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Jurisprudence**

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EGADS! PRESERVATION RUN AMOK: A CALL FOR CHANGE TO ARKANSAS'S WAS IT RAISED?, WAS IT DEVELOPED?, WAS IT RULED ON? JURISPRUDENCE

*Brian G. Brooks**

I. INTRODUCTION

The Arkansas Court of Appeals issued twenty opinions in cases before it on November 19, 2014.¹ Half of those opinions held that one or more issues in a case, maybe even all of the issues, would not be decided on the merits, at least at that time.² Three ordered “rebriefing” due to deficiencies in the abstract or addendum, so those parties will have a chance to fight another day.³ But seven cases were decided in whole or in part on the basis that critical questions directed to the merits of the appeals were not preserved for appellate review.⁴ Assuming no petition for review or rehearing is granted, those seven cases are over, and the issues the appellants felt important enough to brief before the court of appeals will not be decided.

November 19, 2014, was not an extraordinary day in the court of appeals with respect to cases not decided on the merits, nor would it have been extraordinary if the same breakdown had occurred in the Arkansas Supreme Court. Appellate practice in Arkansas is complicated,⁵ and its complexity

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1. Opinions, Court of Appeals, ARK. JUDICIARY REPOSITORY, <http://opinions.aoc.arkansas.gov/WebLink8/Browse.aspx?startid=37576&&dbid=0> (last visited February 15, 2015).

2. *See id.*

3. *Liggins v. State*, No. CR-11-415, 2014 Ark. App. 671, at 3, 2014 WL 6485550 (Nov. 19, 2014); *Hernandez v. State*, No. CR-14-151, 2014 Ark. App. 667, at 4, 2014 WL 6489964 (Nov. 19, 2014); *Dunn-Wright v. Arkansas State Bd. of Educ.*, No. CV-14-293, 2014 Ark. App. 669, at 3, 2014 WL 6490169 (Nov. 19, 2014).

4. *Smith v. State*, No. CR-13-945, 2014 Ark. App. 658, at 2, 2014 WL 6488736 (Nov. 19, 2014); *Rodriguez v. State*, 2014 Ark. App. 660, at 6, 449 S.W.3d 306, 311; *Porchia v. State*, No. CR-14-103, 2014 Ark. App. 662, at 2, 2014 WL 6485638 (Nov. 19, 2014); *Person v. State*, No. CR-14-545, 2014 Ark. App. 656, at 2, 2014 WL 6485593 (Nov. 19, 2014); *Fox v. Arkansas Dep’t of Human Servs.*, 2014 Ark. App. 666, at 8, n.5, 448 S.W.3d 735; *Carter v. Cox*, No. CV-14-247, 2014 Ark. App. 654, at 4, 2014 WL 6485521 (Nov. 19, 2014); *Burks v. Liberty Bank*, No. CV-13-967, 2014 Ark. App. 672, at 4, 2014 WL 6485664 (Nov. 19, 2014).

5. It’s also expensive. The expense arises from the onerous abstracting and addendum requirements in which the appellant must convert the stenographically reported record into a first person narrative (the abstract) and reproduce copies of portions of the record in the ad-

often leads to appeals being decided on technical deficiencies rather than on their merits. Former Justice Hickman⁶ and Judge Leon Holmes⁷ (before he was a Judge) likened Arkansas appellate practice to a legal “Serbonian Bog” where an unwary practitioner can fall prey to procedural traps that prevent appeals from being decided on the merits.⁸ The cases are legion where either the court of appeals or the supreme court avoids reaching one or more of the issues presented by the case on appeal because of one procedural error or another committed by the appealing party.⁹

dendum attached to every one of the 18 copies of the brief filed. ARK. R. APP. P. 4-2(a)(5) and (8). These requirements need to be reexamined, particularly in the electronic age where copies of the entire record can be reduced to an electronic version placed on a disc or a thumb drive. *See, e.g.,* Brian G. Brooks, *Modest Proposals for Significant Change to the Arkansas Rules of Appellate Practice*, ATLA DOCKET, Winter 2010, at 18, 19–20. This essay will not tackle the sacred abstracting and addendum cows. The preservation rules are enough for one writing. Electronic filing has the potential for reducing most, if not all, of this paper waste and expense, but thus far that potential has not been realized. The court’s limited use of electronic filing only added one more burden to filing rather than reducing it. ARK. SUP. CT. R. 1-8 (requiring “courtesy” electronic copies of appellate filings).

6. *Poole v. Poole*, 298 Ark. 550, 551–52, 768 S.W.2d 544, 544 (1989) (Hickman, J., concurring) (“I have come to the conclusion that it is hazardous for a lawyer to file any motion for post-judgment relief. He will enter a maze of our rules and our decisions which qualifies for the legal ‘Serbonian Bog’ award (which, no doubt, Justice Cardozo intended to establish by his dissent in the case of *Landress v. Phoenix Mutual Life Ins. Co.*, [291 U.S. 491 (1934)]).”).

7. Leon Holmes, *Pitfalls of the Appellate Practice: Avoiding the Serbonian Bog*, ARK. LAW., Summer 2000, at 10, 10.

8. The “Serbonian Bog” reference is a nod to John Milton who wrote:

Far off from these a slow and silent stream,
 Lethe, the River of Oblivion, rolls
 Her watery labyrinth, whereof who drinks
 Forthwith his former state and being forgets,
 Forgets both joy and grief, pleasure and pain.
 Beyond this flood a frozen continent
 Lies dark and wild, beat with perpetual storms
 Of whirlwind and dire hail, which on firm land
 Thaws not, but gathers heap, and ruin seems
 Of ancient pile; all else deep snow and ice,
 A gulf profound as that Serbonian bog
 Betwixt Damietta and Mount Casius old,
 Where armies whole have sunk: the parching air
 Burns frore, and cold performs the effect of fire.

JOHN MILTON, *PARADISE LOST* 61–62 (David Scott Kastan ed., Hackett Publishing Co. 2005) (1667). The reference is to the lake of Serbonis in Egypt that appeared to be solid land because of the sand that blew around it, but which was in reality a bog. *Serbonian*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/Serbonian> (last visited Dec. 3, 2014).

9. I do not attempt to quantify the number of cases in which at least one issue is not decided on the merits in an appeal. The cases are too numerous to even begin to review them and certainly too numerous to “count” and analyze. But I offer this challenge. Examine the opinions issued by the Arkansas Court of Appeals on any particular Wednesday or the Ar-

Failure to “preserve” an issue for review on appeal is one of the more common procedural devices used by the courts to avoid addressing the merits of issues on appeal. Of course, any appellate system will have some procedural prerequisite that must be met in order to perfect an appeal and have the issues appealed decided on the merits, which is not problematic if the prerequisites are reasonable. A contemporaneous objection to evidence should be required so that the presenting party can work to cure it.¹⁰ A timely motion for directed verdict at the close of the case for the party carrying the burden of proof (typically the plaintiff but equally applicable to a defendant with respect to things like affirmative defenses) is usually required in any appellate system in order to allow an argument that the evidence was insufficient to support a proposition.¹¹ An objection to an improper remark made in a closing argument is required to allow a trial court to take corrective action, or the issue is barred on appeal.¹² And it is reasonable to require an issue to arise in some form at the trial court in order to argue it on appeal. Doing so allows the opposing side to meet the challenge presented by the argument with needed evidence and thus defeat it.

Arkansas’s preservation rules go much further. This “was it raised, was it developed, was it ruled on?” jurisprudence is an escape hatch used all too often when no good reason exists so as to avoid the issues on appeal. This

kansas Supreme Court on any particular Thursday. (Those are the days our courts issue opinions absent some extraordinary event, typically in the supreme court). One will readily note the number of opinions that turn at least in part on a technical failure of some sort.

Nor do I mean to suggest that the supreme court has ignored the problems pointed out by Judge Holmes. It has, in fact, addressed several of the procedural traps identified by him through rulemaking. Justice Brown pointed them out in his dissent in *White v. Davis*, 352 Ark. 183, 188, 99 S.W.3d 409, 413 (2003):

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

Id. at 188, 99 S.W.3d at 413 (Brown, J., dissenting). *White* is discussed more fully below.

10. *E.g.*, ARK. R. EVID. 103(a)(1).

11. *E.g.*, ARK. R. CIV. P. 50; FED. R. CIV. P. 50.

12. *E.g.*, *Butler Mfg. Co. v. Hughes*, 292 Ark. 198, 206, 731 S.W.2d 214, 215 (1987).

jurisprudence should be rethought.¹³ This essay explains how these preservation rules run amok, and concludes that justice is better served by modifying them. A more lenient approach leading to more cases decided on the merits is then advocated.

II. "WAS IT RAISED? WAS IT DEVELOPED? WAS IT RULED ON?" JURISPRUDENCE: WHERE IT WORKS AND HOW IT HAS RUN AMOK

Here is the basic rule: In order for an issue to be addressed by the Arkansas appellate courts, it must be *raised* before the trial court, sufficiently *developed* in the trial court to allow an informed discussion, and actually *ruled on* by the trial court.¹⁴ Those words seem simple enough and easily complied with. They are not, however, because they are interpreted to require a high degree of precision that often trips even the most experienced practitioner. An examination of situations where preservation serves legitimate purposes contrasted with cases where preservation bars appellate review, but accomplishes really nothing, is useful to see this point.

A. Preservation Correctly Used: Where It Works

The need to raise and argue an issue to a trial court in order to preserve it for appeal is not offensive on its face. It can, and often does, serve legitimate purposes, most specifically to allow either the parties or the trial court to correct the deficiency complained of and avoid any issue on appeal to begin with. Some simple examples make the point.

As noted above, a basic Rule of Evidence is that a contemporaneous objection must be lodged to the admission of evidence when it is offered in order to preserve an argument that the evidence should not have been admitted when the case is appealed.¹⁵ This Rule makes sense when one under-

13. In the interest of full disclosure, I've written on this topic before in two articles, one simply advising the practitioner about the preservation rules and how to make sure they are met and the other calling for change very much like I do here. Brian Brooks, *Is it Raised? Is it Developed? Is it Specific? Preserving Your Issues for Appeal*, ATLA DOCKET, Fall 2007, at 20; Brian G. Brooks, *Modest Proposals for Significant Change to the Arkansas Rules of Appellate Practice*, ATLA DOCKET, Winter 2010, at 18.

14. The preservation rules work to the disadvantage of the appellant primarily. An appellee can, from time to time, convince the appellate courts to address an issue not meeting the letter of these rules on the basis that the court will affirm the trial court when it reaches the correct conclusion but for a different reason. *Riddle v. Udouj*, 371 Ark. 452, 458, 267 S.W. 3d 586, 591 (2007) (citing *Middleton v. Lockhart*, 355 Ark. 434, 439, 139 S.W.3d 500, 503 (2003)). It's a significant risk, however, to attempt to bring an issue up on appeal that is not preserved in the manner described here, even for an appellee. It's just too easy for the courts to avoid it based on the preservation rules.

15. ARK. R. EVID. 103.

stands that quite often, corrective action can be taken that cures the deficiency. For example, if a party wants to introduce a photograph into evidence and the objection is that the exhibit has not been authenticated, a few follow up questions can usually cure the deficiency (or confirm it, whichever the case may be). All the Rules of Evidence, specifically Rule 901, require is that the proponent of the evidence offer enough “to support a finding that the matter in question is what the proponent claims” it to be.¹⁶ Rule 901 even lists “illustrations” of methods of authentication.¹⁷ It would be unfair and nonsensical to allow the objector to sit idly by only to raise this sort of issue on appeal.

This basic principle extends to much more complicated situations. Arkansas follows the so-called *Daubert* analysis for admissibility of expert testimony through which an opponent of the evidence may challenge the expert’s methodology and thereby seek to exclude the evidence, or parts of it. The name derives from *Daubert v. Merrill Dow Pharmaceuticals, Inc.*¹⁸ and the analysis was adopted in Arkansas in *Farm Bureau Mutual Insurance Co. v. Foote*.¹⁹ The analysis charges trial courts with undertaking a preliminary assessment of whether the reasoning or methodology underlying expert testimony is scientifically valid and whether that reasoning or methodology correctly can be applied to the facts at issue.²⁰

Under the *Daubert/Foote analysis*, many factors may apply and no definitive checklist exists.²¹ Typical factors to be considered in the analysis are the expert’s credentials; whether the expert’s methodology has been the subject of peer review; potential error rate; standards; and general acceptance in the scientific community, but these factors are not exhaustive, and they must be applied in a flexible manner.²² The *Daubert* court noted the capabilities of the jury and the adversary system generally, including “vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof,” as “traditional and appropriate means of attacking

16. ARK. R. EVID. 901.

17. ARK. R. EVID. 901(b)(1)–(10).

18. 509 U.S. 579 (1993). In *Daubert*, the United States Supreme Court held that the Rules of Evidence govern the admissibility of evidence and recognized that the “general acceptance” test for the admissibility of scientific evidence that was pronounced in *Frye v. U.S.*, 54 App. D.C. 46, 293 F. 1013 (1923), had been superseded by the Federal Rules of Evidence. *Daubert*, 509 U.S. at 586–87. The Court noted that the rigid standard in *Frye* would be at odds with the Federal Rules’ liberal thrust and their general approach of relaxing the traditional barriers to opinion testimony. *Id.* at 588–89. The Court later extended the holding in *Daubert* essentially to all expert testimony, including technical and engineering experts. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

19. 341 Ark. 105, 115, 14 S.W.3d 512, 519 (2000).

20. *Daubert*, 509 U.S. at 594.

21. *Id.*

22. *Id.*

shaky but admissible evidence.”²³ Those conventional devices, along with the trial court’s ability to direct a verdict or grant summary judgment in appropriate cases, are safeguards against pseudoscience, rather than wholesale exclusion where the basis of scientific testimony meets the standards of Rule 702.²⁴

Clearly, the *Daubert/Foote* analysis is something that ought to be raised and developed before the trial court before a party is allowed to pursue it on appeal. The multi-factor analysis is fact driven, and a record must be created to examine whether it is met. It would be wholly unfair to allow an opponent of an expert to sit by in the trial court and do nothing, then claim for the first time on appeal that the expert’s methodology was flawed. The expert might easily have been able to cure the deficiency if the issue was raised below.

Just as parties might be able to cure a deficiency with a contemporaneous objection, so too might the trial court. A contemporaneous objection to a remark in closing argument must be made in the trial court for good reason. *Butler Manufacturing Co. v. Hughes*²⁵ is an example. Robert Hughes was shocked while using a “roof runner” and fell from a roof.²⁶ He and his wife sued Butler Manufacturing, from whom the roof runner was leased, alleging products liability and negligence theories.²⁷ The jury found in their favor and awarded nearly \$1 million.²⁸ Butler appealed.²⁹ One primary issue on appeal was whether the Hugheses’ attorney made an improper closing argument.³⁰ The Hugheses had offered the testimony of an expert consulting engineer on quality control.³¹ The trial court limited the expert’s testimony to quality control in general, excluding any reference to quality control at Butler specifically.³² When the Hugheses’ attorney and the witness ventured into that area anyway, the trial court sustained an objection.³³ Nevertheless, the Hugheses’ attorney made specific (and speculative) reference to quality control at Butler and the witness’s testimony during his closing argument.³⁴ But Butler did not object contemporaneously.³⁵ Instead it waited until after clos-

23. *Id.* at 596.

24. *Id.* at 594–95.

25. 292 Ark. 198, 729 S.W.2d 142 (1987).

26. *Id.* at 200, 729 S.W.2d at 143.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Butler*, 292 Ark. at 200, 729 S.W.2d at 143.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

ing was completed and the jury was excused to raise the issue, then asked for a mistrial.³⁶ The trial court denied the request.³⁷

The Arkansas Supreme Court affirmed holding that Butler waived the ability to seek a mistrial by failing to raise a contemporaneous objection.³⁸ That was so because “by waiting until after closing arguments when they were out of the presence of the jury to make a motion for mistrial, Butler’s attorney did not give the trial court the opportunity to correct any error committed during the closing argument.”³⁹ Obviously, had the objection been made at the time of the argument, the trial court could have admonished counsel and instructed the jury to ignore the remark. That opportunity was lost by the failure to object.

*John Cheeseman Trucking, Inc. v. Dougan*⁴⁰ is in accord. Eleven vehicles were involved in an accident on Interstate 40 caused by smoke covering the highway.⁴¹ Trucks owned by John Cheeseman Trucking and Mallinckrodt, Inc. stopped on the highway because their drivers could not see, and vehicles coming from behind collided with them.⁴² Four people were killed.⁴³ In a procedurally complicated case, liability was found against defendants related to the Cheeseman and Mallinckrodt entities, the Mallinckrodt defendants settled, and the Cheeseman defendants had judgment entered against them, then appealed.⁴⁴

One issue on appeal was that a mistrial should have been granted because of an improper closing argument by one of the prevailing parties.⁴⁵ The argument made was a speculative rendition of the type of training the jury’s verdict might suggest to the presidents of the defendant companies needed to be put in place for their drivers, but no objection was made to it.⁴⁶ A motion for mistrial was made later, and it was denied.⁴⁷ The supreme court affirmed because of the failure to object contemporaneously, which deprived the trial court of the opportunity to correct the error committed in the argument.⁴⁸

36. *Id.*

37. *Butler*, 292 Ark. at 200, 729 S.W.2d at 143.

38. *Id.* at 206, 729 S.W.2d at 147.

39. *Id.* at 202, 729 S.W.2d at 144.

40. 313 Ark. 229, 853 S.W.2d 278 (1993).

41. *Id.* at 231, 853 S.W.2d at 279.

42. *Id.*

43. *Id. Id.* at 231, 853 S.W.2d at 280.

44. *Id.* at 231–32, 853 S.W.2d at 280.

45. *Id.* at 236, 853 S.W.2d at 282.

46. *Cheeseman*, 313 Ark. at 236–37, 853 S.W.2d at 282–83.

47. *Id.*

48. *Id.* at 237–38, 853 S.W.2d at 283.

*Jones Rigging & Heavy Hauling v. Parker*⁴⁹ is another example, this time outside of the area of closing arguments. Shannon and Rodney Parker collided with a Jones Rigging truck and were injured.⁵⁰ The jury found against the Parkers and they moved for a new trial.⁵¹ The basis of their motion was that they were prejudiced by new information introduced by a witness at trial regarding Jones Rigging's dissolution.⁵² But they did not object to this evidence when it was presented.⁵³ Thus, the Arkansas Supreme Court reversed the grant of a new trial because a contemporaneous objection and request for a continuance is required when a party is faced with surprise evidence in a civil case.⁵⁴ In fact, the court held that Rule 59 was misapplied when the new trial was granted.⁵⁵ The court pointed out that the trial court could cure the deficiency by granting a continuance when the surprise evidence is presented and objected to.⁵⁶

Sensible use of the requirement for a contemporaneous objection is seen in Rule of Civil Procedure 51's direction that objections to jury instructions must be timely and precise. Rule 51 reads,

No party may assign as error the giving or the failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection, and no party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on that issue. Opportunity shall be given to make objections to instructions out of the hearing of the jury. A mere general objection shall not be sufficient to obtain appellate review of the court's action relating to instructions to the jury except as to an instruction directing a verdict or the court's action in declining to do so.⁵⁷

While one could argue with some of the details of the Rule, as I will do below, the basic idea that a reasonably-specific objection to an instruction ought to be required is good. That is so, obviously, because by raising the objection and explaining it sufficiently, the trial court and the parties can work to correct the deficiency and avoid the issue on appeal altogether. Waiting until the appeal to make the objection makes no sense.

49. 347 Ark. 628, 66 S.W.3d 599 (2002).

50. *Id.* at 630–31, 66 S.W.3d at 601.

51. *Id.* at 631–32, 66 S.W.3d at 601.

52. *Id.*

53. *Id.* at 632, 66 S.W.3d at 601.

54. *Id.* at 633–37, 66 S.W.3d at 602–05.

55. *Jones Rigging*, 347 Ark. at 636–37, 66 S.W.3d at 605.

56. *Id.* at 633–34, 66 S.W.3d at 602–03. This statement is something of an oversimplification of *Jones Rigging*. More was wrong with the grant of a new trial than simply failing to object and seek a continuance, but this principle is sufficient for purposes of this essay.

57. ARK. R.CIV. P. 51.

Turning to criminal cases, Rule 33.1 of the Rules of Criminal Procedure requires a defendant in a criminal trial to move for directed verdict, dismissal or an acquittal at the close of the evidence, and if he so moves at the close of the State's case, to renew the motion at the close of all of the evidence.⁵⁸ The Rule also requires the motion made at the close of the State's case or the close of evidence to "specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense."⁵⁹ Thus, it is not good enough simply to move for directed verdict or acquittal and point out that "[t]he State has failed to meet its burden of proof of establishing that [the defendant] has in fact violated [a] specific penal statute."⁶⁰ The defendant must specifically set out how the State failed to carry its burden.⁶¹ The reason for this precision is to allow the trial court to reopen the State's case so it can meet the identified deficiency.⁶²

This discussion is not meant to be an exhaustive listing of the areas where preservation is used or even where it is used properly. It does exemplify, however, what preservation is correctly used to do, namely to allow the parties or the trial court to adjust, amend, build a record or correct so as to make the trial right in the first instance. All of these instances have that theme in common, and it is a theme worth having. That theme, of course, creates another benefit. Where issues are raised and developed below the record is much more likely to be fully and adequately built so that any decision on appeal is informed by adequate facts where needed. Arkansas's preservation jurisprudence goes much further, however. Indeed, it has run amok. The discussion turns there.

B. Preservation Run Amok: Where it Merely Frustrates

Preservation rules that serve no real purpose other than to prevent addressing issues on appeal are readily found in Arkansas cases. *White v. Da-*

58. ARK. R. CRIM. P. 33.1(a) and (b).

59. ARK. R. CRIM. P. 33.1(c).

60. *Hendrix v. State*, 2014 Ark. App. 696, at *3. *Hendrix*, a case I was assigned to as appellate counsel, is a problematic case. The argument on appeal was that the facts proven simply do not establish every element of the crime alleged. The State had no intention of reopening its case because it disagreed with Mr. Hendrix's reading of the criminal statute. Whose reading is correct was not addressed by the court of appeals because the motion for acquittal was not specific enough under Rule 33.1. This seems to be an extreme application of the Rule under which a person actually innocent of the crime charged nevertheless remains in prison because of the wording of a trial motion alone.

61. *Id.* at *5-7.

62. *McClina v. State*, 354 Ark. 384, 394, 123 S.W.3d 883, 889 (2003).

*vis*⁶³ is a classic example. Noel Baker chose 80 heifers to buy from Gary Davis' dairy farm in Missouri and paid \$104,000 for them.⁶⁴ The heifers Mr. Davis delivered, though, were not the heifers Mr. Baker selected.⁶⁵ When Mr. Davis refused to refund Mr. Baker's money, Mr. Baker sued in Searcy County, Arkansas.⁶⁶ Mr. Davis moved to dismiss, arguing that his contacts with Arkansas were insufficient to confer personal jurisdiction over him in the Arkansas courts.⁶⁷ The trial judge denied the motion and eventually entered judgment against Mr. Davis for \$360,657.93.⁶⁸

Mr. Davis moved for a new trial and reasserted his personal jurisdiction argument.⁶⁹ A hearing was held on the motion before a new circuit judge in Faulkner County, which was in the same judicial district as Searcy County.⁷⁰ Mr. Baker's lawyer objected to the hearing being held outside of Searcy County but did not specifically cite the venue statute that made him correct.⁷¹ According to the court:

Noel Baker's counsel noted that the case had been tried in Searcy County, but the motion was being heard in Faulkner County. Counsel stated that "we are here because of the moving party, and not by agreement. We do not agree to the hearing. It is our position that this is outside the venue of the court action. The original court file . . . is not here, and neither is the docket."⁷²

The trial judge responded "All righty. All righty."⁷³ He then proceeded to hear argument and rule in Mr. Davis's favor on the personal jurisdiction issue.⁷⁴

Mr. Baker appealed, but the Arkansas Supreme Court refused to reach the merits of the venue issue because it was not preserved for appeal.⁷⁵ The court wrote,

Here, Noel Baker's counsel told the judge that he did not agree to the hearing, and it was counsel's position that venue was in Searcy County, not Faulkner County. However, counsel made no mention of the venue

63. 352 Ark. 183, 99 S.W.3d 409 (2003).

64. *Id.* at 184, 99 S.W.3d at 410.

65. *Id.*

66. *Id.* Mr. Baker died during the case and Vicki White as the executrix of his estate was substituted as the plaintiff, thus the caption of the case.

67. *Id.* at 184, 99 S.W.3d at 411.

68. *Id.*

69. *White*, 352 Ark. at 185, 99 S.W.3d at 411.

70. *Id.*

71. *Id.* See ARK. CODE ANN. § 16-13-317 (repealed 2003).

72. *White*, 352 Ark. at 185, 99 S.W.3d at 411.

73. *Id.*

74. *Id.*

75. *White*, 352 Ark. at 185-87, 99 S.W.3d at 411-13.

statute, § 16-13-317, he now attempts to argue on appeal. Although the statute authorized the judge to hold the hearing in Faulkner County to render “appropriate orders” with respect to the pending cause in Searcy County, counsel failed to point out to the judge that only “contested cases” may not be tried outside the county of venue of the case without agreement of the parties. . . . Despite this failure, Noel Baker now raises those specific venue issues in this appeal, although those issues were never brought to the trial judge’s attention for a ruling below.

Consistency requires that we follow our long-standing rule that a moving party bears the burden of obtaining a ruling on any objection, and in the absence of such a ruling, the issues are not preserved for our review. Because Baker did not properly obtain a ruling on his objection to venue being in Faulkner County, we are unable to reach the merits of this appeal, and the decision of the trial court is affirmed.⁷⁶

Dissenting, Justice Brown took the court to task for holding that Mr. Baker failed to obtain a ruling and thus failing to preserve the venue issue for appeal,⁷⁷ but this case actually exemplifies how all three preservation requirements (raising, developing and obtaining a ruling) have run amok. Although Mr. Baker’s attorney raised venue as an issue, he did not “mention” the specific venue statute, thus the court determined that the issue was not sufficiently raised.⁷⁸ Compounding his problems, he did not “point out” how the statute controlled and made him correct, thus the court felt the issue was not adequately developed.⁷⁹ And, finally, he did not “obtain” a ruling on his venue objection.⁸⁰

This type of specificity is what makes Arkansas appellate practice so like the Serbonian Bog and explains how preservation has run amok. Counsel told the trial judge that he could not hear the case in Faulkner County and that the hearing was objected to.⁸¹ He said “venue” was not proper.⁸² The trial court quipped “All Righty,” then moved on to entertain argument

76. *Id.* at 186–87, 99 S.W.3d 412–13 (internal citations omitted).

77. Justice Brown wrote,

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

Id. at 188, 99 S.W.3d at 413 (Brown, J., dissenting).

78. *Id.* at 186–87, 99 S.W.3d 412–13.

79. *Id.* at 187, 99 S.W.3d 414.

80. *Id.*

81. *White*, 352 Ark. at 185, 99 S.W.3d at 412.

82. *Id.*

and rule.⁸³ The issue was raised, it was developed, and it was effectively ruled on.

What is more important is that the specificity *White* requires simply does not advance the reasons preservation exists as set out above. Neither the trial court nor the parties needed any more than what Mr. Baker's counsel argued in order to address and correct the deficiency that was pointed out by the objection. No more evidence needed to be developed, no case needed to be reopened, no curative instruction needed to be given, or anything of the like. Preservation served no purpose other than avoiding ruling on the merits.

This avoidance mechanism manifests itself in some interesting and bothersome cases. One example is *Abo v. Walker*,⁸⁴ a child custody case. Meagan Abo and Bart Walker are the unmarried parents of BW.⁸⁵ After Meagan and Bart's relationship ended, BW lived primarily with Bart from May 2012 to March 2013, when Bart sued to establish his paternity and for primary custody.⁸⁶ Meagan responded by correctly noting that by statute she was the legal custodian.⁸⁷ Section 9-10-113 of the Arkansas Code vests custody in the mother when a child is born out of wedlock.⁸⁸ The trial court awarded custody to Bart.⁸⁹ Meagan appealed, arguing that, because of the presumption created by the statute, Bart had to prove a material change in circumstances before being given custody and he never even attempted to do so.⁹⁰ In other words, she argued that the law imposed that burden on him and he failed to carry it.⁹¹ The court of appeals held that the issue was not preserved for appeal.⁹² While Meagan responded to Bart's petition for custody by arguing that the statute vested custody in her, she apparently never said the words "material change in circumstances" in the trial court, so, according to the court of appeals, she neither raised the issue nor obtained a ruling on the point.⁹³

The problem with the court of appeals's ruling is that the statute very clearly places custody of a child born out of wedlock with the mother of the child.⁹⁴ Bart's suit was one to *change custody* from Meagan to himself. Ar-

83. *Id.*

84. 2014 Ark. App. 500.

85. *Id.* at *1.

86. *Id.* at *1-2.

87. *Id.* at *3.

88. *Id.*

89. *Id.* at *2-3.

90. *Abo*, 2014 Ark. App. 500, at *3.

91. *Id.*

92. *Id.* at *4.

93. *Id.*

94. ARK. CODE. ANN. § 9-10-113(a) (2009) ("When a child is born to an unmarried woman, legal custody of that child shall be in the woman giving birth to the child until the

kansas law requires the biological father of a child born out of wedlock to prove a change in circumstances in order for that father to obtain custody.⁹⁵ Meagan very clearly relied on the placement of that burden by pleading that she was the biological mother and that BW was born out of wedlock.⁹⁶ She had nothing left to prove at that point. The burden was solely on Bart. He knew, or should have known, at that point that he had to prove a material change in circumstances in order to prevail.

Thus, with Meagan's reliance on the statute, the parties and the trial court had all of the information they needed in order to try the case correctly. Meagan's failure to utter the words "material change in circumstances" did not deprive Bart of the ability to develop his case or the trial court of the opportunity to cure a deficiency. Preservation served no purpose other than avoiding ruling on the merits.

Strict adherence to preservation rules often leads to avoiding pure questions of law that do not need factual development and over which the trial courts have, or should have, little discretion. *Abo* can be seen as a case in that category. The law placed custody of BW with Meagan because of the circumstances of BW's birth, and the law required Bart to prove a change in circumstances before altering that custody.⁹⁷ The "box" in which the case was to be decided was defined by the law, and the use of strict rules of preservation allowed the law to be circumvented.

*Paulino v. QHG of Springdale, Inc.*⁹⁸ is another example. Theresa Paulino was paralyzed by a surgery she claimed was negligently performed.⁹⁹ Her suit, however, went beyond the typical medical negligence case and alleged that the hospital was negligent in even granting privileges to her surgeon to treat patients like her.¹⁰⁰ This "negligent credentialing" theory of recovery had never been recognized in Arkansas.¹⁰¹ The issue was exhaustively briefed and argued by the parties to the trial court, which held that the theory would not be recognized in Arkansas.¹⁰²

Ms. Paulino appealed. Along with the arguments pressed so diligently in the trial court, Ms. Paulino argued that a particular statute, section 17-95-107, essentially recognized negligent credentialing in Arkansas and that it certainly defeated any notion that Arkansas's Peer Review Statute¹⁰³ immun-

child reaches eighteen (18) years of age unless a court of competent jurisdiction enters an order placing the child in the custody of another party.").

95. *Norwood v. Robinson*, 315 Ark. 255, 256–59, 866 S.W.2d 398, 399–401 (1993).

96. *Abo*, 2014 Ark. App. 500 at 2.

97. *See supra* notes 95–96 and accompanying text.

98. 2012 Ark. 55, 386 S.W.3d 462 (2012).

99. *Id.* at 1–2, 386 S.W.3d at 463–64.

100. *Id.* at 3, 386 S.W.3d at 464.

101. *Id.* at 6, 386 S.W.3d at 465.

102. *Id.* at 4–7, 386 S.W.3d at 465–66.

103. *See* ARK. CODE ANN. §§ 20-9-501 to -503.

ized credentialers from suit.¹⁰⁴ This statute was not mentioned in the lower court, however, and thus the court avoided analyzing its significance merely by holding that the issue was not preserved.¹⁰⁵ In a footnote, the court wrote:

We are precluded from addressing the Paulinos' contention that Arkansas Code Annotated section 17-95-107 provides access to credentialing information by patients who bring negligent-credentialing claims because this contention was not made below. It is well settled that we will not address arguments raised for the first time on appeal.¹⁰⁶

The "contention" in the case was that negligently credentialing a physician was actionable. It was a question of law. If a particular statute may either create that cause of action or support it, then no harm comes from entertaining a purely legal argument arising from it. The parties had no need to adjust their case below to meet the argument, and the trial court had no deficiency it could have corrected. Preservation served no purpose other than avoiding ruling on the merits.

Two cases about which I have written in the past are worth discussing again because they make the point well.¹⁰⁷ In *Whorton v. Dixon*,¹⁰⁸ the plaintiff challenged the portion of the medical-malpractice act that precludes medical-care defendants from having to give testimony about the standard of care.¹⁰⁹ A decisive question was the level of constitutional scrutiny to be employed by the court when reviewing the statute.¹¹⁰ All through the plaintiff's briefs strict scrutiny was employed in the analysis, but apparently no argument was devoted exclusively to that point outside of citation.¹¹¹ The court found that to be insufficient, writing as follows:

Notwithstanding Whorton's contention on appeal that strict scrutiny is the appropriate standard of review, she never made that argument below. In fact, at the hearing on her motion, Whorton failed to object when Dr. Dixon applied the rational-basis standard of review. As a result, rational-basis review was the test accepted and used by the circuit court in reaching its decision. In order to preserve an argument for appeal, the issue must be made and developed before the circuit court.¹¹²

104. See *Paulino*, 2012 Ark. 55 at 14, n.2, 386 S.W.3d at 469, n.2.

105. *Id.*

106. *Id.*

107. See Brooks, *supra* note 13, at 20.

108. 363 Ark. 330, 214 S.W.3d 225 (2005).

109. ARK. CODE ANN. § 16-114-207(3) (2006).

110. *Whorton*, 363 Ark. at 332-33, 214 S.W.3d at 227-28.

111. See Reply Brief for Appellant at 1, *Whorton v. Dixon*, 363 Ark. 330, 214 S.W.3d 225 (2005) (No. 04-1031). The Author assisted the plaintiff's counsel in preparing for oral argument and reviewed the briefs at that time.

112. *Whorton*, 363 Ark. at 333, 214 S.W.3d at 228.

The level of constitutional scrutiny, of course, is a legal standard at issue every time an act of any legislature is challenged. It is raised by the nature of the argument. Making the point in argument to the trial court should be sufficient to preserve the issue for appeal. And if more was needed to be done, the better course of action was a remand. Preservation served no purpose other than avoiding ruling on the merits.

*Sowders v. St. Joseph's Mercy Health Center*¹¹³ is similar. This case “whipsawed”¹¹⁴ the plaintiff between *Clayborn v. Bankers Standard Insurance Co.*¹¹⁵ and *Scamardo v. Jagers*¹¹⁶ on the one hand and *Low v. Insurance Company of North America*¹¹⁷ on the other. Mary Sowders sued St. Joseph during the time when *Clayborn* and *Scamardo* were the law and a suit was allowed against a charity, but a prevailing plaintiff could not collect against the assets of the charity.¹¹⁸ During the pendency of the case, however, the law changed back to what it previously was when *Low* held that a charity could not be sued at all, and that an action could be maintained against the charity’s liability insurer by way of Arkansas’s direct-action statute.¹¹⁹ The trial court entered summary judgment against Ms. Sowders, holding that charitable immunity was the law of the state, and that it barred suit against St. Joseph.¹²⁰ One argument made by Ms. Sowders both at the trial court and on appeal, and made in great detail, was that the doctrine of charitable immunity should be abrogated by the court.¹²¹ But the Arkansas Supreme Court did not address the issue. Even though the trial court declared charitable immunity to be the law of the state, the court could not locate a specific ruling on this policy question, thus the court held that it was not preserved for appeal.¹²²

The trial court had no choice but to recognize the defense of charitable immunity. Controlling Arkansas Supreme Court precedent upheld the doctrine. The trial court could only rule one way. Preservation served no purpose other than avoiding ruling on the merits.

I wrote above that I would quibble with the application of Rule 51 of the Rules of Civil Procedure. *Koch v. Northport Health Services of Arkansas*¹²³ is that quibble. *Koch* is a nursing-home case.¹²⁴ The defendants object-

113. 368 Ark. 466, 247 S.W.3d 514 (2007).

114. *Id.* at 477, 247 S.W.3d at 522 (Brown, J., dissenting).

115. 348 Ark. 557, 75 S.W.3d 174 (2002).

116. 356 Ark. 236, 149 S.W.3d 311 (2004).

117. 364 Ark. 427, 220 S.W.3d 670 (2005).

118. *Sowders*, 368 Ark. at 468–69, 247 S.W.3d at 516–17.

119. *Id.* at 469, 247 S.W.3d at 517; ARK. CODE ANN. § 23-79-210.

120. *Sowders*, 368 Ark. at 469, 247 S.W.3d at 517.

121. *Id.* at 468–69, 247 S.W.3d at 516–17.

122. *Id.* at 477, 247 S.W.3d at 522.

123. 361 Ark. 192, 205 S.W.3d 754 (2005). I’ve written about *Koch* before as well, but what it demonstrates is so very clear that repetition is forgivable I think.

ed to the giving of a jury instruction based on Instruction 601 of the Arkansas Model Instructions, 4th Edition.¹²⁵ That instruction, briefly stated, tells the jury that violation of a statute or regulation may be evidence of negligence, and then sets forth the relevant statutory or regulatory language.¹²⁶

The plaintiff in the case sought to give the instruction using the federal regulations governing nursing homes as the regulation at issue.¹²⁷ The defendants objected.¹²⁸ Their precise objection at trial was:

As to Jury Instruction Number Fifteen, Defendants object to the giving of that instruction which is a violation of statute or ordinance is evidence of negligence. Defendants contend that this is an exceedingly lengthy, drawn out jury instruction which there really is no hope for the jury to understand. It gives well in excess of ten or twelve Code of Federal Register references, one to which the jury, the defendants would contend, have no hope of interpreting and applying. It is fully covered by the other instructions in this case. It is confusing and refers to negligence, again going back to our objection to giving this case to the jury on both negligence and medical malpractice.¹²⁹

The trial court denied the objection, and the defendants appealed. They argued that the trial court erred because Arkansas Model Instruction 601 only allows a regulation to be used if it creates a standard of care, and the regulations do not create a standard of care.¹³⁰ The Arkansas Supreme Court wrote that the issue was not preserved because the defendants did not use the words “standard of care” in the objection.¹³¹ What the court did not explain is exactly how that degree of precision would have changed anything. The trial court could not have altered the instruction in any way to meet the objection. More to the point, it raises a pure question of law about the validity of the instruction in the context of any nursing home case. With an objection to the giving of the instruction in general in place, holding that the issue was not sufficiently preserved seems not to advance any particular purpose.

Arkansas’s preservation rules reach far beyond ensuring that the parties and the trial courts have the opportunity to address and correct deficiencies that might cure objections. They allow issues to be avoided based on lack of technical precision. The result is that important issues in far-reaching cases are not decided. The Bench, the Bar and the public would be better served if preservation were reigned in.

124. *Id.*

125. *Id.* at 209, 205 S.W.3d at 767.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Koch*, 361 Ark. at 207, 205 S.W.3d at 766.

130. *Id.*

131. *Id.* at 209, 205 S.W.3d at 767.

III. REIGNING IN THE “WAS IT RAISED? WAS IT DEVELOPED? WAS IT RULED ON?” JURISPRUDENCE: A SUGGESTION FOR CHANGE

With the discussion above, suggestions for change should be apparent. They are easily stated.

First, preservation should accomplish a goal other than avoiding an issue on appeal. Where it does, it should remain. Where a party may be prejudiced by the failure of the opponent to raise adequately an issue below, then failure to raise it should bar appellate review. Likewise, where an adequate objection would allow the trial court to correct a deficiency if made, failure to raise one should bar review.

The examples set out in Part II.A of this essay are typical. Evidentiary objections can often be cured and should be made. In most instances, jury instruction objections are useful to get the instructions right and need to be made. Indeed, where preservation is truly necessary to have a fair resolution of the issue on appeal, it should be adhered to.

Second, where preservation does not accomplish any goal other than avoiding an issue on appeal, it should bend. Pure issues of law are the best example. Rarely is anything advanced, other than delay, when the appellate courts avoid deciding a question of law adequately presented by the record before them. Whether the precise wording of the issue was raised to the trial court, and certainly whether it was decided by the trial court, is often irrelevant. The question should be decided when the record allows it to be so. The *Sowers* court, for example, had everything it needed to address charitable immunity as a policy matter irrespective of what the trial court had to say about it.

Third, “Was it Ruled On?” is particularly hard to justify as a rule of preservation in many instances. For one thing, if the party pressing the issue lost after raising and arguing the issue below, then by implication the question was “ruled on” in the negative. For another, what the trial court may have decided is often of no moment for ultimately determining the question. Only where the trial court’s decision makes a real difference in how the appellate court resolves the problem should the failure to obtain a ruling make any difference on appeal. The trial judge in *White* did all that needed to be done to “rule” adequately enough to allow the question to be addressed on appeal.

Fourth, where preservation is a concern, the appellate courts should be open to a remand to address them rather than falling back on a preservation default. For example, in *Abo*, a legitimate action for the appellate court would have been to remand the case for correct application of the law. Affirming based on a purely technical preservation rule was unneeded.

IV. CONCLUSION

Preservation can serve a purpose. It can make the record better, more complete and ensure that opportunities to correct deficiencies and avoid issues on appeal are taken. But preservation can run amok and serve no purpose other than avoiding issues on appeal. Where it does, it should bend and the technicalities should be set aside.

Altering the “Was it Raised? Was it Developed? Was it Ruled On?” jurisprudence discussed here does not involve changing a Rule of Civil Procedure, Rule of Evidence, or Rule of Appellate Procedure.¹³² It involves appellate courts approaching their task differently and addressing issues important to cases when neither party to the case will be prejudiced unfairly by doing so even if the strict preservation rules are not met. Implementing this change is, therefore, remarkably simple. So long as both sides are fairly on notice that the issue is raised by the case and have ample opportunity to meet it below, the appellate courts should address it on appeal.

132. Rule 33.1 of the Rules of Criminal Procedure discussed above is a notable exception. That Rule might require some measure of change to its wording to adopt the preservation standard advocated here, but the change is easily accomplished. The Rule could simply require the State to show that it would have asked to reopen its case to present evidence to bridge the gap had the defendant made his or her objection more clear and then proffer the evidence for the record.