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ARKANSAS COURT OF APPEALS

DIVISIONS I & II
No. CA11-21

FAHTIMA SOHALA AYDANI WAGNER APPELLANT	**Opinion Delivered** JUNE 29, 2011
V.	APPEAL FROM THE COLUMBIA COUNTY CIRCUIT COURT [NO. E-2001-172-1]
	HONORABLE HAMILTON H. SINGLETON, JUDGE
GEORGE JONATHAN WAGNER APPELLEE	REVERSED AND REMANDED

RAYMOND R. ABRAMSON, Judge

Sohala and George Wagner divorced in 2001. At the time, they agreed that they would share joint custody of their young daughter, B.W. But both Sohala and George petitioned the circuit court for a change of custody in 2006. After a hearing, the circuit court granted custody to George, gave Sohala visitation rights, and ordered Sohala to pay child support. Sohala again petitioned the circuit court to change custody in February 2010. She alleged, among other things, that George was taking actions to alienate B.W. from her. The circuit court held a hearing. After Sohala presented her case, George moved for a directed verdict. The circuit court granted George's motion, thereby denying Sohala's request to change custody of B.W. to her. Sohala appeals. We reverse and remand.

In child-custody cases, the primary consideration is the welfare and best interest of the child; all other considerations are secondary. *Hatfield v. Miller*, 2009 Ark. App. 832, at 7. "A judicial award of custody will not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree will be in the best interest of the child, or when there is a showing of facts affecting the best interest of the child that were either not presented to the circuit court or were not known by the circuit court at the time the original custody order was entered." *Id.* It is the moving party's burden to show a material change in circumstances. *Id.* The standards for changing custody are more stringent than those for initial custody determinations in order to promote stability and continuity in the life of the child, and to discourage the repeated litigation of the same issues. *Id.*

Here, our review is directed toward the circuit court's grant of George's motion to dismiss. It is the circuit court's duty, in deciding a motion to dismiss made after the presentation of the plaintiff's case, to determine whether, if the case were a jury trial, there is sufficient evidence to present to a jury. *Woodall v. Chuck Dory Auto Sales, Inc.*, 347 Ark. 260, 264, 61 S.W.3d 835, 838 (2001). The circuit court does not exercise its fact-finding powers, such as judging the witnesses' credibility, in making this determination. *Id.* On appeal, we view the evidence in the light most favorable to the nonmoving party, giving the proof presented its highest probative value and taking into account all reasonable inferences deducible therefrom. *Id.* We affirm if there would be no substantial evidence to support a jury verdict. *Id.* In other words, when "the evidence is such that fair-minded persons might

reach different conclusions, then a jury question is presented, and the directed verdict should be reversed." *Id.*

According to Sohala, B.W., who was ten years old at the time of the hearing, had become distant, defiant, defensive, rude, and disrespectful in the five to six months leading up to the hearing. Sohala attributed B.W.'s behavior to "how her father is raising her to feel about [Sohala] and to treat [Sohala]." Sohala also pointed to the fact that B.W. calls George's wife "Mom." Despite her protests, Sohala said that George never discouraged this behavior and told her that "[B.W.] has two mothers." Sohala relayed that George does not keep her informed about B.W.'s activities and medical issues, which is a violation of the visitation guidelines. Sohala also testified that George would not allow B.W. to have any informal contact with her except for what is called for in the visitation guidelines. Sohala further testified that at B.W.'s 2006 birthday party, given by George and his wife, George's mother-in-law verbally attacked Sohala for being at the party. Sohala said that George never intervened and that she left the party soon after.

Sohala also said that in months when she has an extended visitation with B.W. (e.g., spring break, Christmas, etc.), George will not allow her to exercise any additional weekend visitations in that month based on his interpretation of the visitation guidelines. Sohala testified that, through the intervention of her and George's attorneys, she was finally able to exercise weekend visitation in March and July 2010, even though she was also having extended visitations with B.W. during those months. Sohala also told about problems

regarding the starting and ending times of her visitation. For every minute Sohala was late dropping B.W. off after visitation, George would delay the start time of her next visitation by the same amount of time. Sohala said that George would give B.W. his cell phone during Sohala's visitations and that George would send messages to B.W. Sohala said that she usually ate lunch with B.W. at school after her weekend visitation and used to pack a lunch for herself and for B.W. until George indicated that he did not want Sohala bringing food for B.W. anymore. Sohala testified that B.W. would become very nervous and scared when her visitation with Sohala was over and she had to return to George.

Sohala said that when she informed B.W. that she planned to go to court to seek custody of B.W., B.W. was initially happy, but that something had since changed. Sohala opined that her relationship with B.W. had deteriorated and that if something did not change, she did not see a good relationship between her and B.W. in the future. Sohala presented several other witnesses, who corroborated various parts of her testimony.

The circuit court's written findings, in support of its decision to grant George's motion to dismiss, read, in part, as follows:

> 2. This hearing was supposed to be a hearing on [Sohala's] motion that [George] was effecting an alienation of [Sohala's] parental rights. The Court agrees with [George's] motion for directed verdict in that there is no systematic denial of visitation. There have been a few times visitation was not allowed because of what appears to be an erroneous interpretation of the visitation guidelines by [George]. However, a handful of visitation issues over four years does not amount to or spell out systematic.
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> 3. The child appears to be a lovely, outgoing, and fun loving child as the pictures [Sohala] has introduced depict so well. If the child is nervous

> about being picked up at the close of visitation, it could just as easily be because she has been talked to and included in conversations by her mother regarding this litigation. There is no credible evidence [George] is the cause of the child's nervousness and if there was, it would probably not reach the level of a material change of circumstance. Now that the parties are aware of the child's nervousness they can help relieve it by assuring the child of their love for her.
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> . . . .
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> 7. The 2006 birthday party incident is unfortunate, but [George] is not to blame. The incident was over three and a half years ago. The parties should try not to let this matter happen again in the future.

Again, when deciding a motion to dismiss, the circuit court views the evidence in the light most favorable to the nonmoving party and does not exercise its fact-finding powers, such as judging a witness's credibility. *Swink v. Giffin*, 333 Ark. 400, 403–04, 970 S.W.2d 207, 209 (1998); *Rymor Builders, Inc. v. Tanglewood Plumbing Co., Inc.*, 100 Ark. App. 141, 145, 265 S.W.3d 151, 153 (2007). The circuit court should grant the motion to dismiss only if the nonmoving party has failed to make a prima facie case. *Rymor*, 100 Ark. App. at 145, 265 S.W.3d at 153. In other words, the circuit court must decide "whether, if it were a jury trial, the evidence would be sufficient to present to the jury." *Woodall*, 347 Ark. at 264, 61 S.W.3d at 838.

Here, it is apparent from some of the circuit court's findings, particularly the ones quoted above, that it was not giving Sohala's evidence its highest probative value and was exercising its fact-finding powers. Indeed, it appears that the circuit court gave George the benefit of the doubt on the denial-of-visitation issues, attributing them to George's

"erroneous interpretation of the visitation guidelines," before George ever testified or put on any evidence. And in its finding about B.W.'s perceived nervousness at the end of her visitations with Sohala, the circuit court's fact-finding was even more apparent. It stated that the child's perceived nervousness "could just as easily be because she has been talked to and included in conversations by her mother regarding this litigation. There is no credible evidence [George] is the cause of the child's nervousness and if there was, it would probably not reach the level of a material change of circumstance." Last, the circuit court's fault assessment regarding the 2006 birthday-party episode also showed that it was exercising its fact-finding powers: "The 2006 birthday party incident is unfortunate, but [George] is not to blame."

In deciding George's motion to dismiss, the circuit court erred by failing to view the evidence in the light most favorable to Sohala and by exercising its fact-finding powers. Indeed, fair-minded people could have come to differing conclusions on this evidence. *Woodall*, 347 Ark. at 264, 61 S.W.3d at 838. Thus, if this had been a jury trial, then there would be a question for the jury. *Id.* For these reasons, we reverse and remand.

Reversed and remanded.

HART, GLADWIN, ROBBINS, MARTIN, and BROWN, JJ., agree.