both accounts should be handled under the UTMA, while this issue was discussed by the parties below, we have no ruling on

At the hearing, appellee's counsel argued that Arthur was no longer a minor under Arkansas law and should therefore be substituted as the proper plaintiff and that appellant was not the proper party to bring the action. In his rebuttal, appellant's counsel argued that "[a]s far as ACA 9-26-219, as that applies to uniform gifts to minors, the way that the Act is drafted the actual gift itself — the account — remains in effect until the child turns 21. Arthur is still 18, which I think would address the statute of limitations." Later, appellant's counsel and the court had the following exchange:

> MR. PHILLIPS: Well, of course, I think as to the uniform gift to minors account, those are valid until the juvenile reaches the age of 21. As far as the account that actually was Arthur's minor account that was —
>
> THE COURT: But Arthur is now an adult — and I know it's in effect until he's 21. But he now is an adult and has a right to assert his rights and privileges as that adult, even for when he was a minor. But it becomes his right when he reaches 18, does it not?
>
> MR. PHILLIPS: That's correct. And perhaps we need to join Arthur in the lawsuit . . . [.]

This is but one instance in which the court and the parties were clearly in agreement that Arthur was no longer a minor, and yet on appeal, appellant is arguing that under the UTMA, Arthur is still a minor. And, while appellee's own counsel pointed out below that under Ark. Code Ann. § 9-26-219, any adult member of the minor's family can bring the accounting action, appellee's counsel also suggested that the right to do so extinguished when Arthur turned eighteen, and appellant never rebutted this contention by making the argument that he is now making on appeal. And while it is true that appellant raised these arguments in his motion to reconsider, the arguments raised in that motion are not properly before us. Under our case law, we treat a motion to reconsider in a bench trial like a motion for a new trial.

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the issue by the trial court, therefore we will not address it. *See Bell v. Beshears*, 351 Ark. 260, 92 S.W.3d 32 (2002) (holding that a party's failure to obtain a ruling is a procedural bar to this court's consideration of the issue on appeal). We also note that appellant has failed to develop any argument on appeal that, because the "Worthen Bank" account was not expressly created under the UTMA, common law principles would be applied to its administration.

See, e.g., *Ark. Office of Child Support Enforcement v. Parker*, 368 Ark. 393, 246 S.W.3d 851 (2007) (finding that a motion to reconsider was deemed denied pursuant to Rule 59 of the Arkansas Rules of Civil Procedure). Under Rule 59, such a motion made before entry of the final judgment becomes effective and is treated as filed on the day after the judgment is entered. So, in this case, the motion was treated as if it was filed on December 21, 2007, and was deemed denied on January 21, 2008.

Our case law makes clear that when a motion for new trial has been deemed denied in accordance with Ark. R. App. P.–Civ. 4(b)(1), the only appealable matter is the original judgment order. *Lee v. Daniel*, 350 Ark. 466, 91 S.W.3d 464 (2002). Under Ark. R. App. P.–Civ. 4(b)(2), a notice of appeal filed before the disposition of a posttrial motion is effective to appeal the underlying judgment or order, but to also seek an appeal from the grant or denial of the motion, an amended notice of appeal must be filed within thirty days, and we have no such amended notice of appeal in this case. Also, this court has repeatedly held that an objection first made in a motion for new trial is not timely. *Lee*, *supra*.

Based on the foregoing, we hold that appellant's arguments were not presented to the trial court in a timely manner, nor are the arguments properly before this court on appeal. *See Yant v. Woods*, 353 Ark. 786, 120 S.W.3d 574 (2003) (holding that, for the purposes of determining the issues for which appellate review is preserved, a party cannot change on appeal the grounds for an objection or motion made at trial, and is bound by the scope and nature of the arguments made at trial). We therefore are precluded from addressing the merits of appellant's arguments on this point and affirm the trial court.

Because we affirm the trial court on this point, we need not address appellant's second argument concerning laches. *See Weiss v. McLemore*, 371 Ark. 538, 268 S.W.3d 897 (2007). In addition, we note that appellant's second argument was also raised for the first time in his motion to reconsider, and thus we would be precluded from reaching the merits of his argument. *Yant*, *supra*.

Affirmed.

BROWN, J., not participating.

Tony Bernard JOHNSON *v.* STATE of Arkansas

CR 08-930 291 S.W.3d 581

Supreme Court of Arkansas
Opinion delivered January 30, 2009

[redacted]

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

Dustin McDaniel, Att'y Gen., by: *Eileen W. Harrison*, Ass't Att'y Gen., for appellee.

PAUL E. DANIELSON, Justice. Appellant Tony Bernard Johnson appeals from his conviction for attempted capital murder and his sentence to life imprisonment plus fifteen years, which includes an enhancement for use of a firearm.[1] His sole point on appeal is that the circuit court erred in denying his directed-verdict motion in which he claimed that the State failed to introduce substantial evidence that he acted with premeditation and deliberation. We affirm his judgment and conviction.

A review of the testimony of Mary Rose Johnson reveals the following. On April 27, 2007, Mary Rose, who at the time was married to Johnson, went to see an attorney about obtaining a divorce from him. Later that day, Mary Rose received a call from Johnson, inquiring of her whereabouts. Mary Rose told Johnson

[1] Johnson does not challenge the firearm enhancement on appeal.

that she had just left her attorney's office, to which he responded that he hoped "it wasn't what [he thought] it was about." Mary Rose told him that there was no other reason for her to see an attorney, and the call soon terminated.

Upon arriving home approximately fifteen to twenty minutes later, Mary Rose changed clothes and began walking on her treadmill, which was located in the garage of her home. While walking, she looked up to see Johnson standing in the doorway, and Johnson told her that they needed to talk, "God Damn it!" Mary Rose then asked for ten minutes to finish walking. Johnson repeated his statement, then walked over to the wall, and unplugged a cd player to which Mary Rose had been listening.

At that time, Mary Rose told Johnson to plug the cd player back in and to give her ten minutes. After asking three times, Johnson did plug the player back in and turned, as if he was leaving. Mary Rose then heard a loud noise, felt a burning, and began to hold her stomach. After that, Mary Rose fell to her knees on the treadmill, which was still going. Johnson told Mary Rose that she had "throwed [him] away God Damn it!," and she responded that no one did so and asked Johnson to call 911.

Mary Rose began to crawl toward the door, when Johnson looked at her and said, "bitch, don't make another move, just lay there and die! . . . I ought to shoot you in the head." She again asked him to call 911 four different times, which he finally did. After emergency crews and the police arrived, Johnson was arrested. While Johnson was initially charged with criminal attempt to commit murder in the first degree and possession of a firearm by certain persons, the prosecutor later filed an amended information, charging Johnson with criminal attempt to commit capital murder and possession of a firearm by certain persons. He was subsequently tried, and as already set forth, convicted. He now appeals.

Johnson contends that the State failed to introduce substantial evidence that he acted with premeditation and deliberation in committing attempted capital murder. While he concedes that substantial evidence was presented that he fired a .357 revolver at his then-wife, Mary Rose, striking her in the stomach, he maintains that the State failed to prove that he shot her with the culpable mental state required to prove attempted capital murder — premeditated and deliberated purpose to cause death.

The State responds that substantial evidence supporting premeditation and deliberation was presented. Specifically, the State points to the testimony of Mary Rose, as well as to the

testimony of Johnson's co-worker, regarding threatening statements made to him by Johnson relating to Mary Rose. The State avers that the evidence showed that Johnson thought about killing his wife long before he fired the shot, that he attempted to cause her death by firing the shot, and that, by firing the shot, he took a substantial step toward capital murder in a premeditated and deliberated manner. It urges that the jury reasonably inferred, from the deadly nature of the weapon and from the location and extent of Mary Rose's injury, that Johnson possessed the culpable mental state for attempted capital murder.

On appeal, we treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *See Hoyle v. State*, 371 Ark. 495, 268 S.W.3d 313 (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 501, 268 S.W.3d at 318 (quoting *Young v. State*, 370 Ark. 147, 151, 257 S.W.3d 870, 875 (2007)). Furthermore, this court views the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *See id.*

We hold that substantial evidence exists to support the jury's verdict, convicting Johnson of attempted capital murder. 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." Ark. Code Ann. § 5-10-101(a)(4) (Repl. 2006). A person attempts to commit an offense if he or she purposely engages in conduct that "[c]onstitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as the person believes them to be." Ark. Code Ann. § 5-3-201(a)(2) (Repl. 2006). We have held that premeditation and deliberation constitute the necessary mental state for the commission of attempted capital murder. *See Salley v. State*, 303 Ark. 278, 796 S.W.2d 335 (1990).

Deliberation has been defined as "a weighing in the mind of the consequences of a course of conduct, as distinguished from acting upon a sudden impulse without the exercise of reasoning powers." *Ford v. State*, 334 Ark. 385, 389, 976 S.W.2d 915, 917 (1998) (quoting *Davis v. State*, 251 Ark. 771, 773, 475 S.W.2d 155, 156 (1972)). Premeditation means to think of beforehand, and it is

well established that it is immaterial as to just how long premeditation and deliberation exist, so long as they exist for a period of time prior to the homicide. *See id.* Premeditation and deliberation may occur on the spur of the moment and may be inferred by the jury from the type of weapon used, the manner of its use, and the nature, extent, and location of the wounds inflicted. *See id.*

In this case, substantial evidence was presented to support the jury's finding of premeditation and deliberation. In addition to the testimony of Mary Rose already set forth above, Terry Hines, who worked with Johnson at Hines's father's detail shop, testified that on the afternoon in question while at the shop, Johnson was upset that his wife might have wanted a divorce. He stated that Johnson told him that "he was going to go home and just handle his business the way he know how [sic]." He further testified that Johnson told him that "he was going to shoot [Mary Rose] if she had some divorce papers" and that "he was going to kill the bitch." Mr. Hines then testified that while driving Johnson home from work, Johnson repeated that he was going to shoot Mary Rose if she had any divorce papers. Mr. Hines stated that on that day, Johnson had a serious look on his face. And as already noted, Mary Rose testified that Johnson came into her garage demanding to talk to her, shot her, and commented that she should die. Here, there was substantial evidence to support Johnson's conviction for attempted capital murder, and we, therefore, affirm Johnson's conviction and sentence.

Pursuant to Arkansas Supreme Court Rule 4-3(h), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to Johnson, and no prejudicial error has been found.

Affirmed.

Roger and Ruth ANDERSON d/b/a Anderson Auto Salvage *v.* BNSF RAILWAY COMPANY

08-232 291 S.W.3d 586

Supreme Court of Arkansas
Opinion delivered January 30, 2009

Eichenbaum, Liles & Heister, P.A., by: *Christopher O. Parker*, for appellants.

Barrett & Deacon, by: *John C. Deacon, Brandon J. Harrison*, and *Andrew H. Dallas*, for appellee.

ELANA CUNNINGHAM WILLS, Justice. This case requires the court to decide whether federal law preempts an order of the Arkansas State Highway Commission (Commission) forcing Burlington Northern Sante Fe Railway Company (BNSF) to reopen a private "at-grade" railroad crossing.[1] We hold that the Interstate Commerce Commission Termination Act of 1995 (ICCTA) preempts the Commission's jurisdiction in this instance; therefore, we vacate the Commission's order.

The private railroad crossing at issue in this case is located between the cities of Hoxie and Walnut Ridge and has been in

[1] An at-grade railroad crossing is on the same level of the railroad tracks, rather than over or under them.

existence for over eighty years.[2] In 1999, Roger and Ruth Anderson entered into an agreement to purchase the property accessed by the crossing and began using the property for their salvage yard business, Anderson Auto Salvage. BNSF and the Andersons later began negotiations to enter into an "Agreement for Private Crossing." BNSF drafted an agreement that, among other provisions: (1) granted the Andersons a license "to construct, maintain, and use" the crossing; (2) required the Andersons to pay BNSF $10,000; (3) required the Andersons to indemnify BNSF; and (4) required the Andersons to procure and maintain liability insurance in connection with the crossing. The draft agreement also provided that either party could terminate the license by serving the other party thirty-days' notice.

The Andersons refused to sign the agreement, and BNSF later posted notice that the crossing would be closed. After the Andersons contacted city officials in Walnut Ridge regarding the dispute, both the Walnut Ridge city attorney and the Andersons requested that the Commission hold a hearing on BNSF's proposed closing of the crossing. The Commission's counsel sent letters to BNSF asserting that an administrative hearing was required under Ark. Code Ann. § 23-12-304(b) before BNSF could close the crossing.[3] BNSF responded by contending that the Commission's authority to prevent it from closing a private crossing was preempted by federal law, and BNSF later barricaded the crossing.

The Commission held a hearing and ordered BNSF to reopen the crossing within ten days after it found that: the Commission's action was not preempted by ICCTA and was authorized by Ark. Code Ann. § 23-12-304(b); BNSF merely held an easement in perpetuity for railway purposes over the Andersons' property; there were no unsafe conditions that supported

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[2] Department of Transportation (DOT) # 667982U.

[3] Ark. Code Ann. § 23-12-304(b) (Repl. 2002) provides:

> (1) It shall be the duty of the Highway Commission, or any representative thereof, to make a personal inspection of any designated place where it is desired that a road or street, either public or private, cross any railroad in this state.
>
> (2) Upon ten (10) days' notice as required by law and after a public hearing, the commission may make such order as in its judgment shall be just and proper. The order may provide for a crossing at grade, over or under the railroad, and shall be enforced as other orders by the commission.

BNSF's decision to close the crossing; and the crossing was the Andersons' only access to their property. Further, the Commission ordered BNSF to draft an agreement with the Andersons, modeled on an earlier 1921 agreement regarding the crossing that was submitted into evidence, including a provision that stated that "Railway Company may seek to eliminate this crossing by requesting a hearing for that purpose, with notice to Licensee, before the Arkansas State Highway Commission." The Commission's order also prohibited BNSF from charging the Andersons a fee "because no fee was recited in the 1921 agreement," and likewise prohibited BNSF from requiring the Andersons to procure and maintain "insurance of any kind."

BNSF appealed the Commission's decision to the Craighead County Circuit Court, repeating its arguments before the Commission and asserting several procedural errors underlying the Commission's findings and order. Upon review, the circuit court vacated the Commission's order, holding that ICCTA preempted the Commission's authority over any matter in the case, including the safety issues raised by BNSF as well as "the terms and conditions which a railroad may impose in connection with permissive use of such private crossing." Additionally, the circuit court held that the Commission had essentially and unlawfully "prejudged" the issues underlying the dispute between BNSF and the Andersons and committed other procedural errors, as well as exceeded the Commission's constitutional and statutory authority by mandating the terms of the private crossing agreement.

The Andersons bring this appeal, arguing that the circuit court erred in holding that the Commission's authority was preempted by ICCTA. The Andersons also argue that the circuit court erred for the following reasons: their property right in the private crossing was not a revocable license; the Commission properly allocated the burden of proof according to the hearing procedures set out under Ark. Code Ann. § 23-12-304; substantial evidence supported the Commission's findings; and that any procedural errors "did not justify [the circuit court] declaring the hearing officers findings and conclusion void."

We review the Commission's order under the Arkansas Administrative Procedure Act (APA), Ark. Code Ann. §§ 25-15-201 to -218 (Repl. 2002 & Supp. 2007). Review of administrative agency decisions is limited in scope. *Ark. Dep't of Human Servs. v. Bixler*, 364 Ark. 292, 219 S.W.3d 125 (2005). The appellate court's review is directed not to the decision of the circuit court but to the

decision of the administrative agency. *Id.* The APA provides that a reviewing court may reverse or modify the agency's decision if the decision: (1) violates the constitution or a statute; (2) exceeds the agency's statutory authority; (3) is affected by an error of law; (4) is procedurally unlawful; (5) is unsupported by substantial evidence in the record; or (6) is arbitrary, capricious, or is an abuse of discretion. Ark. Code Ann. § 25-15-212(h); *Ark. Dep't of Corr. v. Bailey*, 368 Ark. 518, 247 S.W.3d 851 (2007).

The primary question presented by this case is whether 49 U.S.C. § 10501(b) of ICCTA preempts the Commission's exercise of jurisdiction to order BNSF to reopen a private crossing under Ark. Code Ann. § 23-12-304. The Supremacy Clause of the United States Constitution provides that state laws that "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution" are invalid. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); U.S. Const. art. VI, cl. 2. Under the principle of federal law supremacy, there are three ways that federal law can preempt state law: (1) where Congress makes its intent to preempt state law explicit in statutory language; (2) where state law regulates conduct in a field that Congress intends for the federal government to occupy exclusively; or (3) where there is an actual conflict between state and federal law. *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990). Where a federal statute contains an express preemption clause, the focus of statutory construction is "on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

As the title of the legislation implies, ICCTA abolished the Interstate Commerce Commission, while simultaneously creating the Surface Transportation Board (STB) to replace it and to perform many of the same regulatory functions. *See Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001). ICCTA contains an express preemption clause, stating as follows:

> (b) The jurisdiction of the Board over —
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side

> tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b) (2000).

This court has addressed issues of federal preemption and ICCTA in two cases — *Ouachita R.R., Inc. v. Circuit Court of Union County*, 361 Ark. 333, 206 S.W.3d 811 (2005) and *25 Residents of Sevier County v. Ark. Highway & Transp. Comm'n*, 330 Ark. 396, 954 S.W.2d 242 (1997). In the former, Ouachita Railroad brought an ejectment action against a married couple, the Harbours, alleging that they had wrongfully taken possession of the railroad's land and removed the company's railroad tracks. The defendant Harbours answered the complaint and counterclaimed, contending that they acquired the land through adverse possession and that Ouachita Railroad had abandoned the tracks.

Ouachita Railroad filed a motion for summary judgment, arguing that "the STB had exclusive jurisdiction over the abandonment or discontinuation of use of the right-of-way, and that the STB's authority to regulate the matter preempted all state law relating to it." 361 Ark. at 338-39, 206 S.W.3d at 813. The chancery court issued a letter opinion, finding that the question of whether the property had been abandoned by the railroad could only be resolved by the STB, but the court retained jurisdiction to address state-law claims after the STB's final determination. As directed by the chancery court, the Harbours filed a petition with the STB requesting a waiver of the filing fee, which was declined. Ouachita Railroad then filed a supplemental motion for summary judgment, arguing that, because the STB denied the Harbours' request to waive the filing fee, "since the court had already determined that the STB had exclusive jurisdiction over the Harbours' counterclaim, it was appropriate for the court now to grant its motion for summary judgment." *Id.* at 339-40, 206 S.W.3d at 813. The chancery court denied the motion for summary judgment on the grounds that the Harbours' equitable defenses were within its jurisdiction, regardless of the abandonment issue.

The railroad then petitioned this court for a writ of prohibition, asserting that ICCTA preempted the chancery court's

jurisdiction. Upon review, this court framed the question as "whether the Harbours' counterclaim against the railroad for abandonment and adverse possession of the railroad's right-of-way is exclusively within the jurisdiction of the STB." *Id.* at 343, 206 S.W.3d 816. The court held that "Section 10501(b) clearly provides that the STB's jurisdiction over the abandonment of tracks is exclusive and preempts any remedies available under state law." *Id.* The court noted that it had previously acknowledged "the broad language of § 10501(b)" and "its preemptive effect" in a case involving the closing of a railroad agency station or depot closings, *25 Residents of Sevier County, supra. Id.* The court also cited cases involving the STB's predecessor, the Interstate Commerce Commission (ICC), such as *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319-23 (1981), in which the Supreme Court held that Congress granted to the ICC exclusive and "plenary authority to regulate, in the interest of interstate commerce, rail carriers' cessations of service on their lines."[4] Turning to the Harbours' counterclaims involving adverse possession and other equitable defenses they asserted to establish a right to the land at issue, the *Ouachita Railroad* court held that these issues were also preempted under 49 U.S.C. § 10501, stating as follows:

> As already noted, the ICC's, and now STB's, jurisdiction over the "construction, acquisition, operation, abandonment, or discontinuance of . . . tracks" is exclusive. 49 U.S.C. § 10501(b)(2) (2000). Were the circuit court to quiet title over the land in favor of the Harbours based on their counterclaim of adverse possession or to acknowledge any right to the land by the Harbours, this would necessarily result in the acquisition of the right-of-way by the Harbours and in the discontinuation of the use of the same by the railroad. Such a determination clearly falls within the exclusive jurisdiction of the STB, as demonstrated by the clear language of the statute as well as the case law cited above. . . .

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[4] *See also Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005 (N.D. Iowa 2003) (holding that to the extent that a state-law claim sought to force CC & P to abandon the track in question, such claims were preempted by ICCTA); *Trustees of the Diocese of Vt. v. State*, 496 A.2d 151 (Vt. 1985) (holding that a declaratory-judgment action in state court to determine whether an easement for railroad purposes had been abandoned interfered with the ICC's authority to determine the issue); *City of Seattle v. Burlington N. R.R. Co.*, 22 P.3d 260, 262 (Wash. Ct. App. 2001) (stating that language of § 10501 grants the STB "clear, broad, and unqualified" jurisdiction over the statute's listed activities).

> Because any determination by the circuit court on the matter of title or any right to the land would interfere with STB's jurisdiction as provided for in the statute, we hold that the circuit court is wholly without jurisdiction to determine the abandonment and adverse possession claims but also any equitable defenses asserted by the Harbours that seek to bestow upon them any right to the use of the land. It is the STB that has exclusive jurisdiction over such matters.

Ouachita R.R., Inc. v. Circuit Court of Union County, 361 Ark. at 345, 206 S.W.3d at 817.

In *25 Residents of Sevier County, supra*, relied upon in *Ouachita Railroad*, a railroad filed an application with the Commission to close an agency station in Dierks, Arkansas, in order to consolidate operations with those in a nearby city. After the Commission filed notice of the proposed closing, which became effective ninety days later, twenty-five residents of Dierks filed a petition requesting that the Commission order the railroad to reopen the agency station. The Commission requested that the parties present briefs addressing the question of whether ICCTA preempted state jurisdiction of the discontinuation of railroad agency stations. Following a hearing, the Commission determined that it did not have jurisdiction over the matter, because the STB had held "exclusive jurisdiction over 'transportation by rail carriers' as part of the interstate rail network" and dismissed the residents' petition. 330 Ark. at 398-99, 954 S.W.2d at 243 (quoting the Commission's order). The Pulaski County Circuit Court affirmed the Commission.

On appeal, this court examined the language of 49 U.S.C. § 10501(b) and first determined that, "[c]learly, the act covers 'transportation by rail carriers' and the discontinuation of their carriers' related facilities." *Id.* at 400, 954 S.W.2d at 244. The court then considered the question of whether the agency stations were "facilities" within the meaning of § 10501(b), and held as follows:

> Given the broad language of the act itself, its statutory framework, and considering the recent decisions interpreting the act, we believe it is clear that Congress intended to preempt the states' authority to engage in economic regulation of rail carriers. The preemptive strike, we hold, includes regulation of agency station discontinuations. Accordingly, we conclude § 23-12-611, which gives the AHT Commission the authority to regulate such closings, is preempted by the ICC Termination Act of 1995.

Id. at 401, 954 S.W.2d at 244.

Although this court held that the broad language of 49 U.S.C. § 10501(b) preempted state court action in both *Ouachita Railroad, Inc.* and *25 Residents of Sevier County*, neither case involved railroad crossings as in the present appeal, and ICCTA does not expressly mention railroad crossings. However, a recent decision by the U.S. Fifth Circuit Court of Appeals involves railroad crossings, and it is instructive because it is in accord with this court's construction of ICCTA. In *Franks Investment Co. v. Union Pacific Railroad Co.*, 534 F.3d 443 (2008), a property owner filed an action in state court, alleging that he had a property right in four railroad crossings, and sought an injunction to prevent Union Pacific from closing two of the crossings, and to force it to reopen two it had already closed. The preliminary-injunction motion and possessory action was removed and consolidated in federal district court, which held that the state-law claim was expressly preempted by ICCTA.

Upon review, the Fifth Circuit framed the issue as "whether railroad crossings fit within the purview of 'transportation by rail carriers,' thereby evincing Congress' intent to preempt state-law claims relating to ownership of the closings." *Id.* at 446 (quoting 49 U.S.C. § 10501(b)).

The *Franks* court first recognized ICCTA's broad definition of "transportation" as follows:

> The ICCTA defines "transportation" to include, *inter alia*: "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, *or equipment of any kind related to the movement of passengers or property, or both, by rail,* regardless of ownership or an agreement concerning use."

Id. (quoting 49 U.S.C. § 10102(9)(A)). The *Franks* court then noted that the federal district court had held that crossings are within the STB's exclusive jurisdiction because ICCTA's definition of "transportation" includes "the movement of passengers or property . . . by rail," and "[i]n that regard, the district court found crossings affect safety, drainage, and maintenance, which necessarily affect rail travel." *Id.* The Fifth Circuit agreed, rejecting the argument that, because "crossings" were not explicitly listed in the ICCTA definition of "transportation," it evidenced Congress's intent to exclude crossings from the STB's exclusive jurisdiction. Instead, ICCTA's

broad language and definition of transportation — to include " '*property . . . or equipment of any kind* related to the movement of passengers or property or both, by rail' " — clearly "belies the notion that Congress intended 'transportation' to include only items listed in its definition." *Id.* (emphasis in original).

At issue here, as in *Franks*, is whether a state proceeding to reopen a closed railroad crossing falls within the STB's exclusive jurisdiction under the language of § 10501. The Andersons contend that it does not, and argue that this court should follow the North Dakota Supreme Court holding in *Home of Economy v. Burlington Northern Santa Fe Railroad*, 694 N.W.2d 840 (N.D. 2005). In *Home of Economy*, BNSF closed a private crossing on a spur line that provided access from a road to property owned by the appellant. Home of Economy filed suit against BNSF to reopen the crossing, alleging that it possessed an easement for access to the property. BNSF responded by claiming that it held easements by prescription, necessity, and estoppel. The trial court dismissed the suit, holding that it lacked jurisdiction because ICCTA vested the STB with exclusive jurisdiction over the regulation of railroad operations. *Id.* at 841. The trial court specifically "concluded the closing of the grade crossing constituted regulation of rail transportation under the ICCTA, because the grade crossing affected rail cars going from State Mill and Elevator [Roads] and could also affect liability for accidents at the crossing." *Id.* Thus, the trial court held that the STB's exclusive jurisdiction preempted any state court action by Home of Economy.

On appeal, Home of Economy argued that the ICCTA only grants exclusive federal jurisdiction to the STB "in those cases involving substantial economic impact on a railroad's operations." *Id.* The North Dakota Supreme Court agreed, holding that "ICCTA does not explicitly preempt state law regarding grade crossings" because "[t]he preemption language in the ICCTA explicitly preempts many issues 'with respect to regulation of rail transportation,' but does not specifically refer to states' traditional police power regarding grade crossings." *Id.* at 846 (quoting ICCTA). Although the North Dakota Supreme Court acknowledged that "some courts have broadly construed Congress's preemption language in ICCTA and have concluded that language preempted state or local laws," it interpreted a selection of ICCTA's legislative history to reflect that Congress only intended

to economically regulate the interstate railway system while leaving intact states' police power. *Home of Economy*, 694 N.W.2d at 844.[5]

The Andersons' reliance on *Home of Economy* is misplaced. First, in contrast to *Home of Economy*, this court specifically noted the broad language and preemptive reach of 49 U.S.C. § 10501(b) in *Ouachita Railroad, Inc.*, *supra*, and *25 Residents of Sevier County*, *supra*. More importantly, this court applied the language broadly to preempt state judicial and regulatory action, respectively, in those cases. Second, the Commission's order in this case clearly impacts BNSF's railroad operations and "transportation by rail carriers" for purposes of ICCTA. The Commission ordered BNSF: (1) to reopen the private crossing within ten days; (2) to redraft a 1921 private crossing agreement to apply to the Andersons; and (3) that "[n]o fee may be charged by the railroad for entry into this agreement with the Andersons, as no fee was charged in the 1921 agreement" and "[n]o insurance of any kind may be required by the railroad from the Andersons as no insurance was required in the original [1921] agreement." This action, as in *Franks*, necessarily impacts "transportation by rail," affecting both BNSF's economic interests and the movement of passengers or property. As noted by the Fifth Circuit in *Franks*, *supra*, ICCTA's definition of "transportation" includes "*property . . . or equipment of any kind* related to the movement of passengers or property or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9)(A) (2000) (emphasis added).

■ We hold that ICCTA preempts the Commission's jurisdiction over this private railroad crossing dispute and we vacate the Commission's order. Federal law preemption deprives the Commission's jurisdiction under the facts presented in this case and invests exclusive jurisdiction in the STB. 49 U.S.C. § 10501(b) (STB has exclusive jurisdiction over railroad operations, tracks, and facilities). Decisions of the STB may be appealed to the appropriate United States circuit court of appeals. 28 U.S.C. § 2321(a) (2006) (judicial review of STB orders); 28 U.S.C. § 2342(5) (2006) (exclusive jurisdiction to determine validity of STB final orders lies with the courts of appeals).

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[5] The North Dakota Supreme Court cited H.R. Rep. No. 104-311, at 95-96 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 793, 807-08.

Because we hold that the Commission's jurisdiction is preempted by ICCTA, the Anderson's remaining arguments are moot.

Commission's order vacated.

Lee Mark HARRIS *v.* STATE of Arkansas

CR 08-762 291 S.W.3d 561

Supreme Court of Arkansas
Opinion delivered January 30, 2009

Don Warren, for appellant.

No response.

PER CURIAM. On November 27, 2007, a jury found petitioner Lee Mark Harris guilty of possession of cocaine with intent to deliver and sentenced him to 960 months' imprisonment in the Arkansas Department of Correction. The judgment was entered on December 14, 2007, and on December 10, 2007, trial counsel representing petitioner, Mr. Don Warren, filed a notice of appeal. The appeal was not perfected and petitioner filed a pro se motion for

belated appeal. We treated the motion for belated appeal as a motion for rule on clerk to lodge the record and granted it.

In our per curiam on October 2, 2008, we directed petitioner's retained counsel to file a petition for writ of certiorari to call up the entire record, as only a partial record had been filed. *Harris v. State*, CR08-762 (Ark. Oct. 2, 2008). Mr. Warren filed the petition as directed, and we granted petitioner thirty (30) days to complete the record. *Harris v. State*, 374 Ark. 529, 288 S.W.3d 645 (2008). Thus, the record was to be completed and lodged with this court by November 29, 2008.

[redacted] On January 7, 2009, Mr. Warren filed a "motion to accept belated brief on writ of certiorari," which we will treat as a motion to file a belated return of writ. In the motion, Mr. Warren states that he did not receive the record until January 6, 2009. The affidavit attached to the motion, however, states that the transcript was delivered to the Warren Law Firm on "December 6, 2009." In any case, although Mr. Warren states that "the delay was in no part attributable to the defendant," and it is clear that he is attempting to place blame on the court reporter who prepared the transcript, this court has specifically held that it is not the responsibility of the circuit clerk, circuit court, or anyone other than the appellant to perfect an appeal. *Branning v. State*, 363 Ark. 369, 214 S.W.3d 237 (2005). Because there is presumption of prejudice arising from the failure of counsel to perfect an appeal if counsel's deficient performance led to the forfeiture of the convicted defendant's right to pursue a direct appeal, *see Langston v. State*, 341 Ark. 739, 19 S.W.3d 619 (2000), we grant the motion. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion granted.

Larry NEELY *v.* Lona McCASTLAIN, in Her Official Capacity as Prosecuting Attorney of the 23rd Judicial District of Lonoke County, Arkansas, and State of Arkansas

08-973 291 S.W.3d 585

Supreme Court of Arkansas
Opinion delivered January 30, 2009

J. Thomas Sullivan, for appellant.

PER CURIAM. Appellant Larry Neely appeals from the circuit court's order granting summary judgment to appellees Lona McCastlain and the State of Arkansas. Because appellant has submitted a brief without a proper addendum in violation of Arkansas Supreme Court Rule 4-2(a)(8) (2008), we order rebriefing.

Rule 4-2(a)(8) provides that the appellant's brief shall contain an addendum that includes a true legible photocopy of the order or judgment 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." Rule 4-2(b)(3) provides that, 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, then the court may notify the appellant of the deficiencies and allow appellant to file a substituted brief.

Here, appellant's brief is deficient because his addendum lacks relevant pleadings essential to an understanding of the case. While appellant has included a copy of his complaint for declaratory judgment and writ of habeas corpus, he has failed to include the appellees' answers to that complaint, the appellees' joint motion for summary judgment, and his response to that motion. Also, as part of his argument, appellant discusses information in two affidavits, one affidavit of his own and one affidavit of the investigating officer in his underlying criminal action, but neither affidavit is included in the addendum.

Because appellant has failed to comply with our rules, we order him to file a substituted 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 judgment appealed from may be affirmed for noncompliance with Rule 4-2. After service of the substituted brief, the appellees shall have an opportunity to revise or supplement their brief in the time prescribed by the clerk.

Rebriefing ordered.

STATE of Arkansas *v.* John BROWN

CR 08-826 291 S.W.3d 560

Supreme Court of Arkansas
Opinion delivered January 30, 2009

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

Law Offices of John Wesley Hall, by: *Patrick Benca*, for appellee.

PER CURIAM. The State of Arkansas appeals from the circuit court's grant of Appellee John Brown's Rule 37 petition. Because the State submitted a brief without a proper addendum in violation of Arkansas Supreme Court Rule 4-2(a)(8) (2008), we order rebriefing.

Rule 4-2(a)(8) provides, in pertinent part:

> Following the signature and certificate of service, the appellant's brief shall contain an Addendum which 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). The procedure to be followed when an appellant has submitted an insufficient abstract or addendum is set forth in Arkansas Supreme Court Rule 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.

Ark. Sup. Ct. R. 4-2(b)(3).

Here, the State's brief is deficient due to the fact that its addendum lacks relevant pleadings essential to an understanding of the case. The record reveals that at the conclusion of the hearing on Brown's Rule 37 petition, the circuit court requested that the parties submit posthearing briefs in lieu of oral arguments. The posthearing briefs appear in the record but do not appear in the State's addendum.

Because the State has failed to comply with our rules, we order it to file a substituted abstract, addendum, and brief within fifteen days from the date of entry of this order. If the State 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, Brown shall have an opportunity to revise or supplement his brief in the time prescribed by the clerk.

Rebriefing ordered.

Steve STEWART *v.* STATE of Arkansas

CR 09-29 291 S.W.3d 584

Supreme Court of Arkansas
Opinion delivered January 30, 2009

Gene E. McKissic, for appellant.

No response.

PER CURIAM. Appellant Steve Stewart, by and through his attorney, Gene E. McKissic, has filed a motion for rule on clerk.

Stewart was convicted of multiple counts of perjury by an Ashley County jury; the judgment and commitment order was entered on June 3, 2008. On June 19, 2008, Stewart filed a timely notice of appeal. Shortly thereafter, the court reporter informed Gene McKissic, Stewart's attorney that, due to the number of appeals pending, he would need to file a motion for extension of time to lodge the record. Mr. McKissic filed such a motion on August 19, 2008, and the circuit court granted it on August 21, 2008. The record was tendered to this court on January 12, 2009, and our clerk refused to accept it as it was tendered more than seven months from the date of the entry of the judgment from which the appeal is taken. *See* Ark. R. App. P.–Civ. 5(b)(2). Mr. McKissic has now filed the instant motion for rule on clerk in which he accepts responsibility for miscalculating the deadline for filing the record.

This court clarified its treatment of motions for rule on clerk in *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). There we said that there are only two possible reasons for an appeal not being timely perfected: either the party or attorney filing the appeal is at fault, or, there is "good reason." 356 Ark. at 116, 146 S.W.3d at 891. We explained:

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

Id., 146 S.W.3d at 891 (footnote omitted). While this court no longer requires an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where he has erred and is responsible for the failure to perfect the appeal. *See id.*

In accordance with *McDonald v. State*, *supra*, Mr. Mc Kissic has candidly admitted fault. The motion is, therefore, granted, and a copy of this opinion will be forwarded to the Committee on Professional Conduct.

Billy Joe KELLEY, Jr. *v.* STATE of Arkansas

CR 08-926 292 S.W.3d 297

Supreme Court of Arkansas
Opinion delivered February 5, 2009

Bill Luppen, for appellant.

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

JIM HANNAH, Chief Justice. A Pulaski County jury convicted appellant Billy Joe Kelley, Jr., of the rape of nine-year-old M.W., and he was sentenced as a habitual offender to a term of life imprisonment. On appeal, he contends that the circuit court erred (1) in denying his motion for directed verdict; (2) in allowing the State to introduce into evidence that the victim testified positive for chlamydia, without the testimony of the technician who performed the test; and (3) in refusing to allow him to ask the victim's mother if she had chlamydia. Because this is a criminal appeal in which a sentence of life imprisonment has been imposed, this court has jurisdiction pursuant to Arkansas Supreme Court Rule 1-2(a)(2) (2008). We affirm the circuit court.

Kelley first contends that the circuit court erred in denying his motion for directed verdict on the charge of rape. Specifically,

he contends that there was no evidence that penetration occurred, and he asserts that the State provided no evidence that identified him as the person who raped M.W.

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict, considering only the evidence supporting the verdict, to determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Woolbright v. State*, 357 Ark. 63, 160 S.W.3d 315 (2004). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* The statute under which Kelley was convicted is Arkansas Code Annotated section 5-14-103(a)(3)(A) (Supp. 2007), which provides that a person commits rape "if he or she engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen (14) years of age."

M.W. testified at trial that Kelley engaged in sexual contact with her in November and December 2006, while he was living in a house with her, her mother, and three brothers. M.W. testified that, during that time, Kelley touched her vagina with his penis. M.W. stated that when Kelley touched her vagina with his penis, it was on "the inside." M.W. related that some of the incidents occurred in the morning and others occurred during the evening while her mother was at work and her brothers were not home. M.W. stated that it "hurted" when Kelley did this to her, and that she eventually told her neighbor, Phyllis Gordon, about what had been happening because she was "tired of it" and wanted it to stop. M.W. also testified that after the incidents occurred, she noticed a burning sensation when she went to the bathroom. M.W. stated that sometimes her stomach hurt "after he did it."

Dr. Maria Esquivel examined M.W. at Arkansas Children's Hospital on January 22, 2007. Dr. Esquivel testified that M.W., who was born on August 10, 1997, was about nine years old at the time of the examination. She stated that M.W. had a very thin hymen, and that based on this finding, she suspected that there may have been penetration into the vagina. Dr. Esquivel stated that she did not find any acute, or fresh, injuries, but she explained that any injuries inflicted in November and December would have had time to heal. She also tested M.W. for sexually transmitted diseases and learned that a swab from M.W.'s rectum tested positive for chlamydia. Dr. Esquivel testified that chlamydia is spread either "by active intercourse or by very close genital to genital contact."

She stated that many women who have chlamydia may be asymptomatic but that some women experience burning upon urination.

Kelley contends that there is insufficient evidence to sustain a conviction for rape because M.W. provided contradictory testimony, with respect to when the incidents occurred and where in the house the incidents occurred. He states that the testimony of M.W.'s mother and brothers contradicted M.W.'s testimony as to when and where the incidents occurred. Generally, the time a crime is alleged to have occurred is not of critical significance unless the date is material to the offense. *Martin v. State*, 354 Ark. 289, 119 S.W.3d 504 (2003). This is particularly true with sexual crimes against children. *See id.* Any discrepancies in the evidence concerning the date of the offense are for the jury to resolve. *Id.* Moreover, the duty of resolving conflicting testimony and determining the credibility of witnesses is left to the discretion of the jury. *Hayes v. State*, 374 Ark. 384, 288 S.W.3d 204 (2008). Here, it was for the jury to resolve any inconsistencies in testimony with respect to when and where the incidents occurred.

Kelley also contends that the State's medical evidence contradicts M.W.'s testimony that he put his penis inside her vagina. He states that the only physical evidence that M.W. had sexual contact with another person was that a swab from her rectum tested positive for chlamydia.

A rape victim's testimony may constitute substantial evidence to sustain a conviction for rape, even when the victim is a child. *Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008). The rape victim's testimony need not be corroborated, nor is scientific evidence required. *Id.* More particularly, this court has stated that the testimony of the victim which shows penetration is enough for conviction. *Gatlin v. State*, 320 Ark. 120, 895 S.W.2d 526 (1995). Under the facts of this case, M.W.'s testimony constitutes substantial evidence that Kelley penetrated M.W.'s vagina with his penis. Moreover, Dr. Esquivel's testimony established that M.W. was nine years old at the time the incidents occurred, and her testimony regarding the appearance of M.W.'s hymen was suggestive of a sexual assault. Finally, any inconsistencies in the testimony of witnesses is a matter for the jury to resolve. We hold that the circuit court did not err in denying Kelley's motion for directed verdict as there was sufficient evidence to sustain a conviction for rape.

Prior to trial, Kelley stated that he would object to evidence that M.W. tested positive for chlamydia unless the laboratory technician who performed the test testified at trial. Kelley's objection was based upon "rules of evidence," chain-of-custody grounds, and the confrontation clause. The State indicated it would introduce the evidence through the testimony of Dr. Esquivel, who examined M.W., but did not perform the lab work for the chlamydia test. Prior to trial, the circuit court ruled that, while the lab report showing M.W.'s positive test for chlamydia was hearsay, Dr. Esquivel reasonably relied upon it in forming her opinion that M.W. had chlamydia. Accordingly, pursuant to Arkansas Rule of Evidence 703, the circuit court denied Kelley's motion to exclude evidence about the disease. The record reflects that the circuit court did not address Kelley's confrontation-clause or chain-of-custody claims.

[redacted] The circuit court has wide discretion in making evidentiary rulings, and we will not reverse its ruling on the admissibility of evidence absent an abuse of discretion. *Jackson v. State*, 375 Ark. 321, 290 S.W.3d 574 (2009). The failure to obtain a ruling on an issue at the trial court level, including a constitutional one, precludes review on appeal. *Jackson v. State*, 334 Ark. 406, 976 S.W.2d 370 (1998). Because Kelley failed to obtain rulings on his confrontation-clause and chain-of-custody arguments, we will not consider those arguments on appeal.

We now turn to Kelley's arguments that are preserved for appeal. At trial, Dr. Esquivel testified that cultures were taken from M.W. and sent to the lab. She testified that the lab later notified her clinic that M.W.'s rectal culture had tested positive for chlamydia. Dr. Esquivel stated that she treated M.W. for chlamydia with an antibiotic.

Kelley claims that the circuit court erred when it allowed Dr. Esquivel to testify that M.W. tested positive for chlamydia because her testimony was hearsay. In support of his argument, Kelley cites *Llewellyn v. State*, 4 Ark. App. 326, 630 S.W.2d 555 (1982), where the court of appeals held that, pursuant to Arkansas Rule of Evidence 803(8), a drug-laboratory supervisor's testimony was inadmissible hearsay because he was not present when the substance was delivered to the lab, and he had no personal knowledge of the receipt or testing of the substance. The court of appeals reversed and remanded in *Llewellyn*, and Kelley asserts that, based upon that holding, the instant case should be reversed. We disagree.

In *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997), the State called a doctor to testify about, and give an opinion regarding, DNA testing performed by another doctor. Goff relied on *Llewellyn* and contended that the DNA testimony at his trial was inadmissible under Rule 803(8) because it was not from the doctor who performed the test. This court noted factual distinctions between the two cases and went on to add that *Llewellyn* did not address Arkansas Rule of Evidence 703. With respect to Rule 703, we stated:

> [A]n expert can render an opinion based on facts and data otherwise inadmissible, including hearsay, as long as they are of a type reasonably relied upon by experts in the field. Eisenberg was qualified without objection as an expert in the field of DNA testing, and she testified that it was "quite common" for DNA experts to examine case files and protocols and decide whether the DNA testing in a particular case is accurate. She said that she did so in this case. *Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996). In addition, when an expert's testimony is based on hearsay, this court has held that the lack of personal knowledge on the part of the expert does not mandate the exclusion of the testimony, but instead it presents a jury question as to the weight of the testimony. *See id.*; *Scott v. State*, 318 Ark. 747, 888 S.W.2d 628 (1994).

Goff, 329 Ark. at 521, 953 S.W.2d at 42-43.

The State contends that, in this case, even though Dr. Esquivel did not testify that she normally relies on tests performed by the laboratory, it is axiomatic that physicians routinely rely on the results of tests and others to diagnose and treat many injuries. We agree. Dr. Esquivel's testimony regarding M.W.'s chlamydia diagnosis was based upon a lab report containing data reasonably relied upon by physicians when diagnosing and treating patients. This court does not reverse the circuit court's ruling on a hearsay question absent an abuse of discretion. *Goff*, *supra*. We find no abuse of discretion.

Before leaving this point, we note that Kelley also asserts that he was denied his right to confront the witness who performed the test in violation of Arkansas Code Annotated section 12-12-313(b) (Repl. 2003). Although Kelley provided notice to the State that he intended to preserve all rights under Arkansas Code Annotated section 12-12-313(b), he did not make

this argument to the circuit court and, consequently, he received no ruling on the issue. Accordingly, we will not consider this argument on appeal.

For his final point on appeal, Kelley contends that the circuit court abused its discretion when it refused to allow Kelley to ask M.W.'s mother, Kimberly Britt, if she had tested positive for chlamydia. A trial court's ruling on relevancy is entitled to great weight and will not be reversed absent an abuse of discretion. *Martin, supra.* Britt testified that she and Kelley had engaged in sexual intercourse two or three times per week, without the use of condoms, around the time the incidents with M.W. occurred, and the record reveals that Britt tested negative for chlamydia. Kelley contended below, as he does on appeal, that Britt's negative chlamydia test was relevant evidence, reasoning that if Britt did not contract chlamydia from him, M.W. likely did not contract chlamydia from him. Thus, Kelley suggests that Britt's negative test points to another perpetrator of M.W.

[redacted] Kelley contends that a material issue in this case was whether M.W. contracted chlamydia from having sexual intercourse with him. He is mistaken. The issue in this case was whether Kelley had sexual intercourse with a person under fourteen years of age, or more specifically, whether Kelley penetrated the vagina of M.W. As the State points out, it is not required that the victim contract a sexually transmitted disease in order for the State to prove that rape occurred. Moreover, the jury never heard that Kelley did not have chlamydia or that he refused to be tested for it. Therefore, the question of whether Britt had a positive diagnosis for chlamydia had no relevance to any issue at trial. In addition, even assuming M.W. did contract chlamydia through sexual contact with another person, it does not foreclose a finding that she was raped by Kelley. *See, e.g., Ridling v. State*, 348 Ark. 213, 72 S.W.3d 466 (2002) (stating that evidence of sex with another man was not relevant because, unfortunately, the minor victim's having sex with one older man did not prevent her from having sex with a second older man at the same time). The circuit court disallowed evidence that was collateral to the issue of whether Kelley penetrated the vagina of M.W. We hold that the circuit court did not abuse its discretion in refusing to allow Kelley to ask M.W.'s mother, Kimberly Britt, if she had tested positive for chlamydia.

4-3(h) Review

The record in this case has been reviewed for reversible error pursuant to Arkansas Supreme Court Rule 4-3(h) (2008), and none has been found.

Affirmed.

CITY of LITTLE ROCK *v.* Jung Yul RHEE, Ashia Teriyaki, Fleishauer Family LLC, Kim C. Young, Sirrah, Inc., Jackson Hewitt, Charlie Bond, 12th Street Upholstery & Furniture, Mary Rollins, Mary's Magic Curl Beauty Salon, Pic Pac Store, Inc., Suk Chang, E-Z Food Mart, Thuan Nguyen, Beauty Nails, Ru Jae, J's Grill, Mae Ok Yi

08-606 292 S.W.3d 292

Supreme Court of Arkansas
Opinion delivered February 5, 2009

Thomas M. Carpenter, City Att'y, by: *Julia Hudson*, Ass't City Att'y, for appellant.

John R. Myers, for appellee Jung Yul Rhee.

ROBERT L. BROWN, Justice. Appellant, the City of Little Rock ("the City"), appeals from the circuit judge's order, dismissing the City's motion for injunctive relief against appellee Pic Package Store, Inc. ("Pic Pac"). The City asserts three points on appeal. We affirm the circuit judge's order.

On January 18, 2007, in response to numerous criminal violations that had occurred at or near a strip mall ("the mall property") located at 4401 West 12th Street in Little Rock, the City filed a complaint for an injunction and order of abatement against the owner, mortgagee, and tenants of the mall property pursuant to Arkansas Code Annotated sections 14-54-1503(a), 16-105-401, and 5-74-109. Pic Pac is one of the tenants of the mall property. The City's complaint alleged that approximately thirty-four criminal violations had occurred in connection with the mall property between August 30, 2005, and November 21, 2006, including multiple instances of loitering, public intoxication, possession of a weapon, and possession of a controlled substance. The City's complaint prayed that the circuit judge declare the mall property a common nuisance, enjoin the defendants from occupying the property, evict all tenants and residents from the property, and order that the property be closed. The defendants filed separate answers to the City's complaint.

On March 1, 2007, the parties appeared before the circuit judge for a hearing on the City's complaint. At the hearing, the parties reached a temporary agreement, whereby the defendants stipulated that at least three criminal acts had occurred at the mall property in violation of Arkansas Code Annotated section 5-74-109, and at least one of the criminal acts had involved a controlled substance in violation of Arkansas Code Annotated section 16-105-402. In exchange, the City agreed to meet with the defendants within ten days of the hearing to discuss the current status of the mall property, the current security measures taken at the property, and the City's requested relief. The agreement further provided that if the parties were unable to resolve the dispute by agreement, then the City would seek further relief through the circuit court. The circuit judge incorporated the parties' agreement into a written order that was entered on June 1, 2007.

On September 12, 2007, the City moved for injunctive relief.[1] The City asked the circuit judge to declare Pic Pac a common nuisance under Arkansas Code Annotated section 5-74-109(b) and abate the nuisance by ordering that Pic Pac be closed. The City's motion referred to the parties' stipulation in the June 1, 2007 order that at least three criminal acts had occurred at the mall property in violation of Arkansas Code Annotated section 5-74-109. The City also alleged that three additional violent crimes had occurred at the mall property since the parties' June 1, 2007 agreement. These crimes included a murder and two batteries by gunshot.

On December 20, 2007, the circuit judge held a hearing on the City's motion for injunctive relief. In an order dated February 4, 2008, the circuit judge dismissed the City's motion with prejudice and found that:

> 1. The City of Little Rock failed to establish a link of any kind between the crimes set out in paragraphs 3 and 4 of the Motion for Prohibitive Injunction and an owner, agent or employee of any of the defendant entities or individuals.
>
> 2. The City of Little Rock failed to establish that Pic Package Store, Inc. is a common nuisance pursuant to Ark. Code Ann. § 5-74-109.

The City now appeals.

For its first point on appeal, the City urges this court to declare that Arkansas Code Annotated section 5-74-109 applies to commercial property and not simply to drug houses. Section 5-74-109 provides, in pertinent part:

> (a) Intent. The intent of the General Assembly in this section is to enact civil remedies that eliminate the availability of any premises for use in the commission of a continuing series of criminal offenses.
>
> (b) Common nuisance declared. Any premises, building, or place used to facilitate the commission of a continuing series of three (3) or more criminal violations of Arkansas law is declared to be

[1] The City's motion for injunctive relief was styled "Motion for Prohibitive Injunction."

> detrimental to the law-abiding citizens of the state and may be subject to an injunction, a court-ordered eviction, or a cause of action for damages as provided for in this subchapter.

Ark. Code Ann. § 5-74-109(a)-(b) (Repl. 2005).

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, 254 S.W.3d 729 (2007). Our standard of review for issues of statutory construction is well settled:

> 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 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.

Great Lakes Chem. Corp. v. Bruner, 368 Ark. 74, 82, 243 S.W.3d 285, 291 (2006) (internal citations omitted).

At the hearing before the circuit court, the parties argued over whether section 5-74-109 with its reference to "premises" applied to all commercial property. The City contends that the word "premises" includes commercial buildings, when given its ordinary and usually accepted meaning.

The circuit judge, however, did not address this issue, or rule on it, and the City admits as much in its brief when it said: "The trial court in denying the [City's] motion did not address the issue that the intent of the General Assembly was to include any premise — commercial or residential." This court has repeatedly held that a party's failure to obtain a ruling is a procedural bar to the court's consideration of the issue on appeal. *See, e.g., Johnson v. Cincinnati Ins. Co.*, 375 Ark. 164, 289 S.W.3d 407 (2008); *Cox v. Miller*, 363 Ark. 54, 210 S.W.3d 842 (2005). It was the City's burden to raise this issue and obtain a specific ruling on it. The failure to do so now precludes this court from considering the merits of the City's arguments on this point.

For its second point, the City asserts that the circuit judge erred by finding that Pic Pac was not a common nuisance under Arkansas Code Annotated section 5-74-109(b). As already noted,

the circuit judge found in his February 4, 2008 order that the City "had failed to establish a link" between the alleged crimes and the defendants. This was error, according to the City, because section 5-74-109(b) requires no more proof than a continuing series of three criminal offenses on the property in question. In addition, the City claims that section 5-74-109(b) does not address the actions of people, but rather what occurs on premises and places, and the fact that Pic Pac had taken measures to reduce crime is irrelevant because section 5-74-109(b) does not except property owners who take remedial measures.

To repeat in part, this court reviews issues of statutory interpretation de novo, because it is for this court to determine the meaning of a statute under the canons of construction previously set forth in this opinion. *See McMickle v. Griffin*, 369 Ark. 318, 254 S.W.3d 729 (2007).

We quote again our statutory law, which defines what constitutes a common nuisance and the remedies available to halt it:

> (b) Common nuisance declared. Any premises, building, or place used to facilitate the commission of a continuing series of three (3) or more criminal violations of Arkansas law is declared to be detrimental to the law-abiding citizens of the state and may be subject to an injunction, a court-ordered eviction, or a cause of action for damages as provided for in this subchapter.

Ark. Code Ann. § 5-74-109(b) (Repl. 2005).

The language of section 5-74-109(b) is plain and unambiguous, which means the legislative intent can be determined from the ordinary meaning of the language used. Section 5-74-109(b) defines a common nuisance as "any premises, building, or place *used to facilitate* the commission of a continuing series of three (3) or more crimes." Ark. Code Ann. § 5-74-109(b) (emphasis added). When section 5-74-109(b) is construed just as it reads, giving the words their ordinary and usually accepted meaning in common language, it is clear the City was required to prove that the Pic Pac premises had been used *to facilitate* the commission of the alleged crimes.

The City's interpretation of this language, however, makes the word "facilitate" superfluous and insignificant, which contradicts our case law. *See Bruner*, 368 Ark. at 82, 243 S.W.3d at 291

("This court construes the statute so that no word is left void, superfluous or insignificant, and this court will give meaning and effect to every word in the statute, if possible."). Hence, the City's interpretation of section 5-74-109(b), which eliminated the phrase "used to facilitate," does not pass muster.

Giving every word in section 5-74-109(b) its ordinary meaning, we turn next to the issue of whether the circuit judge erred in finding that Pic Pac was not a common nuisance under section 5-74-109(b). Our standard of review for an appeal from a bench trial is not whether there was substantial evidence to support the findings of the circuit judge, but whether the circuit judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Duke v. Shinpaugh*, 375 Ark. 358, 290 S.W.3d 591 (2009). 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.*

The circuit judge orally declared from the bench that the City failed to prove that the Pic Pac premises were used to facilitate the alleged crimes.[2] In his later order, the judge said that the evidence presented at the hearing showed no "link of any kind" between the defendants and the criminal acts occurring on their property. We affirm the finding of the circuit judge, as we conclude that the absence of any link supports the lack of facilitation by Pic Pac. In fact, we conclude that the evidence showed just the opposite because the defendants, including Pic Pac, had taken extensive measures to curb the criminal activity at or near the mall property, including hiring security guards, installing flood lights and surveillance cameras, and building a fence to keep loiterers from going behind the building.

The circuit judge also heard the testimony of Stuart Sullivan, a homicide detective who had investigated the shootings that had occurred at the mall property. He testified that Pic Pac had not been involved either *directly or indirectly* with any of the shootings, which is the standard under Arkansas Code Annotated section

[2] Although the circuit judge's order discusses the City's failure of proof in terms of establishing a link between the crimes and the defendants, the circuit judge ruled from the bench and said, "[i]t hasn't been presented so far that Pic Pac in any way facilitated that murder . . . it certainly doesn't suggest from what I read as the legislative . . . intent that Pic Pac is facilitating particular conduct."

5-74-109(c).[3] Bob Dailey, the owner of Pic Pac, testified that the crimes in the parking lot were detrimental to his business and that he was continually working with Mr. Rhee, the owner of the strip mall, to improve the security of the property. Dailey added that neither he nor any of his employees had been involved in any of the criminal activity. We hold that the circuit judge's finding of no facilitation or linkage was not clearly against the preponderance of the evidence.

The City further maintains that it was entitled to a finding that Pic Pac was a common nuisance based on the circuit judge's June 1, 2007 order, in which he said: "The defendants do not dispute that at least three criminal acts occurred on the real property as described in the [City's complaint] in violation of Ark. Code Ann. § 5-74-109, and at least one of those criminal acts involved a controlled substance in violation of Ark. Code Ann. § 16-105-402."[4] However, as the City correctly observes in its brief: "[t]he trial court failed to address this issue." Again, a party's failure to obtain a ruling is a procedural bar to the court's consideration of the issue on appeal. *See, e.g., Johnson v. Cincinnati Ins. Co.*, 375 Ark. 164, 289 S.W.3d 407 (2008); *Cox v. Miller*, 363 Ark. 54, 210 S.W.3d 842 (2005). It was the City's burden to raise this issue and obtain a specific ruling on it. The failure to do so now precludes this court from considering the merits of the City's arguments on this point.

For its final point, the City urges this court to declare that Arkansas Code Annotated section 5-74-109(j) requires the circuit judge to grant the City equitable relief upon finding that a premises is a common nuisance under section 5-74-109(b). Because we hold that the circuit judge correctly found that there was no common nuisance, it is not necessary to consider this point.

Affirmed.

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[3] Arkansas Code Annotated section 5-74-109(c) provides that an injunction may issue to enjoin a person from directly or indirectly permitting or maintaining a public nuisance. The circuit judge, as already referenced, decided this case under section 5-74-109(b).

[4] Dailey testified at the hearing that the agreement was merely that three crimes had occurred, not that the strip mall was a common nuisance.

Tommy Lee BROWN *v.* STATE of Arkansas

CR 08-1051 292 S.W.3d 288

Supreme Court of Arkansas
Opinion delivered February 5, 2009

John F. Gibson, Jr., for appellant.

Dustin McDaniel, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

PAUL E. DANIELSON, Justice. Appellant Tommy Lee Brown appeals from the judgment and disposition order convicting him of four counts of cruelty to animals, fining him $530, assessing court costs of $150, and ordering restitution in the amount of $5,090.51 payable to Bluebonnet Equine Humane Society (BEHS). He asserts two points on appeal: (1) that the circuit court erred in ordering restitution; and (2) that the circuit court erred in determining the amount of restitution. We affirm the judgment and disposition order.

On appeal, Brown does not challenge the sufficiency of the evidence to support his convictions, but instead, challenges only the order of restitution and the amount thereof. Accordingly, only a brief recitation of the facts is necessary. *See Rollins v. State*, 362 Ark. 279, 208 S.W.3d 215 (2005). On September 17, 2007, Brown appealed to the circuit court the order of the District Court of Drew County finding him guilty of cruelty to animals, assessing him a fine of $430,[1] assessing costs of $100, and ordering restitution in the amount of $5,090.51. On February 9, 2008, a bench trial was held by the circuit court. Testimony was presented that after four of Brown's horses were seized due to maltreatment by malnourishment, Tina Shalmy, a volunteer with BEHS, took the horses to her property where she cared for them. Ms. Shalmy testified to the costs incurred to care for the horses, specifically:

> PROSECUTOR: Tell me, if the Court were to find you were to get restitution, how much money have y'all been out?
>
> MS. SHALMY: It was five thousand and something. My part alone is three thousand something and we had a two thousand dollar vet bill that she was supposed to bring with her today.

An itemized list of expenses per horse was then admitted as an exhibit. With respect to the veterinarian bill, the following colloquy took place:

[1] The fine consisted of a $425 fine and $5 county jail fee.

PROSECUTOR: Besides the care of those horses, you have a vet bill, and how much is that?

MS. SHALMY: It was two thousand and something dollars, but the veterinarian did not appear today. She has that bill. It was for the care of —

. . . .

CIRCUIT COURT: There may be some bills in this file. It appears to be two vet bills in the Clerk's file from Crystal Springs Vet Service, one for eight hundred and six and one for eight hundred and seventy-one fifty.

PROSECUTOR: Does that sound correct?

MS. SHALMY: Yes, that's about right.

. . . .

PROSECUTOR: And you're asking for that because they are going to ask your society to pay that?

MS. SHALMY: Our society has already paid it.

PROSECUTOR: They have already paid it?

MS. SHALMY: Uh-huh.

In addition, Ms. Shalmy testified that BEHS was a nonprofit organization.

After finding Brown guilty on four counts of animal cruelty, the circuit court found that it could impose restitution, pursuant to Arkansas Code Annotated § 5-4-205 (Repl. 2006), and further ordered restitution, in the amount already set forth above, to BEHS. Brown now appeals.

For his first point on appeal, Brown argues that the circuit court erred in ordering restitution pursuant to Ark. Code Ann. § 5-4-205, because the circuit court failed to make any determination that BEHS was a victim. He maintains that, while BEHS

incurred expenses caring for the horses, it was not as a result of his crime. He further claims that BEHS voluntarily assumed the horses' care, which was not its duty under the law, and, thus, it was not a victim entitled to restitution. The State responds that, in accord with the statute, BEHS suffered monetary loss as a result of Brown's crimes because it treated and cared for the horses, which required care to recover from the physical damage and injuries Brown caused them. It avers that the broad language of the statute allows BEHS to collect from Brown the monetary expense that it incurred as a direct or indirect result of his crimes.

The instant case calls on us to interpret section 5-4-205. This court reviews issues of statutory interpretation de novo, as it is for this court to decide the meaning of a statute. *See Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558 (2003). We construe criminal statutes strictly, resolving any doubts in favor of the defendant. *See id.* We also adhere to the basic rule of statutory construction, which is to give effect to the intent of the legislature. *See id.* We construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language, and if the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion to resort to rules of statutory interpretation. *See id.* Additionally, in construing any statute, we place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole. *See id.*

[redacted] Arkansas Code Annotated § 5-4-205(a)(1) provides that "[a] defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution." The section further provides that "[w]hether a trial court or a jury, the sentencing authority shall make a determination of actual economic loss caused to a victim by the offense." Ark. Code Ann. § 5-4-205(b)(1). "Victim," for purposes of the section or any provision of law relating to restitution, is defined as "any person, partnership, corporation, or governmental entity or agency that suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode." Ark. Code Ann. § 5-4-205(c)(1). The question presented in the instant case is whether BEHS was a victim entitled to restitution as a result of Brown's cruelty-to-animals offenses. We conclude that it was.

BEHS is a humane society registered as a foreign nonprofit corporation here in Arkansas, of which we can take judicial notice.[2] *See Cloird v. State*, 349 Ark. 33, 76 S.W.3d 813 (2002). *See also Mid-State Homes, Inc. v. Knight*, 237 Ark. 802, 803, 376 S.W.2d 556, 557 (1964) ("We take judicial notice of records required to be kept by the Secretary of State."); *Public Loan Corp. v. Stanberry*, 224 Ark. 258, 262 n.2, 272 S.W.2d 694, 697 n.2 (1954) ("We take judicial notice of public records required to be kept."). Furthermore, as evidenced by Ms. Shalmy's testimony set forth above, BEHS incurred monetary expense, either directly or indirectly, as a result of Brown's cruelty to the horses, when it cared for and obtained treatment for the horses following their seizure. Here, Brown asserts that there was no proof that he caused the horses "to be in any worse shape when they were taken from the pasture than they were when he put them there,"and, thus, the circuit court could not conclude that the expenses incurred by BEHS were a result of his offense. However, Brown's assertion belies the fact that he was found guilty on four counts of cruelty to animals, convictions that he does not challenge on appeal.

In addition, Brown, relying on *State v. Webb*, 130 S.W.3d 799 (Tenn. Crim. App. 2003), contends that in order to be a victim, the circuit court was required to find that BEHS seized the horses lawfully. However, this argument, too, is without merit. The statutory definition of "victim" set forth in section 5-4-205(c)(1) is both plain and unambiguous and in no way requires a finding that a victim acted lawfully, rather than voluntarily.

In sum, section 5-4-205 provides that a defendant found guilty of an offense may be ordered to pay restitution and that the sentencing authority shall make a determination of actual economic loss caused to a victim by the offense. It is clear from the evidence presented to the circuit court that BEHS constituted a victim as defined by the statute. Accordingly, the circuit court did not err when it determined that BEHS was entitled to restitution and ordered Brown to pay restitution to BEHS.

For his second point, Brown argues that the circuit court erred in determining the amount of restitution. Specifically, he

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[2] In addition, a review of the record reveals further evidence that BEHS is a corporation, as the expense report admitted into evidence references BEHS as Bluebonnet Equine Humane Society, Inc.

contends that the circuit court erred when it did not conduct a hearing to determine the correct amount of economic loss sustained by BEHS. The State responds that this issue is not preserved for appellate review because Brown failed to object to the circuit court's determination of the amount of restitution. Alternatively, the State urges, the facts established, by a preponderance of the evidence, a basis for the amount of restitution ordered.

The State is correct; this issue is not preserved for our review. Our review of the record reveals that Brown merely challenged whether BEHS was a victim, and, thus, whether restitution was proper. At the conclusion of the trial, the circuit court orally ruled that it would order restitution in the same amount ordered by the district court. At that time, Brown merely questioned whether he was precluded from owning horses in the future. After the circuit court responded affirmatively, the circuit court inquired as to how Brown wished to pay his restitution. No objection was made at either time regarding the amount of restitution ordered. We have held that to preserve an issue for appeal, a defendant must object at the first opportunity. *See Price v. State*, 365 Ark. 25, 223 S.W.3d 817 (2006). Here, Brown failed to object or raise his argument below. Accordingly, we are precluded from reaching his second point on appeal. *See Phillips v. State*, 304 Ark. 656, 803 S.W.2d 926 (1991).

For the foregoing reasons, we affirm Brown's judgment and disposition.

Affirmed.

Warren LAW *v.* STATE of Arkansas

CR 08-231 292 S.W.3d 277

Supreme Court of Arkansas
Opinion delivered February 5, 2009

[redacted]

[redacted]

[redacted]

J. Blake Hendrix, for appellant.

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

ELANA CUNNINGHAM WILLS, Justice. On March 14, 2005, emergency medical personnel were called to a residence at

4701 Elmwood in Little Rock. Once there, the emergency workers found eighty-six-year-old Geneva Law, covered in bruises and bedsores, with rodent feces on the bedroom floor and ants and cockroaches crawling on the floor, on the bed, and on Geneva. Geneva died in the hospital about a month later. Her son, appellant Warren Law, and her daughter, Mary Law, were both charged on September 11, 2005, with abuse of an adult pursuant to Ark. Code Ann. § 5-28-103 (Repl. 1997).[1]

Prior to trial, Warren filed a motion to dismiss the charges, arguing that the statute under which he was charged was unconstitutionally vague. The Pulaski County Circuit Court denied his motion, and the case proceeded to a bench trial on April 24 and 25, 2007. At that trial, the circuit court convicted Warren of abusing an adult and sentenced him to five years' imprisonment, with three years suspended. On appeal, Warren challenges the sufficiency of the evidence supporting his conviction and the constitutionality of the adult-abuse statute.

In his first point on appeal, Warren contends that the evidence was insufficient to convict him of abusing an adult. A motion to dismiss in a bench trial is identical to a motion for a directed verdict in a jury trial in that it is a challenge to the sufficiency of the evidence. *See Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006). A challenge to the sufficiency of the evidence asserts that the verdict was not supported by substantial evidence. *See Sales v. State*, 374 Ark. 222, 289 S.W.3d 423 (2008); *Flowers v. State*, 373 Ark. 127, 282 S.W.3d 767 (2008). Substantial evidence is evidence of sufficient force and character that without resorting to speculation and conjecture compels with reasonable certainty a conclusion one way or the other. *Sales*, *supra*. On appeal, this court does not weigh the evidence presented at trial, as that is a matter for the fact-finder, nor do we assess the credibility of the witnesses. *See Woods v. State*, 363 Ark. 272, 213 S.W.3d 627 (2005). We review the evidence in a light most favorable to the State and consider only the evidence that supports the verdict, and we will affirm where the record reveals that substantial evidence sustains the verdict. *See id.*

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[1] Warren and Mary were also initially charged with second-degree murder, but the State nolle prossed the murder charges. Mary pled guilty to abuse of an adult and was sentenced to five years' imprisonment.

As mentioned above, Warren was charged with abuse of an adult in violation of Ark. Code Ann. § 5-28-103. That statute provides that it is "unlawful for any person or caregiver to abuse, neglect, or exploit any person subject to protection under the provisions of this chapter." Ark. Code Ann. § 5-28-103(a) (Repl. 1997). Although the judgment and commitment order does not specify the particular subsection under which Warren was convicted, the order does state that he was convicted of a Class D felony, and the court commented that this was a case of "extreme neglect." Therefore, we conclude that Warren was convicted under Ark. Code Ann. § 5-28-103(c)(1) (Repl. 1997), which provides as follows:

> (c)(1) Any person or caregiver who neglects an endangered or impaired adult in violation of the provisions of this chapter, causing serious physical injury or substantial risk of death, shall be guilty of a Class D felony and shall be punished as provided by law.

At the time of the offense, Ark. Code Ann. § 5-28-101 (Supp. 2003) provided the following definitions for the relevant portions of the statute:

> (3) "Caregiver" means a related or unrelated person . . . that has the responsibility for the protection, care, or custody of an endangered or impaired adult as a result of assuming the responsibility voluntarily, by contract, through employment, or by order of the court;
>
> . . . .
>
> (5) "Endangered adult" means:
>
> (A) An adult eighteen (18) years of age or older who is found to be in a situation or condition which poses an imminent risk of death or serious bodily harm to that person and who demonstrates a lack of capacity to comprehend the nature and consequences of remaining in that situation or condition;
>
> . . . .
>
> (8)(A) "Impaired adult" means a person eighteen (18) years of age or older who, as a result of mental or physical impairment, is unable to protect himself or herself from abuse, sexual abuse, neglect, or exploitation, and as a consequence thereof is endangered;

. . . .

(10) "Neglect" means acts or omissions by an endangered adult; for example, self-neglect or intentional acts or omissions by a caregiver responsible for the care and supervision of an endangered or impaired adult constituting:

(A) Negligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an endangered or impaired adult;

(B) Negligently failing to report health problems or changes in health problems or changes in the health condition of an endangered or impaired adult to the appropriate medical personnel; or

(C) Negligently failing to carry out a prescribed treatment plan[.]

Thus, to convict Warren of abuse of an adult, the State was required to prove that: 1) Geneva was an endangered or impaired adult; 2) Warren was a caregiver responsible for her protection, care, or custody; 3) he neglected her; and 4) such neglect caused serious physical injury or risk of death. Warren does not challenge the fourth of these elements. Instead, he contends that the State failed to prove that Geneva was endangered or impaired, that he was her caregiver, and that he neglected her.

The first of these elements is whether Geneva was an endangered or impaired adult. As proof on this issue, the State's first witness at trial, Donna Brady, introduced a report from the Adult Protective Services Division of the Department of Health and Human Services.[2] According to Brady, the report indicated that Geneva came to the attention of Adult Protective Services (APS) in April of 2001. At that time, Geneva was living with her sister in Searcy because the home in Little Rock where she had been living with her daughter had been condemned as unsanitary and unsafe. Brady testified that a relative called APS to report that the sister could no longer care for Geneva. The case worker's

[2] While Warren did not place a copy of the APS report in his Addendum, the report is in the record, and this court may go to the record to affirm. *See, e.g., Brown v. State*, 374 Ark. 341, 288 S.W.3d 226 (2008); *McGehee v. State*, 344 Ark. 602, 43 S.W.3d 125 (2001).

report from April of 2001 indicated that Geneva was "confused to [the] point [that she] has to be cued to bathe." The report described her as "very confused" and, although ambulatory, she was incapable of meeting her activities of daily living. The report also noted that she was "very confused and could not provide information without relying on her sister."

Because Geneva's sister could no longer care for her, and her own home had been condemned as "unfit for human habitation," APS contacted Warren, who eventually picked Geneva up and took her to live with him and Mary.[3] On April 18, 2001, the APS case worker confirmed with Geneva's sister that Geneva was unable to care for herself. Further, Mary testified at trial that, four years later, Geneva was still unable to care for herself and had undergone "a rapid deterioration."

Clearly, the State proved that Geneva was an impaired or endangered adult. A frail, confused, elderly woman who was incapable of meeting her own activities of daily living would certainly have been unable to protect herself from abuse or neglect, thus meeting the definition of "impaired." Further, the APS record indicated that she "showed limited signs of competency," was "very confused," and "could not provide information without relying on her sister." One in this condition would plainly "demonstrate[ ] a lack of capacity to comprehend the nature and consequences of remaining" in a situation that placed her at imminent risk of death or serious bodily harm, thus meeting the definition of "endangered." And as will be discussed more fully below, Geneva's situation most assuredly put her at imminent risk of death or serious bodily harm. Accordingly, the State proved that Geneva was an "endangered or impaired adult."[4]

As to the second element of the offense, Warren asserts that the State failed to prove that he was Geneva's caregiver. As discussed above, a "caregiver" under section 5-28-101(3) is "a

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[3] Mary moved in with Warren after her house was condemned in 2001.

[4] Warren cites *Thomas v. State*, 92 Ark. App. 425, 214 S.W.3d 863 (2005), for the proposition that a victim's condition at the time of his or her hospitalization cannot "constitute proof of either alternative status of an 'endangered' or 'impaired' adult." He urges that the "only" evidence that Geneva was an endangered or impaired person consisted of her age and the squalid conditions in which she was found. However, this is simply untrue, as shown by the APS report discussed above, which demonstrated that she was endangered and impaired at the time Warren picked her up at her sister's house in Searcy in 2001.

related or unrelated person . . . that has the responsibility for the protection, care, or custody of an endangered or impaired adult as a result of assuming the responsibility voluntarily, by contract, through employment, or by order of the court." Ark. Code Ann. § 5-28-101(3) (Supp. 2003). Warren argues that the State failed to prove that he voluntarily assumed the responsibility of protecting or caring for Geneva.

At the outset, we note that "caregiver," as defined in section 5-28-101(3), is one who "has the responsibility for the protection, care, *or* custody" of an endangered adult. (Emphasis added.) The use of the disjunctive "or" indicates that the State need only prove that an individual has the responsibility for one of these aspects before he or she may be deemed a "caregiver." *See, e.g.*, *Bailey v. State*, 348 Ark. 524, 529, 74 S.W.3d 622, 624 (2002) ("In its ordinary sense the word 'or' is a disjunctive particle that marks an alternative, generally corresponding to 'either,' as 'either this or that'; it is a connective that marks an alternative.") (quoting *McCoy v. Walker*, 317 Ark. 86, 89-90, 876 S.W.2d 252, 254 (1994)). Because the State introduced proof that Warren agreed to pick Geneva up from her sister's house in Searcy and bring her home to live under his roof, there was clearly substantial evidence that Warren voluntarily assumed responsibility for Geneva's custody.

However, Warren raises an additional argument wherein he asserts that he could not have been criminally responsible for neglecting Geneva unless he met the definition of "caregiver" found in section 5-28-101(10), which defines "neglect" as the "intentional acts or omissions by a caregiver *responsible for the care and supervision* of an endangered or impaired adult." Ark. Code Ann. § 5-28-101(10) (Supp. 2003) (emphasis added). This argument relates to a portion of the third element of the offense, set out above, regarding whether Warren "neglected" Geneva.

Here, Warren argues that the state failed to prove that he voluntarily assumed the responsibility for Geneva's care and supervision and thus could not have "neglected" her under section 5-28-101(10). He contends that he initially refused this responsibility when Geneva's home was condemned, taking her at that time to live with her sister in Searcy. He also notes that it took APS "several weeks" to locate him when the sister became unable to care for Geneva, and he states that he "only took Geneva into his home when [APS] told him he had to, and only then on the

condition that Mary was in his home to provide Geneva 'full-time care.' " On the basis of these factors, Warren maintains that he did not voluntarily assume the responsibility to provide for Geneva's care and supervision, and the State thus failed to prove this element of the crime.

However, while Warren may have acted grudgingly and belatedly, the evidence introduced below supports the trial court's finding that he acted voluntarily and thus was Geneva's "caregiver" under section 5-28-101(3) and was responsible for her "care and supervision" under section 5-28-101(10). Despite his protests that he only took Geneva in when APS told him he "had to," he nonetheless took her in, instead of telling APS to take his mother into the custody of the Department of Human Services or place her in a nursing home. The case summary report from APS states that APS contacted Warren and he indicated that "he would be coming to pick [Geneva] up on [April 18, 2001] to live with him in Little Rock." That it took a few days to locate Warren[5] does not refute or negate the fact that he ultimately took his mother into his home where, according to the report, she could "receive full time supervision."

The report further notes that Mary "will *also* be in the home to provide full time care." (Emphasis added.) The report does not, contrary to Warren's assertion, state that Mary's living in the home was a precondition to Warren's decision to take his mother in, and it does not prove that Mary was intended to be the individual with sole responsibility for caring for Geneva. Rather, it simply indicates that she would be an additional presence in the home. Moreover, although Warren apparently preferred to have his sister attend to Geneva's day-to-day needs, it was nonetheless his decision to personally pick up his endangered and impaired mother and bring her to live under his roof.[6] This decision thereafter effec-

[5] In his brief, Warren argues that it took APS "several weeks" to locate him. From the report, however, it appears that it took three or four days to locate Warren, and another six days before he picked Geneva up from her sister's house. The report states that the first home visit and interview with Geneva was on April 9, 2001. APS reached Warren on April 12, 2001, and he picked her up on April 18. Thus, his statement that it took "several weeks" to locate him is mere hyperbole.

[6] The APS report states that Warren "advised he would come and get [Geneva] to live with him and her daughter."

tively denied Geneva any further services from APS, as the case summary report reflected that there was "[n]o further APS needed at this time."

Having brought her into his home under these conditions, Warren voluntarily assumed the responsibility for the protection, care, or custody of an endangered and impaired adult, making him a "caregiver" under section 5-28-101(3), and he was responsible for the care and supervision of that person for purposes of the definition of "neglect" under section 5-28-101(10).[7] Therefore, we conclude that there was substantial evidence showing that Warren was Geneva's caregiver and that he was a caregiver as that word is used in the definition of neglect.

This leads us to the balance of Warren's third sub-point, wherein he argues that the State failed to prove that he neglected Geneva. Neglect, as defined in section 5-28-101(10), includes "intentional acts or omissions by a caregiver responsible for the care and supervision of an endangered or impaired adult constituting . . . negligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an endangered or impaired adult."

Warren's argument on the first portion of the "neglect" inquiry focuses on his claim that he owed no legal duty to Geneva. He notes that the statute requires an intentional act or omission,[8] and he contends that, in order to demonstrate such an act or omission, the State had to prove that he owed a legal duty to act. *See, e.g.*, *Flippo v. State*, 258 Ark. 233, 238, 523 S.W.2d 390,

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[7] Warren's protestations that Mary was the person responsible for Geneva's care and supervision, and that his own health problems and work schedule prevented him from assuming that role, go to the weight rather than the sufficiency of the evidence on this point.

[8] In his brief, Warren argues that the statute requires a "purposeful act or omission." However, at the time the crime was committed, the statute defined neglect as "intentional acts or omissions by a caregiver." *See* Ark. Code Ann. § 5-28-101(10) (Supp. 2003). Subsequent amendments to the act clarify that neglect means, in pertinent part, a "purposeful act or omission by a caregiver . . . that constitutes negligently failing to . . . [p]rovide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an adult endangered person or an adult impaired person." Ark. Code Ann. § 5-28-101(11)(B)(i) (Repl. 2007) (as amended by Act 1810 of 2005). Act 1810 did not include an emergency clause; therefore, the amendment was not effective until ninety days after the 2005 session adjourned on May 13, 2005. *See, e.g.*, *Reeves v. State*, 374 Ark. 415, 288 S.W.3d 577 (2008) (pursuant to Amendment 7 of the Arkansas Constitution, Acts of the General Assembly that do not contain an emergency clause or a specified effective date become effective on the

393 (1975) ("For criminal liability to be based upon a failure to act, it must be found that there was a duty to act — a legal duty and not simply a moral duty."). However, by proving that Warren was Geneva's caregiver under section 5-28-101(3), as well as a person responsible for her care and supervision under section 5-28-101(10), as discussed above, the State proved that Warren did, in fact, have a legal duty to act.

Warren raises a further argument wherein he suggests that, at most, Geneva was an invitee in his home and that he therefore owed her only a duty to refrain from wantonly or willfully causing her injury. *See, e.g.*, *Turner v. Stewart*, 330 Ark. 134, 141, 952 S.W.2d 156, 160 (1997). This argument misses the mark, however, as he had a duty under the statutes discussed above to refrain from engaging in acts or omissions such as "[n]egligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an endangered or impaired adult." Ark. Code Ann. § 5-28-101(10)(A) (Supp. 2003). "Negligently" is defined in the Arkansas Criminal Code as follows:

> A person acts negligently with respect to attendant circumstances or a result of his conduct when he should be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Ark. Code Ann. § 5-2-202(4) (Repl. 1997).

This court has noted that negligent conduct is distinguished from reckless conduct primarily in that it does not involve the conscious disregard of a perceived risk. *See Hunter v. State*, 341 Ark. 665, 19 S.W.3d 607 (2000). In order to be held to have acted negligently, it is not necessary that the actor be fully aware of a perceived risk and recklessly disregard it. It requires only a finding that under the circumstances he should have been aware of it and his failure to perceive it was a gross deviation from the care a

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ninety-first day after the legislature adjourns). As the crime here was committed in March of 2005, the earlier version of the statute is applicable.

reasonable, prudent person would exercise under those circumstances. *Id.* (citing *Phillips v. State*, 6 Ark. App. 380, 644 S.W.2d 288 (1982)). The facts introduced at trial satisfy this requirement.

Angela Bain, a paramedic with Metropolitan Emergency Medical Services (MEMS), testified that she responded to a non-emergency call at 4701 Elmwood in Little Rock on March 14, 2005. As she walked around to the back of the home, she was met with a strong odor that "smelled like rotting flesh." Upon entering the house, she found Geneva, whom she described as having "all kinds of bruises of varying age on her" and in an environment that "was not . . . appropriate . . . for anyone to be in." Bain stated that there were rodent feces on the floor and ants and cockroaches crawling on the bed and on Geneva. Geneva was lying on a mattress that appeared to be soaked with urine and feces with a deflated plastic mattress, a plastic garbage bag, and soaked newspapers underneath her.

Sergeant Cristie Phillips of the Little Rock Police Department testified that when she got to the scene, Geneva had already been transported to the hospital by medical personnel, but she could "immediately smell just an overwhelming stench of feces. It smelled like rotting flesh." Phillips also went to the hospital to take photographs of Geneva, whom Phillips said was "black and blue all over." One of Geneva's ears was completely swollen shut, and she had bruises all over her face. She also had "crater-sized" bedsores that "you could have stuck your fist in." Phillips noted that at the time she arrived in the emergency room, there were still ants crawling on Geneva, and nurses were "picking the ants off her skin."

Kimberly Finklestein, a crime scene specialist with the Little Rock Police Department, testified that the house was in "disarray" and was "extremely, extremely filthy." She saw what appeared to be animal feces on the floor of Geneva's room, as well as the rest of the house. The mattress of Geneva's bed was soaked and stained with urine and mold, as was the carpet underneath the bed. There were ants and roaches "just crawling everywhere." When Finklestein went to the hospital to see Geneva, she said that she knew she was approaching Geneva's room because, as she was walking down the hallway, she could smell the same stench she had smelled in the house. On redirect examination, Finklestein testified that there was no part of Warren's house where one could not smell "that smell."

Little Rock Code Enforcement Supervisor Sheila Reynolds testified that she was asked to go the Elmwood residence by police. After confirming in the property records that the house belonged to Warren, Reynolds went to the residence some four and a half hours after Geneva had been taken to the hospital. She stated that when she got to the door, there was "such a strong odor that we had to turn around and go back to our vehicle and get some Vick's and put across our nose so we could go in." She described the smell as being a "very strong urine smell" and a "rotted-flesh type smell."

Reynolds described the house, stating that there was a "lot of stuff piled on the floor." In Geneva's room, there were "feathers and rat droppings, possibly rabbit droppings" on the floor by her bed, and the bed appeared to be stained with bodily fluids. Ants were crawling on the comforter, and there was "trash and stuff in the closet, kind of like maybe an animal had lived in there." The remainder of the house was "unsanitary" and "filthy," and the bathtub was black with mold and mildew. There was nothing between Geneva's room and the rest of the house that would have sealed her area off, other than a bedroom door.

The State also called Lynn Espejo, the clinic administrator for Geneva's former doctor, Dr. Scott Brown. Espejo testified that Geneva had not been in to see the doctor since January of 2001. At that time, Geneva weighed 162 pounds and was classified as "obese." She noted that there had been calls from the pharmacy to refill Geneva's blood-pressure medication, but she said that in 2004, Dr. Brown refused to confirm her prescription until she came back in to see him.

Dr. Moses Ejiofor was the emergency room physician on call the day that Geneva was brought to the hospital. He said that she "looked like bone" and was very weak, disheveled, unkempt, and malnourished. Dr. Ejiofor also described the smell of rotting flesh, which he determined was coming, at least in part, from a large wound on her back through which he could see the outline of her spine. Geneva had other large ulcers on her pelvis, a large blood clot in her left ear, and bruises all over her body; further, the bruises were not all consistent with her having fallen. Her bedsores were necrotic and black and appeared to have been there for some time. Dr. Ejiofor said that he knew Geneva was in pain and he could hear her moaning, but she was so weak that she could not even flinch away from him. In addition to her other injuries, Geneva also had a fluid build-up or bleeding inside her brain,

which was consistent with trauma. Cultures of her eyes revealed the presence of three different bacteria, and "approximately eight to nine organisms" were cultured from the ulcers.

[redacted] Plainly, the above testimony constituted substantial evidence that Warren should have been aware of the risk to Geneva, and his failure to perceive the risk posed to his mother was a gross deviation from the care a reasonable, prudent person would exercise under those circumstances. Numerous witnesses testified to the filth in the house and the overwhelming stench of rotting flesh that permeated the environment. It is inconceivable that these conditions went unnoticed,[9] and it is equally inconceivable that these conditions arose overnight. By allowing the squalor to proliferate unchecked, and by either failing or refusing to remedy the circumstances, it is plain that Warren, as caregiver, negligently failed to "provide necessary treatment, . . . care, . . . shelter, [or] supervision" for Geneva, an endangered or impaired adult. In short, the evidence demonstrated that Warren was guilty of neglecting Geneva.

In his second point on appeal, Warren urges that the circuit court erred in denying his motion to dismiss the charges against him on the grounds that the section 5-28-103 is void for vagueness. Statutes are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute. *Bowker v. State*, 363 Ark. 345, 214 S.W.3d 243 (2005); *Reinert v. State*, 348 Ark. 1, 71 S.W.3d 52 (2002). If it is possible to construe a statute as constitutional, we must do so. *Bowker, supra*. Because statutes are presumed to be framed in accordance with the Constitution, they should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable. *Id.*

We have said that a law is unconstitutionally vague under due process standards if it does not give a person of ordinary intelligence fair notice of what is prohibited and it is so vague and standardless that it allows for arbitrary and discriminatory enforce-

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[9] Warren did introduce the testimony of his estranged wife, Shannon Law, who stated that Warren's sense of smell was not the best. Apparently, he did not believe her when she said she smelled gas in the house, although he eventually repaired the gas leak, which stemmed from an extinguished pilot light. However, it was the trial court's duty to assign whatever weight it chose to this testimony. *See, e.g., Buford v. State*, 368 Ark. 87, 243 S.W.3d 300 (2006) (the trier of fact alone determines the credibility of witnesses and apportions the weight to be given to the evidence).

ment. *Id.* (citing *Cambiano v. Neal*, 342 Ark. 691, 35 S.W.3d 792 (2000)). As a general rule, the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the facts at issue. *Id.*; *Graham v. State*, 365 Ark. 274, 229 S.W.3d 30 (2006). When challenging the constitutionality of a statute on the grounds of vagueness, the individual challenging the statute must be one of the "entrapped innocent" who has not received fair warning. *Graham, supra.* If, by his action, that individual clearly falls within the conduct proscribed by the statute, he cannot be heard to complain. *Id.*

On appeal, Warren argues that section 5-28-103 is unconstitutionally vague in its definition of "caregiver." He states that section 5-28-101(3) defines a caregiver as "a related . . . person . . . that has the responsibility for the protection, care, or custody of an endangered or impaired adult as a result of assuming the responsibility voluntarily, by contract, through employment, or by order of the court." On the other hand, in defining "neglect," section 5-28-101(10) imposes criminal liability only on a caregiver who is "responsible for the care and supervision of an endangered or impaired adult." According to Warren, the statute is thus "inconsistent in defining who is a caregiver criminally liable for neglect."

However, as discussed above, the facts demonstrated that Warren clearly met either definition of "caregiver." He voluntarily assumed the responsibility for the protection, care, or custody of an endangered and impaired adult, and he was responsible for the care and supervision of that person. Because the facts adduced at trial place Warren squarely within the definitions of "caregiver," he is not an "entrapped innocent" and thus cannot complain that the statute is unconstitutionally vague. *See, e.g., Talbert v. State*, 367 Ark. 262, 239 S.W.3d 504 (2006).

Warren raises an additional point suggesting that the word "caregiver" can be read so broadly as to "impose a legal duty of care and protection on one who invites another to be his or her roommate" or on the owner of a bed-and-breakfast. However, this court has stated that if a statute clearly applies to the conduct of the party challenging the statute, the fact that the statute may be questionable in its application to speculative situations is immaterial. *See Talbert, supra.*

Affirmed.

Ernest GARCIA, Beverly Garcia, and Patsy Durham *v.*
ESTATE of James M. DUVALL

08-845 293 S.W.3d 389

Supreme Court of Arkansas
Opinion delivered February 12, 2009

Jon R. Sanford, P.A., by: *Jon Sanford*, and *Eubanks, Baker & Schulze*, by: *J.G. "Gerry" Schulze*, for appellants.

Streett Law Firm, P.A., by: *Alex G. Streett* and *James A. Streett*, for appellee.

DONALD L. CORBIN, Justice. Appellants Ernest and Beverly Garcia and Patsy Durham appeal the order of the Yell County Circuit Court denying and dismissing with prejudice their claims against Appellee Estate of James M. Duvall. Their sole point on appeal is that the circuit court erred in finding that their claims were barred by the statute of nonclaim, codified at Ark. Code Ann. § 28-50-101 (Repl. 2004).[1] This court assumed jurisdiction of this

[1] The General Assembly amended section 28-50-101(a)(1) by Act 231 of 2007, and provided for a six-month nonclaim period. Because the nonclaim period at issue here arose in 2006, the prior version of section 28-50-101(a)(1) providing for a three-month nonclaim period is applicable here.

case, as it involves a potential issue of statutory interpretation; our jurisdiction is pursuant to Ark. Sup. Ct. R. 1-2(b)(6). We affirm.

A review of the record reveals that prior to his death on November 15, 2005, James Duvall entered into two separate contracts, one with Appellants Ernest and Beverly Garcia, and the other with Appellant Patsy Durham. The Garcia contract consisted of a handwritten contract, in which Mr. Duvall sold a house, as is, to the Garcias for $55,000. Five hundred dollars was due on January 1, 2002, to be followed by a payment of $1,000 in February 2002, and monthly payments thereafter of $450 at an interest rate of 8.5 percent per annum. The Durham contract was typewritten and provided for the sale of certain real property to Ms. Durham for $12,000, with monthly payments of $150 at a rate of 8 percent per annum.

Following Mr. Duvall's death, personal representatives were appointed for his Estate, and on April 19, 2006, a notice of appointment of co-administrators was published in the Yell County Record. On August 21, 2007, the Appellants filed a complaint in Yell County Circuit Court against the Estate, its personal representatives, and Mr. Duvall's heirs. Appellants sought certification of a class action and alleged two bases for relief: (1) violation of the usury provision in the Arkansas Constitution, article 19, section 13; and (2) violation of the Arkansas Deceptive Trade Practices Act. On September 5, 2007, the Estate filed an objection and disapproval of the claims made by the Appellants. Specifically, the Estate asserted that the claims were not made within the time set forth by the nonclaim statute, and, thus, were barred.

Pretrial briefs were submitted to the circuit court by both sides, and the circuit court then held a hearing and allowed the parties to argue their respective positions. After taking the matter under consideration, the circuit court filed a letter opinion, finding:

> The claimants in this case contend that usury cases are a special category for purposes of measuring the commencement of a limitation period for a claim based on usury but the claimant has cited no pertinent statutory or case law authority that a claim for usury is an exception to the application of the non claim statute.
>
> If the General Assembly of the State of Arkansas had intended to make usury cases an exception to the statute of non claim this Court feels that this could have been done. It has not been done.

> This Court finds that the Arkansas statute of non claim has long barred claims filed against the estate that are not timely filed. In this case, the claims of the claimants, Garcia and Durham, were not timely filed and the Court finds their claims are barred and dismissed in that they were not filed within the appropriate 3 month period. . . .

The circuit court subsequently entered an order memorializing its letter opinion and stated, in pertinent part:

> Based upon the facts as found by this Court, the Court concludes that:
>
> (1) The non claim period applicable to the Claimants and their respective claims ended three months following the first publication of the notice to creditors. Since the first publication of the notice to creditors was April 19, 2006, the non claim period for filing or otherwise asserting a claim against the Estate expired July 19, 2006;
>
> (2) Claimants' claim was not filed until August 27, 2007, over a year after the close of the non claim period;
>
> (3) Pursuant to the terms of the statute of non claim, the Claimants' claims and the civil action upon which they are based are "forever barred as against the estate, the personal representative, or the heirs and devisees of the decedent."

The circuit court then denied and dismissed with prejudice the claims filed by Appellants against the Estate. This appeal followed.

As their sole point on appeal, Appellants argue that it was error for the circuit court to deny and dismiss their claims where they were reasonably ascertainable creditors, were given no notice of the probate proceedings, and filed their claims within two years of the date of the first publication of notice. Appellee counters that the circuit court correctly determined that Appellants' claims were barred by section 28-50-101(a), the statute of nonclaim. Because Appellants failed to obtain a ruling on this argument, we are precluded from addressing it on appeal.

Appellants raised their "reasonably ascertainable creditor" argument before the circuit court in their pretrial brief; however, the main focus of that brief was an argument that when dealing

with a usury claim, the statute of limitations starts over each time a party makes a new payment on a usurious note. In its letter order, the trial court stated that Appellants failed to cite to any authority supporting their argument about the statute of limitations for a usury claim. In its subsequent written order, the trial court found that the statute of nonclaim applied and barred Appellants' claims. The trial court made no finding as to whether Appellants were reasonably ascertainable creditors and thus fell within the two-year limitation set forth in section 28-50-101(h).

In sum, Appellants abandoned their original argument regarding the applicable statute of limitations, and because they failed to obtain a ruling on their alternative argument that they were reasonably ascertainable creditors, we will not address their argument on appeal. *See, e.g.*, *Parker v. BancorpSouth Bank*, 369 Ark. 300, 253 S.W.3d 918 (2007) (holding that failure to obtain a ruling on an issue from the circuit court precludes review on appeal). Accordingly, we affirm.

Affirmed.

Charles ARCHER and Linda Archer, Husband and Wife, Individually and as Parents and Next Friends of Mason Archer *v.* SISTERS of MERCY HEALTH SYSTEM, ST. LOUIS, INC. d/b/a Sisters of Mercy Health System d/b/a St. Joseph's Mercy Health Center; Bethany A. McGraham, M.D.; James E. Tutton, M.D.; Hot Springs Radiology Services, Ltd.; Mark S. Russell, M.D.; Mark B. Robbins, M.D.; Deanna L. Shatwell, R.N. a/k/a Deanna L. Dial, R.N.; and Paula Scheck, R.N.

08-784 294 S.W.3d 414

Supreme Court of Arkansas
Opinion delivered February 12, 2009

Arnold, Batson, Turner & Turner, P.A., by: *Todd Turner* and *Dan Turner*, and *Wigington Rumley, LLP*, by: *Joe Dunn*, for appellants.

Wright, Lindsey & Jennings LLP, by: *Edwin L. Lowther, Jr.*, *David P. Glover*, and *Gary D. Marts, Jr.*, for appellee Sisters of Mercy Health System, St. Louis Pooled Comprehensive Liability Program, et al.

Brian Brooks, for amicus curiae Arkansas Trial Lawyers Association.

ROBERT L. BROWN, Justice. This appeal involves a medical malpractice action brought by appellants Charles and Linda Archer ("the Archers") on behalf of their son, Mason Archer, against multiple parties, including appellee, Sisters of Mercy Health System, St. Louis Pooled Comprehensive Liability Program ("the Liability Pool").[1] The circuit judge entered an order dismissing the Liability Pool. We reverse and remand.

The following facts are gleaned from the Archers' pleadings and pretrial motions. On March 12, 2005, the Archer family was in an automobile accident while returning to their home in Arkadelphia, after a trip to Hot Springs. The driver of the other vehicle involved in the accident, who was intoxicated at the time, died in the accident. The Archers sustained serious injuries. The injuries suffered by Mason Archer ("Mason"), who was six years old at the time of the accident, are the subject of the instant lawsuit.

When emergency personnel arrived at the crash scene, they discovered that Mason had suffered a fractured wrist. He also had visible facial injuries. Mason was moving all four extremities at the scene, but the ambulance crew placed him on a spinal board and in a cervical collar until doctors could determine whether he had suffered any spinal cord injuries. The ambulance took Mason to the emergency room at St. Joseph's Mercy Health Center ("St. Joseph's").

The Archers allege that St. Joseph's and the doctors who treated Mason acted negligently in providing medical care, with the result that Mason is permanently paralyzed from the chest down. Their complaint asserts that when Mason arrived at the emergency room, he complained to a nurse of abdominal pain and pain in his arms and legs, that he was then examined by Dr. Bethany McGraham and subsequently by Dr. James Tutton, and

[1] The Archers added the Liability Pool as a named defendant in their First Amended Complaint.

that Mason was eventually transferred to Arkansas Children's Hospital where it was determined that he had serious spinal-cord injuries.

The essence of the Archers' negligence claim is as follows: Dr. Tutton ordered a CT scan of Mason's head, neck, abdomen, and pelvis at St. Jospeph's, which was not read by a doctor for almost four hours. When the results were eventually interpreted, they were incorrectly determined to be negative. After the test results came back, a nurse removed the cervical collar from Mason and allowed him to move around.[2] The collar was removed before Mason was examined by a physician, and a nurse "pulled on Mason's arm" in an attempt to help him stand up, resulting in permanent paralysis.

On March 9, 2007, the Archers filed suit against various parties.[3] They did not name the Liability Pool[4] then because two months before the Archers filed their original complaint, this court handed down a decision specifically holding that the Liability Pool was not an insurer for purposes of the direct-action statute, codified at Arkansas Code Annotated section 23-79-210. *See Sowders v. St. Joseph's Mercy Health Ctr.*, 368 Ark. 466, 475, 247 S.W.3d 514, 521 (2007). Later, in response to the decision in *Sowders*, the Arkansas General Assembly amended the direct-action statute to expressly state that "[a]ny self-insurance fund, pooled liability fund, or similar fund maintained by a medical care provider for the payment or indemnification of the medical care provider's liability for medical injuries under § 16-114-201 et seq. shall be deemed to be liability insurance susceptible to direct action under this section." Act of Mar. 30, 2007, No. 750, 2007 Ark. Acts 3963 (hereinafter "Act 750").

On August 27, 2007, after the enactment of Act 750, the Archers amended their original complaint to name the Liability Pool as a defendant to the instant action. On November 9, 2007, the Liability Pool moved to dismiss the amended complaint on the

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[2] St. Joseph's has denied that the cervical collar was removed.

[3] The Archers initially named Sisters of Mercy Health System, St. Joseph's Mercy Health Center, Bethany A. McGraham, M.D., James E. Tutton, M.D., Hot Springs Radiology Services, Ltd., Mark S. Russell, M.D., Mark B. Robbins, M.D., Deanna L. Shatwell, R.N., and Paula Scheck, R.N.

[4] St. Joseph's is a member of the Liability Pool, which is a pooled-liability fund administered and maintained by Sisters of Mercy Health System.

basis that Act 750 could not be applied retroactively because it had created a new cause of action against the Liability Pool. On March 11, 2008, the circuit judge held a hearing on the motion, and on April 25, 2008, she handed down a letter ruling in which she explained her decision to grant the Liability Pool's motion. The judge specifically found that:

> [T]he amendment to the direct-action statute changed a fund which was previously not insurance to insurance. This is a substantive change for *the Program* [Liability Pool] to be prepared to pay potential claims it had not previously been required to pay. It created a new right to sue which tort victims did not have prior to the law. It enlarged the responsibility of *the Program* [Liability Pool] to include the accumulation of funds adequate to pay potential new claims. All of the Arkansas cases on this subject indicate prospective application only for such substantive changes.

On May 8, 2008, the circuit judge entered an order dismissing the Liability Pool and a certificate of final judgment, pursuant to Arkansas Rule of Civil Procedure 54(b).

The Archers contend on appeal that Act 750, which permits direct-action lawsuits against pooled-liability funds and deems such funds to be liability insurance for such lawsuits, is remedial in nature and, as such, should be applied retroactively so as to effectuate the intent of the legislation.[5]

We first consider the Liability Pool's claim that this court should not consider the Archers' arguments that the direct-action statute should be construed liberally, that retroactive application is necessary to effectuate its intended purpose, and that rules of statutory construction require that Act 750 be retroactively applied. The Liability Pool initially asserts that the Archers did not raise these issues before the circuit judge. It, however, is wrong on this point. The record clearly indicates that the Archers raised these issues during the March 11, 2008 hearing. Further, these points are not separate issues on appeal. Rather, if the court determines that Act 750 is remedial, they necessarily become part of the court's analysis in determining whether to apply the act retroactively.

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[5] The direct-action statute, Arkansas Code Annotated section 23-79-210, which Act 750 amended, reads that "[w]hen liability insurance is carried by any cooperative non-profit corporation, association, or organization . . . not subject to suit in tort . . . the person so injured or damaged shall have a direct cause of action against the insurer." Ark. Code Ann. § 23-79-201 (Supp. 2007).

This court has consistently set forth the law regarding retroactive application of statutes. *See, e.g.*, *McMickle v. Griffin*, 369 Ark. 318, 254 S.W.3d 729 (2007). We have said:

> Retroactivity is a matter of legislative intent. Unless it expressly states otherwise, we presume the legislature intends for its laws to apply only prospectively. However, this rule does not ordinarily apply to procedural or remedial legislation. The strict rule of construction does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only support a new or more appropriate remedy to enforce an existing right or obligation. Procedural legislation is more often given retroactive application. 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.

McMickle, 369 Ark. at 338-39, 254 S.W.3d at 746 (citing *Bean v. Office of Child Support Enforcement*, 340 Ark. 286, 296-97, 9 S.W.3d 520, 526 (2000)). The general rules also apply to amendatory acts. *See Gannett River States Publ'g Co. v. Ark. Ind. Dev. Comm'n*, 303 Ark. 684, 799 S.W.2d 543 (1990).

This court has also observed that:

> 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. Statutes which do not create, enlarge, diminish, or destroy contractual or vested rights, but relate only to remedies or modes of procedures, are not within the general rule against retroactive operation. In other words, statutes effecting changes in civil procedure or remedy may have valid retroactive 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 . . . . A statute which merely provides a new remedy, enlarges an existing remedy, or substitutes a remedy is not unconstitutionally retrospective . . . .

JurisDictionUSA, Inc. v. Loislaw.com, Inc., 357 Ark. 403, 412, 183 S.W.3d 560, 565-66 (2004) (citing *Padgett v. Bank of Eureka Springs*, 279 Ark. 367, 651 S.W.2d 460 (1983)).

We turn then to the central question of whether Act 750, amending Arkansas Code Annotated section 23-79-210, is reme-

dial in nature. In *Rogers v. Tudor Insurance Co.*, we said, "[d]irect action statutes are remedial in nature and are liberally construed for the benefit of injured parties and to effectuate the intended purposes." 325 Ark. 226, 234, 925 S.W.2d 395, 399 (1996) (citing 12A *Couch on Insurance 2d* §§ 45:798, 45:800, at 455, 458 (1981)). Despite this statement of the law, the Liability Pool maintains that the *Rogers* language is dicta and that this court should decline to hold that Arkansas's direct-action statute is remedial. In support of its position, the Liability Pool directs this court to additional language from *Couch on Insurance*, which indicates that some jurisdictions treat direct-action statutes as creating a substantive right in the claimant to sue the insurance company. *See* 7A Lee R. Russ & Thomas Segalla, *Couch on Insurance 3d* § 104:54, at 104-82 (1999).[6] According to the Liability Pool, this court should "consider the text [*Couch*] in its entirety" because "the view of direct action statutes being procedural in nature is not universally applied."

We disagree with the Liability Pool's analysis. This court should rely on the quoted language from *Rogers* that direct-action statutes are remedial in nature as precedent. The *Rogers* court studied *Couch on Insurance* and cited as authority language from *Couch* that direct-action statutes are remedial in nature, even though the treatise also included the reasoning that some jurisdictions use to hold that direct-action statutes create substantive rights. The clear message from *Rogers* is that this court was persuaded by the view that the statute is remedial in nature.

The Liability Pool goes on and claims that Act 750 cannot be remedial because it affords the Archers a new legal right and imposes a new obligation on it. In essence, it argues that when the negligence cause of action arose, the Archers did not have a right to sue the Liability Pool, and it was not obligated to pay damages on the claim. Accordingly, it asserts that Act 750 operates to give plaintiffs a new cause of action against pooled-liability funds and, therefore, cannot be remedial in nature. We disagree.

Act 750 did not create a new cause of action. The negligence cause of action that is the heart of the Archers' claim is grounded in this state's common law and is regulated by statute. *See* Ark. Code Ann. §§ 16-114-201 to -212 (Repl. 2006 & Supp.

[6] The section cited by the Liability Pool primarily addresses choice of law issues pertaining to direct-action statutes, which are not relevant to the current analysis.

2007) (Actions for Medical Injury). The statutes govern "any action against a medical care provider, whether based in tort, contract, or otherwise, to recover damages on account of medical injury." *Id.* § 16-114-201 (Repl. 2006). The application of the charitable immunity doctrine, however, operates to prevent some injured parties from recovering damages for negligence against charitable hospitals directly. *See Low v. Ins. Co. of N. Am.*, 364 Ark. 427, 440, 220 S.W.3d 670, 680 (2005) (certain charitable entities are immune from tort liability).

The direct-action statute, codified at section 23-79-210, is a statutory remedy because it provides a new or substitute remedy for the underlying claim of negligence in cases where the plaintiff cannot recover directly from a negligent charitable hospital. *See JurisDictionUSA, Inc.*, 357 Ark. at 412, 183 S.W.3d at 566 (a statute providing a new or substitute remedy can be applied retroactively). After this court's decision in *Sowders*, parties injured as the result of negligence on the part of charitable hospitals, who did not carry traditional liability insurance but did contribute to a pooled-liability fund, were left without a remedy for the hospital's negligence. 368 Ark. 466, 247 S.W.3d 514. As already noted, the General Assembly responded with Act 750 by amending the direct-action statute so that it now expressly states that pooled-liability funds are liability insurers under the statute. Contrary to the Liability Pool's contention, this amendment did not create a new legal right for injured parties. Instead, it clarified that those injured parties have a remedy against a liability pool for the underlying claim of negligence when charitable immunity of a hospital is involved.

Despite this, the Liability Pool relies heavily on this court's often-cited language that a remedial statute cannot "impose a new obligation." *See McMickle*, 369 Ark. at 339, 254 S.W.3d at 746. Its position is that Act 750 imposed a new obligation by requiring it to pay damages to the Archers in the event a jury finds that St. Joseph's was negligent in providing medical care to Mason. The Liability Pool relies on this court's decision in *Estate of Wood v. Arkansas Department of Human Services* to support its argument. 319 Ark. 697, 894 S.W.2d 573 (1995). We do not agree that the *Estate of Wood* case militates in favor of the Liability Pool's position.

At issue in *Estate of Wood* was an act that permitted the Arkansas Department of Human Services (DHS) to make a claim against a decedent's estate for medicaid payments made to the decedent prior to death. *Id.* at 698, 894 S.W.2d at 574. This court

refused to apply that act retroactively because it "appear[ed] to create a new legal right which allow[ed] DHS to file a claim against the estate of the deceased." *Id.* at 701, 894 S.W.2d at 575. The court went on to note that "[p]rior to the enactment [of the act, the decedent] had no reason to consider the medicaid payments as anything other than an outright entitlement. After the enactment it was as if she had a loan from DHS to be repaid from the assets of her estate." *Id.* at 701, 894 S.W.2d at 576.

The Liability Pool contends that, like in *Estate of Wood*, "the remedy that Appellants assert is a new legal right" and it "is now burdened with the new obligation to plaintiffs bringing such suits." The Liability Pool, though, misapplies the *Estate of Wood* decision to the instant matter. In that case, DHS had no right to recover medicaid payments from a decedent's estate prior to the enactment of the act. In this case, the Archers already had the right to sue in negligence and recover from a liability insurer, under the direct-action statute, prior to the enactment of Act 750. Act 750 merely clarified an avenue of relief for the Archers to pursue under that statute. The Liability Pool also advocates that the "obligation" imposed on the decedent in *Estate of Wood*, to repay DHS the money she received in benefits during her life, is analogous to its "new obligation" to pay damages to the plaintiffs under the direct-action statute. However, the proper interpretation of *Estate of Wood* is that the legislative act in that case interfered with the decedent's vested right to receive benefits as an "outright entitlement." *Id.* at 701, 894 S.W.2d at 576. In the instant case, Act 750 does not disturb any of the Liability Pool's vested rights.

Furthermore, the Liability Pool's argument that Act 750 cannot be remedial because it imposes an obligation on it to pay damages is unpersuasive because this court has held that statutes and court rules are remedial in certain cases and can be applied retroactively even if the result is that a party may have to pay damages it otherwise would not have previously had to pay. *See, e.g.*, *Steward v. Statler*, 371 Ark. 351, 266 S.W.3d 710 (2007) (estate permitted to proceed with a wrongful death claim even though it failed to comply with the procedural requirements of the statute at the time the suit was filed; court applied an amendment retroactively); *McMickle*, 369 Ark. 318, 254 S.W.3d 729 (plaintiff permitted to seek loss-of-life damages against a defendant even though the statute was amended to allow for such damages after the suit was filed; court applied the changes to the statute retroactively); *JurisDictionUSA, Inc.*, 357 Ark. 403, 183 S.W.3d 560 (applied an

amendment to Ark. R. Civ. P. 55(f) retroactively and reversed a default judgment under the previous version of the rule; allowed the plaintiff to proceed with the claim).

We are further influenced in our decision by the fact that the Liability Pool is a self-insurance program administered and maintained by the Sisters of Mercy Health System, which does business in many states, but in Hot Springs as St. Joseph's. Hence, the Liability Pool is not a separate, unrelated, and distinguishable third party. It is a fund that clearly is under the umbrella of the same non-profit corporation that runs St. Joseph's. It also receives contributions from Sisters of Mercy hospitals throughout a multi-state region, including St. Joseph's, to cover medical malpractice claims. In some of those states, Sisters of Mercy hospitals are not protected by charitable immunity, as St. Joseph's is in Arkansas, which means the Liability Pool pays malpractice claims against those hospitals. It is difficult under these facts to accept the proposition that the Liability Pool qualifies as a new party, brought into this matter and burdened with a new obligation imposed by virtue of Act 750.

Because we hold that Act 750 is remedial in nature, this court must then apply the cardinal principle for construing remedial legislation and examine what is "the spirit which promoted its enactment, the mischief sought to be abolished, and the remedy proposed." *McMickle*, 369 Ark. at 339, 254 S.W.3d at 746. Act 750 was clearly enacted to reverse this court's decision in *Sowders* and to permit parties to recover directly from pooled-liability funds like the Liability Pool. Act 750 operates to provide injured parties with a remedy when there otherwise would have been none. Again, this court has said that "direct-action statutes are remedial in nature and are *liberally construed for the benefit of injured parties.*" *Rogers*, 325 Ark. at 234, 925 S.W.2d at 399 (emphasis added). Using these principles of the law, we apply Act 750 retroactively, and we reverse the circuit judge's order, which dismissed the Liability Pool as a defendant in the instant action.

Reversed and remanded.

William L. JACKSON *v.* SPARKS REGIONAL MEDICAL CENTER and Columbia Casualty Company

08-323 294 S.W.3d 1

Supreme Court of Arkansas
Opinion delivered February 12, 2009

[Rehearing denied March 19, 2009.]

Law Offices of Charles Karr, P.A., by: *Charles Karr*, for appellant.

Warner, Smith & Harris, PLC, by: *C. Wayne Harris* and *Jason T. Browning*, for appellees.

PAUL E. DANIELSON, Justice. Appellant William L. Jackson, as special administrator of the Estate of Sherri Jackson, deceased, appeals the order of the Sebastian County Circuit Court granting summary judgment in favor of appellees Sparks Regional Medical Center and Columbia Casualty Company. Jackson asserts that Sparks's motion for summary judgment was granted in error because Sparks is not entitled to the charitable-immunity defense and that, under the special circumstances of this case, Columbia was not entitled to summary judgment based on the expiration of the statute of limitations and the savings statute. We affirm in part and reverse and remand in part.

The record reveals the following facts. Jackson originally filed a lawsuit on February 7, 2002, against Sparks, Steadfast Insurance Company, Dr. James Patrick Bell, Emergency Medical Services Group, P.A., Dr. Robert L. Kale, and John Does Nos. 1-10, based upon allegations of medical malpractice resulting in the death of Sherri Jackson. Sparks and Steadfast filed a timely answer, in which Sparks asserted it was immune from suit because of the charitable-immunity doctrine and Steadfast denied it was the correct liability carrier for Sparks.

On May 6, 2002, Jackson filed a First Amended Complaint, naming Columbia, the correct liability carrier for Sparks, as a defendant. Jackson took a voluntary nonsuit as to Steadfast and, as a result, an order of dismissal without prejudice was entered as to Steadfast on May 7, 2002. Subsequently, Jackson also took a voluntary nonsuit as to Columbia and Sparks on April 6, 2004, and July 29, 2004, respectively.

Jackson refiled his lawsuit against Sparks, Dr. James Patrick Bell, Emergency Medical Services Group, P.A., Dr. Robert L. Kale, and John Does Nos. 1-10, on July 25, 2005. Columbia was not named as a defendant. Sparks again asserted charitable immunity in its answer and filed a motion for summary judgment on February 26, 2007, asserting the same. On July 6, 2007, Jackson filed a motion to substitute Columbia for Sparks. A hearing was held four days later, on July 10, 2007, on Sparks's motion for summary judgment, which the circuit court granted. On July 11, 2007, Jackson filed an Amended Complaint, naming Sparks,

Columbia, and John Does Nos. 1-10 as the defendants. An order dismissing Sparks with prejudice was entered on July 17, 2007.

Columbia filed an answer and a motion for summary judgment on September 10, 2007. In its motion for summary judgment, Columbia asserted that its motion should be granted because the medical malpractice statute of limitations and the one-year savings statute had both expired. The circuit court granted Columbia's motion on November 14, 2007. Jackson now appeals from the circuit court's orders of July 17, 2007, and November 14, 2007.

Before reaching the merits, we must address the potential Rule 54(b) problem presented by the instant case. While neither party raises this issue on appeal, whether or not an order has been properly appealed pursuant to Rule 54(b) of the Arkansas Rules of Civil Procedure is a jurisdictional question, which this court may address sua sponte. *See Jones v. Huckabee*, 363 Ark. 239, 213 S.W.3d 11 (2005). When Jackson refiled suit on July 25, 2005, he named Sparks, Dr. James Patrick Bell, Emergency Medical Services Group, P.A., Dr. Robert L. Kale, and John Does Nos. 1-10 as the defendants. However, the record reveals that Dr. Bell, Dr. Kale, and Emergency Medical Services Group were never served or dismissed. There is also not a Rule 54(b) certificate in the record. Under the old civil procedure rule, this case would be dismissed for lack of a final order. *See McKinney v. Bishop*, 369 Ark. 191, 252 S.W.3d 123 (2007).

On October 9, 2008, this court approved a new rule, Rule 54(b)(5), said to be effective January 1, 2009. *See In re Arkansas District Court Rules*, 374 Ark. App'x 653 (2008) (per curiam). The new rule provides:

> (b) *Judgment Upon Multiple Claims or Involving Multiple Parties*
>
> . . . .
>
> (5) *Named but Unserved Defendant.* Any claim against a named but unserved defendant, including a "John Doe" defendant, is dismissed by the circuit court's final judgment or decree.

Id. at 662.

This court must now decide whether the amended version of Rule 54(b) should be applied retroactively to the instant case. We construe court rules using the same means and canons of

construction used to interpret statutes. *See City of Fort Smith v. Carter*, 364 Ark. 100, 216 S.W.3d 594 (2005). In *Bean v. Office of Child Support Enforcement*, 340 Ark. 286, 9 S.W.3d 520 (2000), we discussed the rules we adhere to when considering whether to apply a statute retroactively:

> Our rule on this point could not be more clear. Retroactivity is a matter of legislative intent. Unless it expressly states otherwise, we presume the legislature intends for its laws to apply only prospectively. *Estate of Wood v. Arkansas Dep't of Human Servs.*, 319 Ark. 697, 894 S.W.2d 573 (1995) (citing *Chism v. Phelps*, 228 Ark. 936, 311 S.W.2d 297 (1958)). 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. 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. *See Arkansas Rural Med. Practice Student Loan & Scholarship Bd. v. Luter*, 292 Ark. 259, 729 S.W.2d 402 (1987); *Chism, supra*; *Arkansas State Highway Comm'n v. Hightower*, 238 Ark. 569, 383 S.W.2d 279 (1964).
>
> However, this rule does not ordinarily apply to procedural or remedial legislation. *Gannett River States Publ'g Co. v. Arkansas Industrial Dev. Comm'n*, 303 Ark. 684, 799 S.W.2d 543 (1990); *Forrest City Mach. Works v. Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981). The strict rule of construction does not apply to remedial statutes which 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. *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962). Procedural legislation is more often given retroactive application. *Barnett v. Arkansas Transp. Co.*, 303 Ark. 491, 798 S.W.2d 79 (1990). 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. *Arkansas Dep't of Human Servs. v. Walters*, 315 Ark. 204, 866 S.W.2d 823 (1993); *Skelton v. B.C. Land Co.*, 260 Ark. 122, 539 S.W.2d 411 (1976) (citing *United States v. Colorado Anthracite Co.*, 225 U.S. 219 (1912)).

340 Ark. at 296-97, 9 S.W.3d at 526.

[redacted] Rule 54(b)(5) is procedural and remedial and certainly does not disturb vested rights or create new obligations. This new

rule merely attempts to avoid the problems on appeal created by a certain situation. In the Reporter's Notes accompanying Rule 54(b)(5), it is stated that the problem under Rule 54(b), as previously drafted, was that when, after the case had been appealed and briefed, the appellate court discovered a forgotten defendant whose presence destroyed the finality of the judgment being appealed, it was a waste of litigants' time and money and scarce judicial resources. Therefore, we will apply the new rule retroactively and allow it to serve its intended purpose.

Turning to the merits of the appeal, Jackson first argues that summary judgment should not have been granted in favor of Sparks because Sparks is not an entity entitled to charitable immunity. Appellees respond that Jackson failed to establish that Sparks is not a charitable organization based on the eight factors set forth by this court in *George v. Jefferson Hosp. Ass'n, Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999).

This court's standard of review for summary judgment is well settled:

> 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. After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable minds might reach different conclusions from those undisputed facts. 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 question of 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.

Sykes v. Williams, 373 Ark. 236, 239-40, 283 S.W.3d 209, 213 (2008) (internal citations omitted).

This court has also established eight factors to consider when determining whether an entity is entitled to charitable immunity:

> (1) whether the organization's charter limits it to charitable or eleemosynary purposes; (2) whether the organization's charter

> contains a "not-for-profit" limitation; (3) whether the organization's goal is to break even; (4) whether the organization earned a profit; (5) whether any profit or surplus must be used for charitable or eleemosynary purposes; (6) whether the organization depends on contributions and donations for its existence; (7) whether the organization provides its services free of charge to those unable to pay; and (8) whether the directors and officers receive compensation.

George v. Jefferson Hosp. Ass'n, Inc., 337 Ark. 206, 211-12, 987 S.W.2d 710, 713 (1999). We have further instructed that these factors are "illustrative, not exhaustive, and no single factor is dispositive of charitable status." *Id.* (citing *Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997)).

[redacted] A review of the evidence in the record shows that Sparks qualifies as a charitable institution based on the factors listed in *George, supra.* Consideration of the first and second factors suggest that Sparks is charitable as illustrated by its Articles of Incorporation, which were included in the record and state that Sparks is "a public benefit corporation" under the provisions of the Arkansas Nonprofit Corporation Act of 1993, and that it is "organized, pledges its assets to, and shall be operated exclusively for charitable, scientific, and educational purposes."

[redacted] Dan Hamman, Chief Financial Officer for Sparks, in a sworn affidavit filed with Sparks's motion for summary judgment, stated that Sparks's operating margin in 2006 was (0.3)% and 1.5% in 2005, indicating a loss from operations. Hamman's affidavit also provided that any surplus funds are used "exclusively for charitable, scientific, and educational purposes," more specifically, to "perpetuate its charitable community benefit of providing medical assistance to the public." Further, the affidavit provided that, for the fiscal year 2006, the total unreimbursed value of providing charity care was approximately $3,045,284, and that under its Charity Care policy, Sparks provides services free of charge to patients unable to pay at the same level of care provided to those who are able to pay. Additionally, the unreimbursed value of providing care to persons covered by governmental programs at below cost totaled $5,691,424, which Sparks considers to constitute additional charity care. Considering this evidence in light of the third, fourth, fifth, and seventh factors also suggests that Sparks is entitled to a charitable status.

In considering the sixth factor, we note that Sparks does not depend solely on contributions and donations for its existence. Most of its operating funds are provided through Medicare, Medicaid, and individual patients or their private insurers. While the nonprofit hospital in *George* only received donations totaling approximately 6% of its financial obligations, this court stated that "a modern hospital, with rare exception, would find it extremely difficult to operate wholly or predominately on charitable donations." *George*, 337 Ark. at 214, 987 S.W.2d at 710. As was the case in *George*, the fact that Sparks receives most of its funding through sources other than contributions or donations does not "negate its overriding charitable purpose." *Id.*

Finally, the eighth factor listed in *George* considers whether the directors and officers receive compensation. Article IX of Sparks's Articles of Incorporation provides that "[t]he Corporation shall not have or issue shares of stock and no dividends shall be paid, and no part of the income of the Corporation shall be distributed to its members, directors and officers." However, Sparks's Chief Executive Officer receives approximately $350,000 per year in compensation, and the next two ranking officers receive approximately $250,000 and $236,000 respectively. Jackson argues that those salaries, in addition to salaries of other full-time employees, are evidence that Sparks is "big business." This court has previously rejected that argument, stating:

> [I]t is not necessary for charitable organizations to have entirely volunteer staff and management. [Jefferson Regional Medical Center's] size and complexity make knowledgeable, well-qualified personnel essential. Such persons do not readily volunteer their services or serve at rates of compensation markedly lower than market rates.

Id. at 214, 987 S.W.2d at 710. Similarly, in the instant case, such compensation for certain positions required to manage and operate Sparks "does not put the hospital in the position of being maintained for private gain, profit, or advantage of its organizers." *Id.*

Based on the totality of the evidence shown in the record, circumstances, and the factors this court has adopted to help determine whether an organization is entitled to charitable immunity, the circuit court did not err in granting Sparks's motion for summary judgment. *See also Scamardo v. Sparks Reg'l Med. Ctr.*,

375 Ark. 300, 289 S.W.3d 903 (2008) (*Scamardo II*) (holding that Sparks was entitled to charitable immunity).

For his second point on appeal, Jackson argues that, although his amended complaint naming Columbia as a defendant was filed after the two-year statute of limitations for medical-malpractice claims and after the one-year savings statute had expired, due to the special circumstances of this case, the circuit court's dismissal resulted in an injustice. Further, he asserts that the circuit court should have found that his amended complaint related back to his original complaint, which was timely under the savings statute, or allowed him to proceed under the law as set out in *Scamardo v. Jaggers*, 356 Ark. 236, 149 S.W.3d 311 (2004) (*Scamardo I*). Appellees argue that the circuit court did not err because Jackson did not prove each element as required by Rule 15(c) of the Arkansas Rules of Civil Procedure to have the amended complaint relate back to the original filing. Specifically, appellees argue, as the circuit court reasoned, that Jackson did not prove that Columbia knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against Columbia.

The relevant facts are more clearly explained when set out in a time line as follows:

Feb. 2000:	Alleged Malpractice
Feb. 7, 2002:	Jackson timely filed a complaint against Sparks, Steadfast Insurance, Dr. Bell, Emergency Medical Services Group, Dr. Kale, and John Does Nos. 1-10.
May 6, 2002:	Jackson filed amended complaint to substitute Columbia for a John Doe. (Columbia was the appropriate liability carrier for Sparks rather than Steadfast.)
May 7, 2002:	Jackson voluntarily nonsuited Steadfast.
Feb. 26, 2004:	This court handed down *Scamardo I*, holding that a charitable institution was not necessarily immune from tort liability and, therefore, the statute allowing direct suit against the liability insurer did not apply.
April 6, 2004:	Jackson voluntarily nonsuited Columbia.
July 29, 2004:	Jackson voluntarily nonsuited Sparks.

July 25, 2005:	Jackson refiled his lawsuit against Sparks, Dr. Bell, Emergency Medical Services Group, Dr. Kale, and John Does Nos. 1-10.
Dec. 15, 2005:	This court handed down *Low v. Insurance Co. of North America*, 364 Ark. 427, 220 S.W.3d 670 (2005), overruling *Scamardo I* and holding that a charitable institute was immune from tort liability.
Feb. 26, 2007:	Sparks filed a motion for summary judgment, asserting charitable immunity.
July 11, 2007:	Jackson filed an amended complaint, adding Columbia as a defendant.

The issue this court must decide is if Jackson was in fact "whipsawed" by the changes that took place in the law during the course of his lawsuit. It is undisputed that Jackson first filed his lawsuit against both Sparks and Columbia, but took a voluntary nonsuit against both parties in 2002 following this court's decision in *Scamardo I*. The *Scamardo I* decision upheld the principle established in *Clayborn v. Bankers Standard Insurance Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002), that charitable organizations are not altogether immune from suit and that a charitable organization may have a suit brought against it and a judgment entered against it. Therefore, Columbia, the liability insurer for Sparks, was not the appropriate party to sue at the time Jackson needed to refile his lawsuit as the statute permitting direct action against a liability insurer would not have applied.

On December 15, 2005, this court handed down its decision in *Low*, specifically overruling both *Scamardo I* and *Clayborn*. We held that charitable organizations were in fact immune from tort liability. *See Low, supra*. It is clear, at that point in time, that Jackson's claim against Sparks became subject to summary judgment, and he had lost his opportunity to file a claim against Columbia as the one-year savings statute had expired prior to this change in the law.

The next important filing in the case did not occur until Sparks filed its summary-judgment motion on February 26, 2007, based on charitable immunity. Before a hearing took place on that motion, Jackson filed an amended complaint on July 11, 2007, attempting to add Columbia as a defendant. Appellees' argument is that Jackson's action against Columbia was not timely because the

two-year medical-malpractice statute of limitations and the one-year savings statute had both expired at the time Jackson attempted to amend his complaint. Jackson avers that his amended complaint should relate back to the time of the original filing under Rule 15(c) of the Arkansas Rules of Civil Procedure. The Rule states:

> An amendment of a pleading relates back to the date of the original pleading when:
>
> (1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (2) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (1) is satisfied and, within the period provided by Rule 4(i) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Ark. R. Civ. P. 15(c) (2008).

The circuit court found that the claims clearly arose out of the same alleged conduct or occurrence and that Columbia received the requisite notice. However, the circuit court found that the last requirement of Rule 15(c), subsection (2)(B), was problematic because Jackson did not attempt to amend his complaint for eighteen months after *Low* was handed down. The circuit court found that the lapse of time between *Low* and Jackson's amended complaint gave the impression that something other than a mistake in identity was a factor. Appellees also use that reasoning in their argument on appeal.

The circuit court relied on *George v. Jefferson Hospital Ass'n, Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999), to support its finding that Jackson could have amended the complaint before the court ruled that the defendant was charitably immune. The court in *George* opined that the plaintiff there could have sued both the charitable institution and its liability insurance carrier initially and, through alternative pleading, not have jeopardized its claim against either the hospital or its insurer. 337 Ark. at 216, 987 S.W.2d at

715. However, the instant case is factually different from *George*. Here, Jackson had initially named both Sparks and Columbia as defendants, but took a voluntary nonsuit against both parties. It voluntarily nonsuited Columbia after this court's holding in *Scamardo I*. *Scamardo I* was still the law when Jackson refiled his case and, therefore, Columbia would not have been a proper defendant for Jackson to name at that time.

There is nothing in the record to suggest why Jackson waited eighteen months to attempt to amend his complaint; however, the situation would not have been any different had he attempted to do so immediately following *Low*. In theory, Sparks could have filed its motion for summary judgment immediately following *Low* as well, but it did not do so until fourteen months later.

Appellees further argue that there was no doubt that Jackson knew the identity of Columbia because he was provided with Columbia's identity after his initial lawsuit was filed against Sparks and Steadfast. That is clearly undisputed, but is not the issue here. Rule 15(c) states only that there needed to be a "mistake concerning the identity of the *proper party*." (Emphasis added). While Jackson obviously knew that Columbia was the correct liability insurer for Sparks, he was unaware that Columbia was the proper defendant because of the change in the law. In fact, Columbia was not the proper defendant during the time within which he was required to refile his lawsuit. Columbia only became the proper defendant after *Low*, which was not decided until after Jackson lost his opportunity to refile against it.

Other cases have come before this court in which an appellant argued that the retroactive application of Low was unfair and prejudicial to their case. *See Anglin v. Johnson Reg'l Med. Ctr.*, 375 Ark. 10, 289 S.W.3d 28 (2008); *Neal v. Sparks Reg'l Med. Ctr.*, 375 Ark. 46, 289 S.W.3d 8 (2008); *Felton v. Rebsamen Med. Ctr.*, 373 Ark. 472, 284 S.W.3d 486 (2008); *Sowders v. St. Joseph's Mercy Health Ctr.*, 368 Ark. 466, 247 S.W.3d 514 (2007). However, in the instant case, this court's decision in *Low* caused Jackson to make an understandable mistake, and not allowing Rule 15(c) to apply would indeed have an unfair and prejudicial result. In *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413, 418 (8th Cir. 1967), the Eighth Circuit Court of Appeals stated that Rule 15(c) was designed for relation back "to prevent forfeiture when determination of the proper party to sue is difficult or when an

understandable mistake has been made." Both bases apply here given the special circumstances of this case and, therefore, we hold that Jackson's amended complaint relates back to his original timely complaint under Rule 15(c). As a result, we reverse and remand the circuit court's order granting summary judgment as to Columbia. The summary-judgment order granted in favor of Sparks is, however, affirmed.

Affirmed in part; reversed and remanded in part.

Charles Jason BALDWIN *v.* STATE of Arkansas

CR 09-60 294 S.W.3d 411

Supreme Court of Arkansas
Opinion delivered February 12, 2009

J. Blake Hendrix and *John T. Philipsborn*, for appellant.

No response.

PER CURIAM. Appellant Charles Jason Baldwin, by and through his attorneys, has filed a motion for rule on clerk. His attorneys, J. Blake Hendrix and John T. Philipsborn, state in the motion that our clerk refused to accept their 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 said that there are only two possible reasons for an appeal not being timely perfected: either the party or attorney filing the appeal is at fault, or, there is "good reason." 356 Ark. at 116, 146 S.W.3d at 891. We explained:

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

Id., 146 S.W.3d at 891 (footnote omitted). While this court no longer requires an affidavit admitting fault before we will consider the motion, an attorney should candidly admit fault where he has erred and is responsible for the failure to perfect the appeal. *See id.*

In accordance with *McDonald v. State*, *supra*, Mr. Hendrix and Mr. Philipsborn have candidly admitted fault. The motion is, therefore, granted. A copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motion granted.

WILLS, J., not participating.

Robert MAULDING *v.* PRICE'S UTILITY CONTRACTORS, INC., Cincinnati Insurance Co., Second Injury Trust Fund, and Death and Permanent Total Disability Trust Fund

08-1449 294 S.W.3d 413

Supreme Court of Arkansas
Opinion delivered February 12, 2009

Diana M. Maulding, for appellant.

David L. Pake, for appellee Second Injury Trust Fund.

William C. Price, for appellees Price Utility Contractors, Inc. and Cincinnati Insurance Company.

PER CURIAM. Appellant Robert Maulding seeks an order that all medical information regarding him be redacted in the abstracts, briefs, and addendums. This motion was certified to this court by the court of appeals because it concerns an issue of first impression. Thus, our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(b)(1) (2008).

Maulding states that "this is an appeal from an Arkansas Workers' Compensation Commission case," and that "the Argument, Abstract, and Addendum" will contain "a lot of personal medical information" that "should not be in the public domain." He asks this court to order that "all medical information" be redacted by "lining out" with a "permanent black marker."

Maulding provides no reason for the requested redaction. He provides no convincing argument and no authority to show that his medical information should be excluded from the briefs on appeal. He simply asserts it should be excluded. This court will not consider an argument, even a constitutional one, if

the appellant makes no convincing argument or cites no authority to support it. *Hendrix v. Black*, 373 Ark. 266, 283 S.W.3d 590 (2008). Also, if the point argued is not apparent without research, this court will not hear the matter. *Id.*

Further, the issue is moot. At issue are documents in the addendum. An addendum appends to the brief documents that are found in the record. *See* Ark. Sup Ct. R. 4-2(a)(8) (2008) (The addendum must include an index of where any item can be found in the record.) Thus, the very information Maulding seeks to redact was disclosed below and already is in the record. Although Maulding fails to cite it, Administrative Order No. 19(VI)(A) specifically provides that where the information has already been disclosed in open court and is included in the verbatim transcript of court proceedings, the information is not excluded from public access.

The motion is denied.

James MUNSON *v.*
ARKANSAS DEPARTMENT of CORRECTION

07-1037 294 S.W.3d 409

Supreme Court of Arkansas
Opinion delivered February 12, 2009

James Munson, pro se.

Dustin McDaniel, Att'y Gen., by: *Renae Ford Hudson*, Ass't Att'y Gen., for appellee.

PER CURIAM. Appellant James Munson, an inmate incarcerated in the Arkansas Department of Correction ("ADC"), filed a petition in Pulaski County Circuit Court for judicial review under Arkansas Code Annotated § 25-15-212 (Repl. 2002) to challenge a disciplinary action against him by the appellee ADC. Appellee moved to dismiss for failure to state a claim upon which

relief could be granted under Arkansas Rule of Civil Procedure 12(b)(6). The circuit court granted the motion and appellant has lodged an appeal of that order in this court.

Appellant argues on appeal that the court erred in dismissing the petition, that his petition stated a claim for violation of due process, and that the ADC did not follow its own procedures. In his petition, appellant alleged that, as a result of appellee's failure to follow its procedures, he had lost class status and certain privileges, and was subjected to isolation for a period of time. Appellant further alleged that the disciplinary action resulted from an ADC officer's failure to act and that the other inmate involved was not subjected to disciplinary action.

In reviewing the circuit court's decision on the motion to dismiss, we treat the facts alleged in the complaint as true and view them in a light most favorable to the plaintiff. *Rhuland v. Fahr*, 356 Ark. 382, 155 S.W.3d 2 (2004). In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and all pleadings are to be liberally construed. *Id.* A trial judge must look only to the allegations in the complaint to decide a motion to dismiss. *Fuqua v. Flowers*, 341 Ark. 901, 20 S.W.3d 388 (2000).

Here, the appellee first argues that we should affirm dismissal of the petition by the circuit court because judicial review was not available to appellant as an inmate. Appellee urges us to overrule our decision in *Clinton v. Bonds*, 306 Ark. 554, 816 S.W.2d 169 (1991), holding that Act 709 of 1989, amending the Arkansas Administrative Procedure Act by excluding prison inmates from judicial review of administrative adjudications, unconstitutionally deprives inmates of review of constitutional questions. This court does not lightly overrule cases and applies a strong presumption in favor of the validity of prior decisions. *Echols v. State*, 354 Ark. 414, 125 S.W.3d 153 (2003). It is necessary to uphold prior decisions unless a great injury or injustice would result. *Id.* at 418, 125 S.W.3d at 157. The court only breaks with precedent when the result is patently wrong and so manifestly unjust that a break becomes unavoidable. *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004).

Here, it is not necessary to consider whether our holding in *Clinton v. Bonds* is still valid, because it is evident that appellant's petition did not raise a constitutional question so as to permit judicial review. Appellee also contends that the ADC's disposition

of the matter here did not constitute an order for purposes of section 25-15-212, and, as appellant's petition did not raise a constitutional question, we agree that it did not.

Appellant contends that his right to due process was violated because the ADC did not follow its own procedures and that issue was raised in his petition. He essentially claims a liberty interest in having the ADC officials follow the procedures. But, appellant does not have a liberty interest in the actual procedures to be administered. *See Kennedy v. Blankenship*, 100 F.3d 640 (8th Cir. 1996).

Nor can appellant show a substantive due process violation as a result of the sanctions that were imposed by the ADC in the proceeding. To state a case for a substantive due process violation, appellant must have shown an atypical and substantive deprivation that was a dramatic departure from the basic conditions of his confinement. *Id.*; *Sandin v. Conner*, 515 U.S. 472 (1995). Appellant's petition did not set forth any conditions resulting from the proceedings that would show such an atypical and substantive deprivation.

Appellant's petition alleged the sanctions imposed resulted in a loss of class status and certain privileges, and that he was subjected to isolation for a period of time. Under *Kennedy v. Blankenship*, claims of segregation from the general prison population do not indicate a dramatic departure from the basic conditions of appellant's confinement. In Arkansas, there is no liberty interest in good time under the analysis in *Wolff v. McDonnell*, 418 U.S. 539 (1974). *McKinnon v. Norris*, 366 Ark. 404, 231 S.W.3d 725 (2006) (per curiam). A loss of class status and privileges such as appellant cited, even if impacting good time, would not compromise a liberty interest.

Appellant's petition for review did not state that sanctions were imposed that were sufficient to compromise a liberty interest, and unless such sanctions may be imposed, the ADC's disciplinary proceedings did not invoke due process so as to mandate notice and hearing. Appellant's petition did not, therefore, show that the ADC's disposition of the matter did conform to the requirements of the definition of "order" in Arkansas Code Annotated § 25-15-202(5) (Supp. 2007). The proceedings did not therefore result in an order for purposes of judicial review under section 25-15-212.

Considering the facts alleged in the petition as true and viewing those facts in a light most favorable to the plaintiff, appellant failed to allege facts that would support a claim for judicial review under the statute. He did not allege that the ADC imposed sanctions sufficient to raise a liberty interest or due process, and without such a liberty interest at stake, the ADC's actions did not constitute an order subject to judicial review.

Affirmed.

BROWN, J., not participating.

[redacted]

[redacted]

[redacted]