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Gerald Lee TOLLEY *v.* STATE of Arkansas

CA CR 80-63 611 S.W. 2d 798

Court of Appeals of Arkansas
Opinion delivered February 25, 1981

E. Alvin Schay, State Appellate Defender, by: *Deborah R. Sallings*, Deputy Defender, and *Howard Koopman* and *Jeff Rosenzweig*, Pulaski County Public Defenders, for appellant.

Steve Clark, Atty. Gen., by: *Jack W. Dickerson*, Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. Appellant was charged December 17, 1979 with two counts of theft of property having a value in excess of $2,500.00, in violation of Ark. Stat. Ann. § 41-2203 (Repl. 1977), and one count of theft of receiving property having a value in excess of $100.00, in violation of Ark. Stat. Ann. § 41-2206 (Repl. 1977). On March 19, 1980, another information was filed charging him with breaking or entering in violation of Ark. Stat. Ann. § 41-2003 (Repl. 1977). Appellant signed plea statements related to all these charges and proceedings were had to accept his guilty plea on May 22, 1980, the date the cases were set for trial. The Court accepted appellant's plea of guilty on all four counts and assessed a sentence of six years on each theft of property count, five years on the theft by receiving count and two years on the charge of breaking or entering with all those sentences to run consecutively as to each other and to any sentence which the defendant was then serving. On the same day appellant filed a "Motion to Withdraw a Guilty Plea", and a hearing was held on that motion June 11, 1980. The trial court denied the motion, and from that denial arises this appeal.

Appellant had negotiated a plea with the prosecuting attorney's office in which it was agreed that he would plead guilty to all four charges in exchange for a recommendation of a sentence of six years on each of the theft of property charges, five years on theft by receiving, and an unspecified

amount of time on breaking or entering, with all sentences to run concurrently with each other and with any sentence defendant was then serving, making the total jail time six years. In the plea statements, appellant acknowledged that he understood the minimum and maximum sentences possible on each charge and that he was waiving his right to trial by jury or by the Court. He also indicated that he understood that the plea bargain was not binding on the Court. In open court the judge inquired of appellant as to whether he understood that the judge did not have to give him the sentence that had been negotiated and the appellant indicated that he did understand. After the Court learned of the terms of the plea agreement, the Court inquired of some of the victims of the crime who were present as to whether they approved of the plea agreement. Some indicated they did not. The Court indicated that his policy was to decline to accept negotiated pleas on separate occurrences for concurrent sentencing, but that when the crimes alleged occurred as separate transactions he believed those sentences should run consecutively. At that point the Court indicated that it would allow appellant to withdraw his guilty plea. Seven days time was requested by appellant's attorney to discuss the matter and the Court declined to grant that amount of time and indicated that if appellant was tried by a jury and found guilty that the Court would run any sentences imposed by the jury consecutively. The prosecutor then advised the Court that the case had been set for trial that day and that all the state's witnesses were present. Having been reminded of this fact the Court indicated that it was withdrawing its offer to allow appellant to withdraw his guilty plea and was ready to sentence appellant. Appellant's attorney indicated that he knew of no reason why sentence should not be imposed at that time and the sentences were imposed as stated earlier.

At the hearing June 11, 1980, on the motion to withdraw the guilty plea, appellant testified that he believed he would receive a sentence of six years total, that he was dissatisfied with the plea when he found out that he would receive a sentence totaling nineteen years, and that he wanted a trial by jury.

Rule 26.1 of the Ark. Rules of Crim. Proc. (Repl. 1977) provides in part:

> a. The Court shall allow a defendant to withdraw his plea of guilty or nolo contendere upon a timely motion and proof to the satisfaction of the Court that withdrawal is necessary to correct a manifest injustice.
>
> Rule 26.1 (c) provides in part:
>
> Withdrawal of a plea of guilty or nolo contendere shall be deemed to be necessary to correct a manifest injustice if the defendant proves to the satisfaction of the Court that:
>
> > ... (ii) the plea was not entered or ratified by the defendant or a person authorized to do so in his behalf;
> >
> > (iii) the plea was involuntary, or was entered without knowledge of the nature of the charge or that the sentence imposed could be imposed;
> >
> > (iv) he did not receive the charge or sentence concessions contemplated by a plea agreement and the prosecuting attorney failed to seek or not to oppose the concessions as promised in the plea agreement; or
> >
> > (v) he did not receive the charge or sentence concessions contemplated by a plea agreement in which the trial judge had indicated his concurrence and he did not affirm his plea after receiving advice that the judge had withdrawn his indicated concurrence and after an opportunity to either affirm or withdraw the plea.

In this case the appellant responded in the affirmative to the trial court's question as to whether or not he was entering a guilty plea to the charges because he was guilty. We believe this effectively disposes of appellant's contention that he did not actually enter a plea of guilty or tell the Court

that he was guilty of the four felonies with which he was charged.

Appellant also argues that the state breached its agreement indirectly by objecting to the withdrawal of the plea. The appellant argues that Rule 26.1 (c)(iv) (Repl. 1977) would require allowance of the withdrawal of the plea of guilty. We do not find anything in the record that indicates the prosecuting attorney did not actively seek the concessions agreed upon. The state merely objected to a delay in appellant's decision regarding a plea or trial since that was the day set for trial. This in no way was a failure of the prosecutor to seek the concessions agreed upon.

Appellant complains that the Court stated a policy of running sentences consecutively where the crimes occurred independently of each other. The simple answer is that no objection was raised at the trial level and therefore we will not consider the matter. *Wicks* v. *State*, 270 Ark. 781, 606 S.W. 2d 366 (1980).

The real issue in this case is whether or not the trial court abused its discretion in not allowing the defendant to withdraw his guilty plea. It is worth remembering that this case was set for trial on the day the proceedings were had on the plea. We are unable to find any basis whatsoever for the argument of appellant that the Court concurred in the plea agreement. Appellant argues that this is the case but the record is void of any evidence to support such an allegation, and we find it to be without merit.

Appellant here entered a guilty plea, knowing that the Court was not bound to accept the negotiated plea, and after being advised that the Court would not abide by the plea agreement, raised no objection to sentence being imposed at that time. After sentencing, which resulted in a sentence unsatisfactory to defendant, he sought a jury trial. Under the circumstances, we find no manifest injustice, nor abuse of discretion by the trial court.

Affirmed.

CORBIN, J., not participating.

FOGLEMAN, Special Judge, joins in this opinion.

VICTOR INDUSTRIES CORPORATION *v.*
Charles L. DANIELS, Director of Labor
and Ronnie GATES

E 80-123 611 S.W. 2d 794

Court of Appeals of Arkansas
Opinion delivered February 25, 1981

James A. McLarty, for appellant.

Thelma Lorenzo and *Bruce Bokony*, for appellees.

LAWSON CLONINGER, Judge. In this unemployment compensation benefits case, the employee, appellee Ronnie Gates was discharged by the employer, appellant Victor Industries Corporation, for excessive absences from work. This appeal is from a finding by the Employment Security Division, which was upheld by the Appeals Tribunal and Board of Review, that appellee was entitled to benefits because he was discharged for reasons other than misconduct connected with the work.

The only issue is whether the finding that appellee's absences did not constitute misconduct, as defined by the Arkansas Employment Security Act, is supported by substantial evidence.

We find that the decision is not supported by substantial evidence and we reverse.

Appellee worked for appellant for six years when he was discharged on March 10, 1978, for excessive absenteeism under a labor agreement which provided:

> An employee may lose all seniority and may be discharged without warning if he: . . . (d) is irregular in attendance or a chronic absentee, viz: has an average of one day weekly for three months regardless of reason . . .

At the time of his employment, appellee was given an Employees Information Handbook which he acknowledged receiving and reading, the relevant parts stating:

> Good attendance and promptness is essential from a financial point of view and for job security ... Certain acts have been designated at this plant as prohibited. Intentional performance of any of these acts may subject you to dismissal or suspension. .. Excessive absenteeism which is defined as (a) unexplained or unreported absences for as many as three or more working days spread over any six-month period, or (b) an average of one day's absence weekly for any three month period regardless of reason (excluding granted leaves of absence).

It is not disputed that appellee was absent during his final thirteen weeks of his employment a total of twenty-two working days, or thirty-six percent of the time. Ten of the absences were never reported, and one was reported the following day; the remainder were reported shortly before the beginning of appellee's scheduled workday, six of them being reported forty minutes or less before appellee's shift was to begin.

Appellee's personnel director testified that appellant makes toothpaste tubes, and that it takes a full crew to run a production line; that if there are absences the company has to try to get a replacement from over a three-county area, and to find a skilled worker who is available on short notice is difficult. He stated that the company has a sick leave policy, and if a leave is requested and verified the company grants it; that appellee made no sick leave request; and that appellee had been a good and conscientious worker.

Appellee testified that he missed the days because he was sick, and that each time he was sick he called appellant; that he did not really know when to call when he was sick, and thought that if he called in an hour and ten minutes before his shift began the company could get someone else to do his job; that he was a press operator, and that the company has production helpers who can run his press, but that another

qualified operator had to show them what to do; and that he knew he was missing too many days.

The first paragraph of the Employment Security Act declares that the measure is created for the benefit of persons unemployed through no fault of their own. Ark. Stat. Ann. § 81-1101 (Repl. 1976). The Act should not be extended to protect a person unemployed through fault of his own, as fault is defined in subsequent sections of the Act.

Ark. Stat. Ann. § 81-1106 (Repl. 1976) provides that an individual shall be disqualified for benefits,

> (b)(1) . . . if he is discharged from his last work for misconduct in connection with his work.

Ark. Stat. Ann. § 81-1107 (d)(7) (Supp. 1979) provides that the findings of the Board of Review as to the facts are conclusive on appeal if they are supported by evidence. The definition of evidence in this context has been extended by the courts to mean substantial evidence. *Terry Dairy Products Company, Inc.* v. *Cash*, 224 Ark. 576, 275 S.W. 2d 12 (1955). Substantial evidence is valid, legal, and persuasive evidence; such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Partlow* v. *Arkansas State Police Commission*, 271 Ark. 351 (1980). Whether the evidence is substantial is a question of law. *Skorcz* v. *Howie*, 243 Ark. 640, 421 S.W. 2d 874 (1967).

We find that appellee was discharged through fault of his own making, and that his excessive absences constituted misconduct as defined by the Employment Security Act. He had been an employee of appellant for six years; and not only had he been placed on notice that good attendance was essential in the plant; he knew that his skills at his position made it difficult to replace him on short notice. Appellee made no report at all of ten of his absences, in direct violation of the company policy that an employee was subject to dismissal if he had as many as three unexplained or unreported absences over any six-month period; and he was absent a total of twenty-two working days when company policy limited him to thirteen. We find his

absences amounted to willful disregard of the employer's rules, and a disregard of the standard of behavior which the employer had the right to expect of him. These derelictions constitute misconduct. *Stagecoach Motel* v. *Krause*, 267 Ark. 1093, 593 S.W. 2d 495 (Ark. App. 1980). *Willis Johnson Company* v. *Daniels*, 269 Ark. 795, 601 S.W. 2d 890 (Ark. App. 1980).

In the case of *Parker* v. *Ramada Inn*, 264 Ark. 472, 572 S.W. 2d 409 (1978), the Board of Review had found that a cook was properly discharged for misconduct because he missed one day's work out of eight. The Arkansas Supreme Court upheld the finding and noted:

> . . . a single incident of missing work has ordinarily been considered misconduct within the meaning of the employment security laws when the failure to report and appear for work involved a disregard of standards of behavior which the employer has a right to expect . . . consequently, we cannot say that appellant's conduct did not, as a matter of law, involve a violation of the standard of behavior that a restaurant operator has a right to expect. . .

We find that appellee's conduct in the instant case, as a matter of law, involved and violated a standard of behavior that the appellant had a right to expect.

Reversed.

GLAZE, J., and MAYFIELD, C.J., dissent.

TOM GLAZE, Judge, dissenting. The appellant's sole contention on appeal is that the Board of Review's decision is not supported by substantial evidence. The findings of the Board of Review are conclusive on appeal if supported by substantial evidence. *Parker* v. *Ramada Inn*, 264 Ark. 472, 572 S.W. 2d 409 (1978). From a careful review of the record, I can find no merit in appellant's contention, and I feel in holding otherwise that we are placing this court in the position of being a trier of facts, a role which under prior

case law clearly has been delegated to the Appeal Tribunal and the Board of Review in unemployment benefit cases.

The appellant in his argument relies on three Arkansas cases, and it is important to note that in each of these cases, the court affirmed the Board of Review's findings and decision. First, the case of *Stagecoach Motel* v. *Krause*, 267 Ark. 1093, 593 S.W. 2d 495 (Ark. App. 1980) is cited by appellant. The claimant in that cause was terminated by her employer for failure to follow the employer's policy. The employer owned a motel and required his desk clerks, including the claimant, to collect room rent in advance, and, if unsuccessful, the clerk was to notify the employer. The claimant failed to do so on one occasion, and although she claimed that she had tried to contact her employer about it, she was unable to do so. The employer discharged claimant for violating his policy, contending claimant's act or misconduct was against the employer's best interests. The Board of Review held against the employer and this court agreed, holding that a question of fact was presented to the Board on which it could have found either way.

The next case relied on by appellant is *Parker* v. *Ramada Inn, supra*. The facts before the Board of Review in *Parker* involved a cook who was discharged by the employer after the cook failed to report to work. The cook had worked seven days, and he overslept on the eighth day. The Board found the cook's failure to report was misconduct and denied benefits. Again, the court on review held that a question of fact was presented to the Board and refused to reverse the Board's finding.

The third case argued in appellant's brief is *Coker* v. *Daniels*, 267 Ark. 1000, 593 S.W. 2d 59 (Ark. App. 1980). The claimant in *Coker* was discharged because of a history of absences due primarily to a lack of transportation. From the evidence presented to the Board of Review, the Board denied benefits to the claimant, and as was true in *Parker* and *Stagecoach Motel*, the court on review affirmed the Board's findings as being supported by substantial evidence.

Finally, the case of *Willis Johnson Company* v. *Daniels,*

269 Ark. 795, 601 S.W. 2d 890 (Ark. App. 1980) was recognized by appellant in oral argument but not cited in its brief. In *Willis Johnson*, the claimant was discharged by his employer for misconduct, the employer alleging the claimant would not adhere to an itinerary. The evidence was in conflict, and the Board of Review found for the claimant, stating he did not knowingly or willingly act against the best interest of his employer.

On review, this court affirmed the Board's decision and Judge Pilkington, speaking for the majority, stated this court's role when considering unemployment compensation cases:

> . . . If this court was entitled to make the original determination of this case upon the same evidence considered by the Board of Review, we would probably reach a different conclusion and hold that this employee was not eligible to receive unemployment benefits; however, we are not privileged to substitute our findings of fact for that of the Arkansas Employment Security Board of Review.

In the case at bar, we have the same duty as the court in the cases reviewed above, i.e., to determine if there was substantial evidence before the Board of Review to sustain its findings. In the instant case, the issue is whether the actions of the claimant as reflected in the record can sustain the Board's finding of no misconduct under the Arkansas Employment Security Act. Misconduct has been best defined by our court in the *Willis Johnson* case as follows:

> Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, ordinary negligence or good faith errors in judgment or discretion are not considered misconduct for unemployment insurance purposes unless it is of such degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer's interests or of an employee's duties and obligations.

In the instant case, Gates was described by the appellant, his employer, as a very conscientious worker, who often worked through his rest break and part of his lunch break to make sure his machine was in shape and that production could be carried out. Gates was an employee of appellant's for more than six years, and there is no evidence that he had problems of sickness or absenteeism in prior years. There is no disagreement that Gates was sick during the three month period in which he was absent twenty-two days. Although Gates did not call his employer every day he was absent, he did call one or more times during each period he was ill. There was no evidence that a replacement for Gates was obtained or that the appellant's work was curtailed due to Gates' absence.

From this evidence above, it is difficult, even if I were the trier of fact, to conclude how Gates manifested wrongful intent, evil design or an intentional substantial disregard of appellant's interest. Of course, I am not the trier of fact and neither is this court on review. The Board found, in view of conflicting evidence and arguments, that Gates' conduct was not of evil design or an intentional substantial disregard of appellant's interests.

Appellant strongly contends that Gates deliberately violated its rules and acted in disregard of the standard of behavior which appellant has a right to expect of its employees. Appellant admits, however, that it had no rules or policy in effect which served as a guide for what is expected of an employee if he will be absent, e.g., there were no rules which indicated when notice of absence was to be given, to whom it was to be given or how (in what manner) it was to be given. Actually, the Board of Review could have found Gates did more than what appellant expected. In any event, the Board did conclude from the evidence that Gates' actions did not reach the level of misconduct under the unemployment act, and we should not substitute our findings for those of the Board.

There is no question that appellant was permitted to discharge Gates because of excessive absenteeism as that term was defined in the contract between appellant and the

Union. However, misconduct under the Arkansas Employment Security Act and as defined in *Willis Johnson* is not the same term or level of conduct as that intended under the Union contract. Regardless of whether our determination on the evidence may have been different is unimportant. The Board made its decision, and there was substantial evidence in the record on which it based that decision. I believe that the court's holding in this case is reached by erroneously substituting our findings for the Board's and in this respect is inconsistent with all of the cases cited by both the appellant and appellee.

For the above reasons, I respectfully dissent.

I am authorized to state that Chief Judge Mayfield joins in this dissenting opinion.

CAPITOL OLD LINE INSURANCE
COMPANY *v.* Christine M. GORONDY, Administratrix
of the Estate of Steve GORONDY, Deceased

CA 80-419 612 S.W. 2d 128

Court of Appeals of Arkansas
Opinion delivered February 25, 1981
[Rehearing denied March 25, 1981.]

Daggett, Daggett & Van Dover, by: *Jimason J. Daggett*, for appellant.

William H. Drew, for appellee.

TOM GLAZE, Judge. This appeal is from a jury verdict rendered in favor of the appellee, Christine M. Gorondy, as Administratrix of the Estate of Steve Gorondy, deceased. Appellant, Capitol Old Line Insurance Company, had issued an insurance policy on Steve Gorondy's life, and one month later he died while at work. Gorondy was interred without any certification as to cause of death. Claim for payment under the life insurance was made and Capitol denied payment, contending that Gorondy had falsely and fraudulently executed his application for the insurance policy stating that "he was in sound health and never had, nor been told that he had, or been treated for, heart disease, high blood pressure, lung or kidney ailment or cancer." The Administratrix filed suit against Capitol which resulted in a jury verdict against Capitol in the sum of $8,812.50 plus interest, statutory attorney's fees and penalty.

The legal issue raised by Capitol is whether the trial court erred in giving two instructions to the jury which Capitol contends are conflicting and misled the jury. Of course, if Capitol is correct in its contention, it is settled law that it is prejudicial error for the court to give instructions which are directly conflicting and calculated to mislead the jury. *McCurry* v. *Hawkins*, 83 Ark. 202, 103 S.W. 600 (1907), *St. Louis, Iron Mountain & Southern Railway Company* v. *Woods*, 96 Ark. 311, 131 S.W. 869 (1910) and *Chicago Mill &*

Lumber Company v. *Johnson*, 104 Ark. 67, 147 S.W. 86 (1912). To consider the issue presented on appeal, it is necessary to set forth the two instructions in full. Instruction No. 1 was requested by Capitol and granted by the trial court over appellee's objection, and Instruction No. 7 was requested by appellee which was granted by the trial court over Capitol's objection. The instructions are as follows:

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 7

Defendant, Capitol Old Line Insurance Company, has the burden of proving its affirmative defense that Steve Gorondy *fraudulently misrepresented* the facts in his application for insurance with Capitol Old Line Insurance Company, material to the risk, and further that Capitol Old Line Insurance Company would not have issued its policy of insurance if the true facts had been known.

Whether or not Steve Gorondy fraudulently misrepresented facts is for you to determine from the evidence in this cause. If you so find, Capitol Old Line Insurance Company must further prove such fraudulent misrepresentation had a causal relationship to the death of Steve Gorondy.

If the Defendant has proved to your satisfaction that Steve Gorondy made misrepresentations in his application for insurance with Capitol Old Line Insurance Company that were *fraudulent*, and material to the risk, and further find that Capitol Old Line Insurance Company would not have issued its policy of insurance if the true facts had been known, and you further find that there was a causal connection between such *fraudulent misrepresentations* and the death of Steve Gorondy, then you will find for Defendant, Capitol Old Line Insurance Company. [Emphasis supplied.]

DEFENDANT'S INSTRUCTION NO. 1

You are instructed that if you find the decedent, Steve

> Gorondy, failed to inform the Defendant insurance company about his previous high blood pressure, and that such information was material, that is, that the information would have caused the Defendant insurance company to refuse the issuance, then the Defendant has a right to avoid this policy and is not obligated thereunder. *It is immaterial and irrelevant if the insured acted in good faith, without any bad motive or intent to deceive. This means that if a representation is made which is untrue and material, it taints the entire policy, whether fraudulent or not.* The Defendant insurance company has only to prove the making of the misrepresentation and its effect upon the risk undertaken. [Emphasis supplied.]

It is readily apparent that the two instructions above are in conflict. Moreover, after a study of the record and briefs, we also find that the instructions conflict with the law as well. First, the Administratrix contends that Capitol had the burden of proving that Steve Gorondy *fraudulently* misrepresented the facts in his application for insurance. This contention seems to arise from the fact that in its answer Capitol alleged "by way of affirmative defense" that Gorondy made misrepresentations in his application which were fraudulent.

The controlling law on what Capitol's burden of proof was in this case is set forth in Ark. Stat. Ann. § 66-3208 (Repl. 1980), which provides as follows:

> All statements in any application for a life or disability insurance policy or annuity contract, or in negotiations therefor, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless either:
>
> (a) Fraudulent; *or*
>
> (b) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; *or*

> (c) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract in as large an amount or at the same premium or rate, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise. [Emphasis supplied.]

Although Capitol plead the affirmative defense that there was a fraudulent misrepresentation, § 66-3208(b) clearly provides that a misrepresentation need only be "Material either to the acceptance of the risk, or to the hazard assumed by the insurer." See *National Old Line Insurance Company* v. *People* 256 Ark. 137, 506 S.W. 2d 128 (1974), and the cases cited therein.

The court may require a pleading to be amended to conform to the facts proved. Ark. Stat. Ann. § 27-1160 (Repl. 1979) and Rule 15(b) of the *Arkansas Rules of Civil Procedure.* This procedure has been followed in many cases. *Callahan* v. *Farm Equipment, Inc.*, 225 Ark. 547, 283 S.W. 2d 692 (1955); *Elmore, Admr.* v. *Dillard*, 227 Ark. 260, 298 S.W. 2d 338 (1957); *Royal Service Company* v. *Whitehead Construction Company, Inc.*, 254 Ark. 234, 492 S.W. 2d 423 (1973). At the trial of this cause, there was sufficient evidence presented, without an objection, to support an instruction which contained the necessary element of material misrepresentation as opposed to a fraudulent misrepresentation. In view of the law as set forth in § 66-3208 above and the evidence before the court, we believe the correct procedure would have been for the court to require that Capitol's answer conform to the proof and refuse the Administratrix's Instruction No. 7, which required Capitol to show fraud.

Regarding Defendant's Instruction No. 1, we are concerned because it is not clear from the wording in the instruction whether a causal relation must exist between Gorondy's alleged material misrepresentation and his death. Our Supreme Court has held this causal connection must be established. *National Old Line Insurance Company* v. *People, supra.* Instruction No. 1 does contain language

which would require Capitol to prove the misrepresentation and its effect upon the risk undertaken, but we do not believe this language addresses the causal relation issue. Therefore, we hold that Instruction No. 1 is only a partial statement of the law and did not comply with § 66-3208 or the principle of law enunciated in *People.*

Since we find both the Instructions No. 1 and No. 7 to be in conflict with one another as well as with the law, we must hold that the jury verdict be reversed and this cause is remanded.

Reversed and remanded.

Margaret BENNETT *v.* Charles L. DANIELS, Director of Labor, and ARKANSAS STATE MEDICAL BOARD

E 80-250 611 S.W. 2d 801

Court of Appeals of Arkansas
Opinion delivered February 25, 1981

No briefs filed.

TOM GLAZE, Judge. This case involves a petition to review the Board of Review's denial of unemployment benefits of the claimant, Margaret Bennett. The Board of Review affirmed the decision of the Appeal Tribunal which determined that Bennett was disqualified from receiving benefits under Section 5(a) of the Arkansas Employment Security Law, finding she quit her last work without good cause. The sole issue on appeal is whether the Board's finding is supported by substantial evidence and is in accordance with the law.

There were some conflicts in the testimony before the Appeal Tribunal, but the essential facts necessary for deciding this case are clear.

Bennett was employed by the Arkansas State Medical Board in July, 1979. Dr. Joe Verser was her immediate supervisor. In December, 1979, Verser's wife had surgery, resulting in Mrs. Verser's application for Social Security benefits in January, 1980. Mrs. Verser became depressed and Dr. Verser decided that his wife might do better if she worked part-time for the Medical Board. Mrs. Verser began work in January, 1980, and the evidence reflects that she worked 193 hours without pay from January until May, 1980. Dr. Verser testified that an accountant had instructed him that Mrs. Verser could not draw any money.

In May, 1980, problems began to surface which ultimately caused this appeal. The Medical Board had an appropriation for extra help which apparently had not been expended. At work one day in May, Mrs. Verser stated that since she would be unable to claim any monies for her work, Elizabeth Branum, a former employee, should draw it. Mrs. Verser expressed the fact that if the money was not spent, the appropriation would be lost, i.e., the Arkansas General Assembly would not appropriate funds in the future for extra help since it had not been used. On May 27, 1980, Dr. Verser requested Bennett to prepare a voucher to pay Branum for the 193 hours Mrs. Verser had worked from January to May, 1980. Bennett refused, stating that she had

been advised by an attorney that this was illegal. Mrs. Verser overheard Bennett's response and in Dr. Verser's word, "exploded."

Nothing else was said for the next few days, but during this time, Dr. Verser testified that Bennett had presented a voucher to him with Branum's name, and he had signed it without looking at it. Later, Bennett gave Dr. Verser a check for him to sign which was payable to Branum. He asked Bennett why she had him sign the check since she normally signed checks, and Bennett replied that he had signed the voucher. From the record, the check apparently was never signed and paid to Branum and Dr. Verser later cancelled the voucher which had previously been submitted. Ill feelings between the parties continued to exist, and Bennett tendered her resignation on June 6, 1980.

Our court has not been confronted with the issue of whether a job which involves an illegal or otherwise questionable practice is good cause for an employee to voluntarily terminate his employment and draw unemployment benefits. Although there is little authority on this issue, there are two jurisdictions in which good cause was found and the employee was held entitled to benefits. *Zinmon* v. *Unemployment Compensation Board of Review*, 8 Pa. Commw. Ct. 649, 305 A. 2d 380 (1973) and *Mueller* v. *Harry Lee Motors*, Fla. App., 334 S. 2d 67 (1976). We agree with the principle enunciated in *Zinmon* and *Mueller* and hold that Bennett's refusal to prepare the voucher in Branum's name for work performed by Mrs. Verser was justifiable and was good cause for voluntarily terminating her employment with the Medical Board. Bennett was a bookkeeper for the Medical Board, and because she prepared vouchers and signed checks, she served under a bond. If Bennett had followed Dr. Verser's request, she could have become liable if an exacting audit had been conducted by the State. At the very least, the request made of her by Dr. Verser was a questionable practice which may have resulted in problems for Bennett in the future.

Of course, the Board of Review affirmed the Appeal Tribunal's finding that Bennett quit because of a disagree-

ment with a co-worker which created tension in the office, and this was a personal reason which was not the fault of the employer. The testimony is clear that tension and ill will existed in the office, but we hold that these problems ensued as a direct result of the request made of Bennett and was the fault of the employer.

We reverse the decision of the Board of Review and remand for the entry of an order allowing the petitioner benefits.

Reversed and remanded.

RADIOLOGY ASSOCIATES, P.A. *v.*
AETNA CASUALTY AND SURETY COMPANY

CA 80-442 613 S.W. 2d 106

Court of Appeals of Arkansas
Opinion delivered March 11, 1981
[Rehearing denied April 15, 1981.]

Frederick S. Ursery, for appellant.

Laser, Sharp, Haley, Young & Huckabay, P.A., for appellee.

JAMES R. COOPER, Judge. This is an appeal from a decision of the Pulaski Circuit Court holding that appellee was not liable to appellant on an employee dishonesty policy.

In September of 1977, appellant's bookkeeper requested maternity leave, and appellant sought temporary help. They hired Helen Warfel, who was referred to them by Select Aides, a temporary help employment service. Mrs. Warfel began work September 12, 1977, and was trained by the permanent bookkeeper through October 3, 1977, when the maternity leave began. Mrs. Warfel worked through November 22, 1977.

Mrs. Warfel was paid by Select Aides at the rate agreed upon by Mrs. Warfel and appellant of $3.50 per hour during training and $4.00 per hour while the permanent book-

keeper was on leave. Select Aides billed appellant for the hourly rate paid Mrs. Warfel plus forty-two percent. From the forty-two percent Select Aides paid social security, withholding, Workers' Compensation Insurance and other deductions required by law, and retained the balance of its fee. The duties performed by Mrs. Warfel were identical to those performed by the permanent bookkeeper.

On November 22, 1977, the permanent bookkeeper returned to work and discovered that Mrs. Warfel had embezzled over $119,000 from appellant by issuing checks to fictitious payees.

Prior to these events, appellee had issued to appellant an insurance policy in the amount of $25,000.00, covering losses sustained through fraud or dishonesty practiced by any employee. Appellee denied coverage, alleging that Mrs. Warfel was not an employee of appellant under the policy.

Appellant urges that the trial court erred in finding that Mrs. Warfel was not an employee of appellant, and therefore not covered by the policy issued by appellee.

The insurance policy defines "employee" as follows:

> " 'Employee' means any natural person (except a director or trustee of the Insured, if a corporation, who is not also an officer or employee thereof in some other capacity) while in the regular service of the Insured in the ordinary course of the Insured's business during the Policy Period and whom the Insured compensates by salary, wages or commissions and has the right to govern and direct in the performance of such service but does not mean any broker, factor, commission merchant, consignee, contractor or other agent or representative of the same general character. As applied to loss under Insuring Agreement 1, the above words 'while in the regular service of the Insured' shall include the first 30 days thereafter; . . ."

Appellee concedes that Mrs. Warfel met this definition in all respects except two. First, appellee argues that she was

not in the regular service of the appellant, and second, that appellant did not compensate her by salary, wages, or commission.

It is clear that her duties were the same as the regular bookkeeper, that she worked the same hours and that outwardly she was a regular employee of appellant. It is undisputed that her employment was temporary. The policy of insurance does not exclude temporary employees, and in fact does not make any distinction between permanent and temporary employees. Even though the job was temporary, it was in the regular service of the appellant.

Appellee argues that it should be allowed to limit its coverage to regular employees whose background it can check. Counsel does not cite us to any provision of the policy which so limits liability. Further, we are unable to find any provision of the policy which requires appellant to notify appellee of the hiring of new employees, either temporary or permanent.

The right of control is of major importance in determining the relationship between appellant and Mrs. Warfel. *Sandy* v. *Salter*, 260 Ark. 486, 541 S.W. 2d 929 (1976), *Martin* v. *Indiana Refrigeration Lines, Inc.*, 262 Ark. 671, 560 S.W. 2d 228. Appellant had control over Mrs. Warfel as to the manner in which she did her work; it hired her and it alone had the authority to fire her, or alter the terms of her employment, and she received wages paid by appellant in the agreed amounts.

The remaining question is whether the arrangements as to method of payment prevent Mrs. Warfel from being considered an "employee" of appellant. As a result of a personal interview, appellant hired Mrs. Warfel. The rate of compensation, $3.50 per hour while in training and $4.00 per hour thereafter, was negotiated between appellant and Mrs. Warfel. Select Aides billed appellant for the hourly rate plus forty-two percent, which covered deductions required by law, Workers' Compensation Insurance, and the fee due Select Aides. The form of the business agreement between Select Aides and appellant as to pay is not determinative as

to whether appellant paid Mrs. Warfel "salary, wages, or commission." Mrs. Warfel was paid the agreed rate by appellant just as surely as if appellant had paid her directly by one check with a separate check going to Select Aides for its forty-two percent. The method by which Mrs. Warfel was paid is of little significance, since it is clear that the funds she received originated with appellant.

We believe that the evidence shows, as a matter of law, Mrs. Warfel to have been an employee of appellant, as defined by the insurance policy issued by appellant. The case is reversed and remanded for entry of a judgment in favor of appellant consistent with this opinion.

Reversed and remanded.

GLAZE, J., not participating.

Katherene SEAWRIGHT *v.* SEAWRIGHT SUPER SAVER and UNITED STATES FIDELITY & GUARANTY COMPANY

CA 80-383 613 S.W. 2d 102

Court of Appeals of Arkansas
Opinion delivered March 11, 1981
[Rehearing denied April 15, 1981.]

Frederick S. "Rick" Spencer, for appellant.

Harkey, Walmsley & Belew, by: *Bill H. Walmsley*, for appellees.

DONALD CORBIN, Judge. The appellant, Katherene Seawright, appeals from a decision by the Arkansas Workers' Compensation Commission dismissing her claim for benefits. The Commission held that the statute of limitations has run before the claim was filed with the Workers' Compensation Commission.

The appellant sustained a compensable injury on January 20, 1976, while employed by her husband at Seawright Super Saver. The insurance carrier paid a total of $782.00 to a chiropractor, Dr. Richard L. Byrd, for medical treatment rendered to the claimant between the date of the injury and July 8, 1977. No other benefits were paid by the

carrier. On October 24, 1978, the Arkansas Workers' Compensation Commission received its first notice of a claim for additional benefits in a letter from the appellant's attorney dated October 20, 1978. This letter contained a copy of a letter from the appellant's attorney dated June 23, 1978, which set out in detail the facts and circumstances surrounding appellant's injury and the specific benefits being sought. The Commission responded to the notice of claim by letter dated October 27, 1978. It contained the following blind post script to the appellant's attorney: "We have no record of receiving your 6/23/78 letter until receipt of your 10/20/78 letter."

David Fleming, an adjuster for the insurance company, testified that his first knowledge of a claim for additional benefits was receipt of notice of claim for benefits on October 26, 1978.

The claimant offered proof of mailing to the Workers' Compensation Commission a June 23, 1978, letter constituting the claim as well as a receipt of a copy of the same by the claimant. The administrative law judge found that the first notice of a claim for additional benefits was received by the Commission on October 24, 1978, but that the appellee insurance company was estopped from asserting the statute of limitations as a defense in this case. On appeal to the full Commission, the decision of the administrative law judge was reversed and the claim was dismissed as barred by the statute of limitations.

Appellant raises five points for reversal. The first concerns the application of Ark. Stat. Ann. § 81-1318(b) (Repl. 1976) which provides:

> Additional compensation. In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one [1] year from the date of the last payment of compensation, or two [2] years from the date of the injury, whichever is greater.

The burden to act within the period of limitations is placed upon the claimant and it is not an excuse to say it is the fault of the postal service or of the Commission that the filing was not effectuated. See *Superior Federal Savings and Loan Association* v. *Shelby*, 265 Ark. 599, 580 S.W. 2d 201 (1979).

There is substantial evidence to support the Commission's finding that appellant failed to file within the time prescribed. The evidence submitted by the appellant goes to the proof of mailing of the claim but not to the proof of filing. The Arkansas Supreme Court stated in *McFall* v. *United States Tobacco Co.*, 246 Ark. 43, 436 S.W. 2d 838 (1969), that "... there simply is nothing in the law that permits us to extend the statute of limitations beyond the period fixed by statute." If there is an inequity here it is better addressed by the Arkansas General Assembly. In *Miller* v. *Everett*, 252 Ark. 824, 481 S.W. 2d 335 (1972), the court said: "The statute of limitations applies with full force to the most meritorious claims, and the court cannot refuse to give the statute effect merely because it seems to operate harshly in a case involving an obviously meritorious claim."

The second point for reversal involves the question of whether the employer furnished medical services so as to toll the statute. No evidence was submitted on this issue so we decline to consider it.

Appellant raises as a third point that the appellee insurance carrier should be estopped from raising the statute of limitations as a bar to appellant's claim. There is nothing in the record to show that the appellee insurance carrier, because of something it had done or failed to do, caused the appellant to fail to timely file her claim with the Arkansas Workers' Compensation Commission. See 28 Am. Jur. 2d *Estoppel and Waiver* § 27 at page 627.

Appellant's fourth point for reversal is that the Commission abused its discretion when it denied appellant's motion to remand the case for further evidence. The appellant filed an affidavit on May 28, 1980, the date of the hearing before the full Commission. Rule 14 of the Arkansas

Workers' Compensation Commission provides in part:

> All oral evidence or documentary evidence shall be presented to the designated representative of the Commission at the initial hearing on a controverted claim, which evidence shall be stenographically reported. Each party shall present all evidence at the initial hearing. Further hearings for the purpose of introducing additional evidence will be granted only at the discretion of the hearing officer or Commission.

We find that the Commission did not abuse its discretion. The affiant was present at the hearing before the administrative law judge on November 30, 1979, and could have presented her evidence at that time.

Appellant's fifth argument concerns the constitutionality of the application of Ark. Stat. Ann. § 81-1318(b) and is without merit. See *Hagger* v. *Wortz Biscuit Co.*, 210 Ark. 318, 196 S.W. 2d 1 (1946). Every requirement of due process was accorded the appellant pursuant to the provisions of Ark. Stat. Ann. § 81-1318 (b).

We hold that there is substantial evidence to support the findings and decision of the Commission. Therefore we affirm.

Affirmed.

CLONINGER, GLAZE and COOPER, JJ., dissent.

TOM GLAZE, Judge, dissenting. I disagree with the decision reached by the majority. My disagreement is based on the actions of the adjuster for the appellee insurance carrier and the circumstances surrounding his relationship with the claimant. Shortly after claimant's injury, the adjuster investigated and subsequently determined that the injury was compensable and advised her that he would pay benefits. Although claimant earned a weekly wage of $92.00, she was never paid any temporary disability, mileage to and from the treating doctor who was located in another city or any other benefits under Sections 10 and 11 of the Workers'

Compensation Act. There is no explanation given as to why these benefits were never paid the claimant. The record is devoid of any discussion between the adjuster and the claimant concerning these possible benefits even though eight months after the injury the claimant's treating doctor informed the appellee that the claimant's injury was permanent. The only benefits paid by the insurance carrier were in the form of fees paid to the doctor.

The appellant contends that the appellee insurance carrier should be estopped to raise the statute of limitations because of the conduct of its adjuster. I heartily agree. Appellant relies in part on the case of *Buena Ventura Gardens* v. *Workers' Compensation Appeal Board*, 49 Cal. App. 3d 410, 122 Cal. Rptr. 714 (1975). The California Court of Appeals found that the employer and its insurance carrier had knowledge that the claimant's injury was probably permanent, and that it was conceivably work related. It then held that the employer and insurance carrier could not raise the statute of limitations as a defense to the claim since the claimant had been ignorant of her rights of which the employer and carrier had a duty to advise her. The *Buena Ventura Gardens* decision was actually premised on various provisions contained in the California Labor Code and an earlier decision by the California Supreme Court which held that these provisions placed an affirmative duty on the employer to notify the claimant that he may have a claim for Workers' Compensation benefits. *Reynolds* v. *Workmen's Compensation Appeals Board*, 12 Cal. 3d 726, 527 P. 2d 631 (1974).

The case at bar is strikingly similar to the facts and issues with which the court in *Buena Ventura Gardens* was confronted. The equities in this cause dictate that we should adopt the principle of law enunciated in *Buena Ventura Gardens* and *Reynolds*.

The Arkansas Workers' Compensation Act in clear and simple language provides what is expected of all parties when a compensable injury is involved. First, the insurance carrier shares equally with the employer the duties imposed

by the Act pursuant to Section 37 which in pertinent part provides:

> ... in order that the administration of this Act in respect of such liability may be facilitated, *the Commission shall by regulation provide for the discharge by the carrier, for such employer, of such obligations and duties of the employer in respect of such liability, imposed by this Act upon the employer*, as it considers proper in order to effectuate the provisions of this Act. For such purpose (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier; (2) jurisdiction over the employer by the Commission or by any Court under this Act shall be jurisdiction over the carrier; and (3) any requirements by the Commission or any Court under any compensation order, finding or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer. [Emphasis supplied.]

Next, since we in the instant case are considering an admitted compensable injury, we must also note the duties imposed on the employer and insurance carrier under Sections 10, 11 and 19 of the Arkansas Workers' Compensation Act which in relevant part provide:

> SECTION 10.
>
> (a) *Disability.* Compensation to the injured employee shall not be allowed for the first seven (7) days disability resulting from the injury, excluding the day of injury. *If a disability extends beyond that period, compensation shall commence with the ninth (9th) day of disability. If the disability extends for a period of two (2) weeks, compensation shall be allowed beginning the first day of disability, excluding the day of injury.* [Emphasis supplied.]
>
> Compensation payable to an injured employee for disability shall not exceed sixty-six and two-thirds percent (66 2/3%) of the employee's average weekly

wage, with a fifteen dollar ($15.00) per week minimum, ...

SECTION 11.

The employer shall promptly provide for an injured employee such medical, surgical, hospital, and nursing services, and medicine, crutches, artificial limbs and other apparatus as may be reasonably necessary for the treatment of the injury received by the employee. If the employer fails to provide the services or things mentioned in the foregoing sentence within a reasonable time after knowledge of the injury, the Commission may direct that the injured employee obtain such service or thing at the expense of the employer, and any emergency treatment afforded the injured employee shall be at the expense of the employer. [Emphasis supplied.]

SECTION 19.

(a) *Compensation shall be paid directly to the person entitled thereto* without an award, *except in those cases where liability has been controverted by the employer* . . . .

(b) *The first installment of compensation shall become due on the fifteenth (15th) day after the employer has notice of the injury or death*, as provided in Section 17, on which date all compensation then accrued shall be paid. Thereafter compensation shall be paid every two weeks except where the Commission directs that installment payments be made at other periods.

(c) *Upon making the first payment and upon suspension of payment of compensation the employer shall notify the Commission of such fact on a form prescribed by the Commission.*

(d) Each employer desiring to controvert the right to compensation shall file with the Commission, on or before the fifteenth (15th) day following notice of the

> alleged injury or death, a statement on a form prescribed by the Commission that the right to compensation is controverted .... [Emphasis supplied.]

The above provisions of our Workers' Compensation Act place a duty on the employer and insurance carrier to pay benefits if there is a compensable injury. The evidence in the record before us clearly reflects that after her injury, the claimant was unable to work. In fact, the doctor's report indicates that he had not planned to release the claimant until July 8, 1977, approximately eighteen months after her injury. I strongly believe that the adjuster and the insurance carrier had a duty under Arkansas law to either pay the benefits required under Sections 11 and 19 or notify the Commission that the employee's claim was controverted. If the adjuster had taken this forthright action during one of his many contacts with the claimant, I am convinced the statute of limitations issue the carrier raises would have never occurred. Instead, the claimant was never informed of her possible entitlement under the Workers' Compensation Act, and it seems patently unfair to permit the adjuster and his carrier to now take advantage of a situation they helped to create. I would hold that under the circumstances described in this case, the insurance carrier should not be permitted to raise the defense of the statute of limitations to defeat the employee's claim. Therefore, I would reverse and remand.

I am authorized to add that Cloninger and Cooper, JJ., join in this dissent.

Imogene Gaines MOORE et al *v.*
CITY OF BLYTHEVILLE

CA 80-437 612 S.W. 2d 327

Court of Appeals of Arkansas
Opinion delivered March 11, 1981

Oscar Fendler and *Bill W. Bristow*, for appellants.

Max Harrison; Percy Wright; and *Reid, Burge & Prevallet*, by: *Robert L. Coleman*, for appellee.

TOM GLAZE, Judge. This case involves four appellants who appeal from a Chancery Court decree which compelled the appellee, the City of Blytheville, to take certain corrective action to abate a nuisance caused by its dump, but which

denied damages that appellants alleged they suffered as a result of the nuisance. In 1956, the appellant, Imogene Moore, and her husband, now deceased, conveyed a five acre tract of land to the appellee, and the appellee used the tract thereafter as the city dump. The deed of conveyance contained three covenants wherein the appellee agreed: (1) to erect a fence to prevent debris from blowing onto adjoining lands; (2) to chemically treat the garbage so as to prevent objectionable odors; and (3) to purchase and use equipment to bury the garbage.

Appellants Moore and her daughter, Mona Phillips, own acreage which adjoins the dump. Appellant Ron Stallings is the executor of the Wesley Stallings Estate which has an interest in land located next to the dump. The fourth appellant, Richard Conley, is a tenant who farms the lands owned by Moore and Phillips. In 1976, twenty years after the dump was established, the appellants filed this action against the appellee. The cause was not tried by the court until October, 1979. The appellants' complaint as amended alleged that the appellee breached the three covenants contained in the 1956 deed, and that its actions constituted inverse condemnation, i.e., the appellee's actions amounted to a taking and devaluation of the adjoining land owned by Moore, Phillips and Stallings. The relief sought by appellants was for an order to enforce the deed covenants, an injunction to abate a nuisance caused by the dump and damages suffered due to inverse condemnation and a loss of crops.

Appellants first contend that the lower court's decree entered in March, 1980, offers no real relief because it will not provide for abatement of the nuisance which the Chancellor found to exist. The Chancellor ordered the appellee to take the following corrective measures within sixty days of its decree so as to abate the nuisance:

(a) The top surface of the dump site shall be graded so as to eliminate water pockets or pools from forming on the top of the mass;

(b) The sides of the dump site should be graded and

sloped at such an angle which would permit proper drainage of rain water falling upon the site; and,

(c) The digging and maintaining of ditches in an area immediately adjacent to the dump site, on both the East and West sides, for the purpose of collecting and carrying off water either falling upon or accumulating at the dump site. Such ditches should connect with existing drainage ditches on the South side of the dump site.

The court's order, appellants argue, does not go far enough. In a motion to reconsider, they asked the court to require the employment of an engineer to do a feasibility study to include surveys for drainage ditches, tests for leachate and plans for covering the refuse to prevent further accumulation of leachate.

The Chancellor has a great deal of discretion regarding the question of whether and to what extent injunctive relief should be granted. *Arkansas Community Organization for Reform Now* v. *Brinegar*, 398 F. Supp. 685 (E. D. Ark. 1975), affirmed 531 F. 2d 864 (8th Cir. 1976). It is also settled law that whatever judgment is entered takes its validity from the action of the court based on existing facts and not from what may happen in the future after the court has rendered its judgment. *Brotherhood of Locomotive Firemen and Enginemen* v. *Simmons*, 190 Ark. 480, 79 S.W. 2d 419 (1935). In the instant case there is no evidence within any degree of certainty that the migration of leachate from the dump to adjoining lands was a problem. One witness, an inspection engineer-geologist with the State Department of Pollution Control and Ecology, testified that he saw a small amount of leachate coming from the dump at its northeast corner, but later admitted that he had not determined leachate had caused damage to any crops. This same witness related that he dug a ten foot hole on the east and west sides of the dump and no leachate had seeped into either hole. Another employee, a field inspector, of the same State agency, stated that leachate could deplete the growth of crops, but again offered no evidence that it had. Certainly, if any nuisance and causally connected damage to crops by leachate could

be established in the future, the appellants would not be foreclosed from bringing an action at that time. From a review of the record before us, however, we find that the facts do not establish or warrant the commission of an engineer. We are satisfied that the Chancellor exercised appropriate discretion as to the extent of what actions he required of the appellee to alleviate the existing nuisance.

The second point for reversal raised by appellants concerns the trial court's denial of damages. The court's decree denied damages to Moore and Phillips premised on the doctrines of laches and equitable estoppel. Stallings and Conley were refused damages because proper evidence was not presented which complied with the Arkansas law for loss of growing crops.

Although the lower court's decree did not specifically deal with the inverse condemnation issue, it is clear that damages were not awarded to the appellant landowners, Moore, Phillips and Stallings on this theory. These appellants did offer proof through testimony on this issue by a real estate appraiser, but it is difficult to discern from the record on what basis the Chancellor denied the relief sought. Moore and Phillips did not have a claim for crop damages. Thus, the only common loss which Stallings could have with Moore and Phillips, is a devaluation of their respectively owned properties. Again, the court denied Moore's and Phillips' damage claims because of laches and estoppel, but was silent as to Stallings except for his claim for crop damage. Of course, we review Chancery cases *de novo*, and if the Chancellor is correct for any reason, we affirm the decision. *Apple* v. *Cooper*, 263 Ark. 467, 565 S.W. 2d 436 (1978).

We agree with the Chancellor that the doctrine of laches does apply to the condemnation damage claims. The Moore family, including Phillips, has owned the property adjoining the dump prior and subsequent to the time the dump was established. Stallings testified that his adjoining property has been owned by his family since the 1940's. These appellants failed to file any action for inverse condemnation until 1976, i.e., twenty years after the appellee commenced

operation of the dump. By the time this case was tried in 1979, they offered evidence that Stallings' land was valued at $1,800 per acre and the Moore and Phillips properties were worth $1,200 per acre. The appellants' real estate appraiser then rendered his opinion that their entire tracts of land were decreased in value because a number of acres contained in each tract could not be cultivated due to the adjoining dump. He valued Stallings' loss at $9,600 and Moore's and Phillips' losses at $16,800. In weighing this evidence, we take judicial notice that the value of farm land has materially increased in the past twenty years, and during the same period, the dollar has continued to diminish in purchasing power. *Tomlinson* v. *Williams*, 210 Ark. 66, 194 S.W. 2d 197 (1946); *Sinkhorn* v. *Meredith*, 250 Ark. 711, 466 S.W. 2d 927 (1971).

Our Supreme Court has held that when a person, who knows his rights, takes no step to enforce them until the condition of the other has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as estoppel against the assertion of the right. *Dickenson* v. *Norman*, 165 Ark. 186, 263 S.W. 387 (1924). We find that the tremendous increase in the value of land alone in the past twenty years would have permitted the Chancellor to apply the laches doctrine against Moore, Phillips and Stallings. This fact coupled with the devaluation of today's dollar certainly places the appellee at more of a disadvantage than if appellants had pursued their condemnation claim at some reasonable time after the dump was established in 1956.

Before leaving the damage issue relative to inverse condemnation, we also note that the appellee offered expert testimony to the effect that the market value of the land owned by these appellants was not affected by the city dump. Thus, the Chancellor was presented with opposing expert opinion evidence, and he may well have relied on the opinion of appellee's expert witness in denying the appellants' claims.

The appellants Stallings and Conley also sought damages to crops they lost on acreage located next to the dump,

and they presented evidence that each suffered respective losses of $5,502 and $14,802. In considering these requests for damages, the Chancellor held that Stallings and Conley did not present proper evidence to sustain their alleged damages for loss of crops. Appellee contends that laches also should bar any crop damage claims because, as noted earlier, the Stallings had owned and farmed their land since the 1940's, and Conley testified that he had leased land from the Moores and farmed it for eight years, which was sometime in 1971.

A study of the decree and record reflects that the Chancellor did not consider laches as applicable to the loss of crop claims, but based his decision only on the fact that such crop damages were not properly sustained by the evidence presented. We agree with the Chancellor. However, the measure of damages the Chancellor appears to have used to make his decision we find is erroneous. Before we discuss the measure of damage issue, we will first dispose of the issues raised by the appellee regarding the statute of limitation and laches and their applicability to appellants' claims for crop damages. The applicable statute of limitations to the facts at bar is found in Ark. Stat. Ann. § 37-206 (Repl. 1962) which provides for a three year limitation for injuries to real property. See *Consolidated Chemical Industry, Inc.* v. *White*, 227 Ark. 177-178, 297 S.W. 2d 101 (1957). In accordance with § 37-206, Stallings and Conley limited their claims, seeking damages commencing in 1973 or three years prior to the filing of this action in 1976. Although there are other legal problems relative to these appellants' request for crop damages, we find no evidence in the record which limits their claims to less than the statutory three year period, and we, therefore, find laches does not apply to these specific claims.

The primary issue to be decided, and previously mentioned, is what is the measure of damages in view of the evidence presented in the trial below. Once we make this determination, we can then decide if Stallings and Conley presented proper evidence to meet their burden of proof to establish the damages to which they contend they are entitled. The burden is clearly on these appellants. *Adams* v. *Adams, Ex cx*, 228 Ark. 741-745, 310 S.W. 2d 813 (1958).

First, we reject appellee's contention that the measure of damages to crops set forth in AMI 2225 is applicable since its terms contemplate the destruction of a mature crop. The facts in the record before us indicate that no crops that may have been planted grew to maturity. Stallings testified that before the seeds he planted germinated, the rats would literally dig them out of the ground. He related that he could not plant because the rats would take (destroy) the plants. Conley later testified that 1979 was the first time in eight years he had a crop because of some kind of acid in the soil which came from the dump. The Supreme Court in the case of *Farm Bureau Lumber Corporation* v. *McMillan*, 211 Ark. 951-954, 203 S.W. 2d 398 (1947) stated the rule we must follow in selecting the correct rule or measure to determine damages to crops:

> . . . if the total destruction of the crop was at a time when the crop was too young to have a market value and when it was too late to plant another crop, the "rental value of the land" is the rule that governs; but if the destruction of the crop was at a time when the market value could be determined, then the "market value of the crop" is the rule to govern . . .

In considering the evidence before us in view of the rule stated in *McMillan*, we find that the rental or usable value of the land was the correct criterion or measure to be applied to the facts at bar. The proof presented by the appellants concerned the market value of what they believed would have been their average yield per acre but for the damage caused by the appellee's dump. Since the evidence in the record is insufficient regarding the rental value of the acreage appellants contend was damaged, we would agree that the Chancellor's denial of the damages to crops was correct.

The appellants petition this court to remand this cause to the Chancellor for a hearing on the damages if we, as we have here, determined the proof offered by appellants was insufficient. Where a case has been once heard upon the evidence or there has been a fair opportunity to present it, we would not usually remand a case solely to give either party

an opportunity to produce other evidence. This rule is not imperative, and this court has the power, in furtherance of justice, to remand any case in equity for further proceedings, including hearing additional testimony. *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W. 2d 18 (1979). It has also been a long standing practice and rule of our Supreme Court, which we adopt as well, that Chancery cases will not be remanded for further proceedings when we can plainly see from the record what the rights and equities of the parties are. *Prickett* v. *Ferguson*, 45 Ark. 177, 55 Am. Rep. 545 (1885), and *Ferguson* v. *Green, supra.*

From the record we are unable to decide the issue regarding crop damages without remanding. As we mentioned earlier, it appears from the record, the court's decree and the parties' briefs that the parties and the Chancellor relied on the measure of damages for mature crops as is set forth in AMI 2225. Of course, we have held this was error. Our Supreme Court has held that when all the parties tried a case upon an erroneous theory, the court may exercise its discretion to remand so that pertinent facts, not fully developed, might be ascertained. *Brizzolara* v. *Powell*, 214 Ark. 870, 218 S.W. 2d 728 (1949).

It is obvious from the record that the court and the parties were concerned with an erroneous standard when considering appellants' claims for damages to their crops. We in no way imply that either the court or appellee had the duty to try appellants' case. However, in accordance with the principle announced in *Brizzolara* and in the furtherance of justice, we remand this cause with directions to permit these appellants and the appellee to present further evidence relative only to any damages Stallings and Conley may have suffered to their crops in view of the measure or rule stated in *Farm Bureau Lumber Company* v. *McMillan, supra*. The proof as to damages at the hearing will be restricted in one respect. Since the record does reflect that in 1977 Stallings did not farm his six acres in question because it was a wet year, we hold that any damages he sustained in 1977 were not due to appellee's dump.

For the foregoing reasons we affirm the lower court's decision except that part which pertains to claims for crop damage by Stallings and Conley which is reversed and remanded for proceedings consistent with this opinion.

Affirmed in part and reversed and remanded in part.

Paul JONES *v.* SCHEDULED SKYWAYS, INC., Employer; THE HARTFORD INSURANCE COMPANY, Insurance Carrier

CA 80-454 612 S.W. 2d 333

Court of Appeals of Arkansas
Opinion delivered March 11, 1981

James W. Gallman, for appellant.

W. W. Bassett, Jr., for appellees.

TOM GLAZE, Judge. This is an appeal by Paul Jones from a decision of the Arkansas Workers' Compensation Commission denying his claim for benefits. Jones was president, one of four owners, and chief executive officer of operations of Scheduled Skyways, Inc., (Skyways) from 1972 until November 12, 1978. On December 12, 1977, he suffered a myocardial infarction which he contended was produced, caused and aggravated by his employment with Skyways. After a period of recovery, he returned to Skyways to part-time employment on February 13, 1978. Jones resumed full-time employment on March 25, 1978, continuing to work under the same conditions as before his illness until November 12 when he was asked by the other owners to resign his position.

Dr. Robert McCollum, a general practitioner in Fayetteville, began treating Jones in 1974 for hypertension and his symptoms were brought under control with hypertensive medication. Jones continued to see Dr. McCollum, and when he suffered the infarction in 1977, McCollum was the physician who referred him to Washington General Hospital.

From the record it is clear that Jones' job involved the

type of mental stress that executives are subject to in times of business reversals. Skyways was not only a commuter airline, but also served as a Gulf fuel distributor, rented airplanes, provided outside maintenance on airplanes, was a Cessna dealer, operated a flight school and served as a federally regulated public airline. At the time of the heart attack, Jones was experiencing problems with maintenance of equipment, inflight engine failures, shortages of personnel, expansion of services to new cities, and profit losses. In addition, there were disputes between Jones and the other owners of Skyways, competition with other airlines and a high employee turnover rate. Jones further testified that he normally worked from 7:45 A.M. until 7:00 P.M. during the week, 10:00 A.M. to 4:00 P.M. on Saturdays, and long enough to process the mail on Sunday. He indicated that he enjoyed his work so much that he would have worked longer hours had it not been for his wife.

The Administrative Law Judge, in an opinion filed April 1, 1980, found that Jones sustained an accidental injury on December 12, 1977, which arose out of and in the course of his employment, and the Judge awarded benefits from December 12, 1977, until February 13, 1978, and from November 12, 1978, until some date yet to be determined. However, the Workers' Compensation Commission, after reviewing the medical reports and depositions and the record in this case, denied the compensation benefits requested.

It is a well established principle of law that we must affirm if we find any substantial evidence to support the Commission's ruling. *Taylor* v. *B. J. McAdams*, 270 Ark. 707, 606 S.W. 2d 141 (Ark. App. 1980); *Hammer* v. *Intermed Northwest*, 270 Ark. 262, 603 S.W. 2d 913 (Ark. App. 1980); *Thompson* v. *Sellers & Sons Construction Company*, 267 Ark. 710, 589 S.W. 2d 596 (Ark. App. 1979). The duty of the Workers' Compensation Commission is to make a finding in accordance with the preponderance of the evidence and not on whether there is any substantial evidence to support the findings of the Administrative Law Judge. *Potlatch Forests, Inc.* v. *Smith*, 237 Ark. 468, 374 S.W. 2d 166 (1964); *Allied Telephone Company* v. *Rhodes*, 248 Ark. 677, 454

S.W. 2d 93 (1970); *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W. 2d 360 (1979). In a Workers' Compensation case, the court must view and interpret the evidence, and all reasonable inferences deducible therefrom, in the light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the action of the Commission, whether it favored the claimant or the employer. *Clark* v. *Peabody Testing Service, supra; Thompson* v. *Sellers & Sons Construction Company, supra.*

In this case we have conflicting opinions of the two doctors deposed by the parties. First, Dr. McCollum found a causal connection between the mental stress and worry that Jones experienced in connection with the job as president of Skyways and the hypertension which McCollum felt contributed to the infarction. Secondly, Dr. Harrison Butler, a cardiologist, reviewed all the medical records involved, and it was his opinion that there was not a causal relationship between the employment and the injury. Both doctors testified at length regarding how they arrived at their respective but differing opinions.

Dr. McCollum admitted that the cause of essential hypertension is simply medically unknown; that many types of work aggravate pre-existing hypertensive conditions to the point that they become a problem, but that they certainly do not always result in myocardial infarction. Here, it was only after the infarction that McCollum advised Jones to remove himself from his employment. This recommendation was made in May, 1978, five months after Jones' heart problem. It was Dr. McCollum's opinion that Jones was a particular individual who would have difficulty handling stress, and that his job was aggravating his hypertension which in turn aggravated his heart condition.

Dr. Butler, on the other hand, found no substantial reason that would indicate that Jones' employment had a direct cause and effect relationship upon his myocardial infarction. Butler stated that essential hypertension was only one of many risk factors which may influence the development of heart disease, citing, for example, that one's diet, heredity, salt intake, physical activity and obesity can

have an effect in the development of essential hypertension. Dr. Butler did not disagree with Dr. McCollum's diagnosis of essential hypertension, but stated that emotional stress was most often associated with labile hypertension, which is indicated by elevated pressure during times of excitement or fright, and a normal pressure during times of relative calm.

It is the duty of the Commission to weigh medical evidence as it does any other evidence. We have held that when medical testimony is conflicting, the resolution of the conflict is a question of fact for the Commission. When the Commission chooses to accept the testimony of one physician in such cases, the court is powerless to reverse the decision. *Barksdale Lumber Company* v. *McAnally*, 262 Ark. 379, 557 S.W. 2d 868 (1977). In *Barksdale*, McAnally suffered a heart attack and died while at work. He was being treated by a cardiologist in Hot Springs, and the cardiologist rendered an opinion that the employment did not precipitate the heart attack, aggravate his condition or cause his death. Another doctor, a general practitioner, reviewed the medical records, and opined that the work did cause or contribute to McAnally's death. The Commission allowed the claim for death benefits, and the Supreme Court refused to reverse. The court found that the general practitioner's opinion would support an award, and the relative qualifications of the doctors and the fact that one had not examined the deceased went to the weight of the testimony and not to its probative value. Further, the court held that where a medical expert witness gives an opinion based upon facts established by the record upon a matter recognized as a proper subject of expert opinion, it is ordinarily sufficient to sustain an award unless impeached to such an extent as to have no probative value.

We are not at liberty to weigh the credibility of witnesses. Thus, where doctors express conflicting views on the issue of whether a person's work caused or aggravated a heart attack, the issue of credibility is one for the Commission. *Dena Construction Company* v. *Herndon*, 264 Ark. 791, 575 S.W. 2d 155 (1979).

We are unable to say that fair-minded men could not

reach the conclusion upon which the Commission denied this claim. Therefore, we hold that there was sufficient evidence to support the Commission's determination.

Counsel for Jones raised a second issue in his reply brief, contending that Jones failed to receive a fair hearing before the Commission. He argues that at the time the Commission decided against Jones, it was composed of Cowne, a management or employer representative; Clark, a labor representative; and Tatum, an impartial representative and chairman.[1] Cowne and Tatum rendered the majority opinion and Clark dissented. Later, Cowne left the Commission, Tatum assumed the management or employer position, Rotenberry became chairman and Clark remained in his same position. Apparently, Jones believes that Tatum's change from the chairman's position to the employer's position indicates that he unfairly decided against Jones. There is nothing in the record which supports this contention, and the law is well settled that public officers are presumed to act lawfully, sincerely and in good faith in the execution of their duties. *Arkansas Pollution Control Commission* v. *Coyne, et al*, 252 Ark. 792, 481 S.W. 2d 322 (1972).

We affirm the decision of the Commission.

Affirmed.

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[1]Ark. Stat. Ann. § 81-1342 (Repl. 1976) does not employ the terminology "impartial representative" but rather provides that the third member shall be the chairman of the Commission who shall have been engaged in active practice of law in the State for not less than five years next preceding his appointment.

Shirley DUVALL *v.* Charles L. DANIELS,
Director of Labor

E 80-280 613 S.W. 2d 116

Court of Appeals of Arkansas
Opinion delivered March 18, 1981

Appellant, *pro se*.

Herrn Northcutt, for appellee.

JAMES R. COOPER, Judge. This is an appeal from a decision of the Board of Review affirming the Appeal Tribunal, which affirmed the Agency determination denying unemployment benefits to claimant on the finding that she was not fully available and actively seeking work and in the labor market under the provisions of Ark. Stat. Ann. § 81-1105 (c) (Repl. 1976).

The appellant worked as an intermittent poultry inspector and had worked at that job for five years. The testimony indicated that she was allowed to work 1,280 hours annually and no more; that she was willing to give up that job if she could find a full time job which would pay her

more money per year; and that appellant wished to retain her U.S.D.A. position and draw unemployment benefits after she had worked her maximum time for the government.

The Board of Review held appellant disqualified from receiving benefits under Ark. Stat. Ann. § 81-1105 (c) (Repl. 1976), which required her to be "available" for work. The Board found that she was not fully available and actively seeking work and in the labor market at the time of the hearing.

There is substantial evidence to sustain the finding of the Board that appellant was not available to pursue a full time position elsewhere, and since the determination by the Board is supported by substantial evidence we affirm. Ark. Stat. Ann. § 81-1107 (d) (7) (Repl. 1976).

Affirmed.

PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* James A. JONES

CA 80-455 613 S.W. 2d 114

Court of Appeals of Arkansas
Opinion delivered March 18, 1981

Rose Law Firm, for appellant.

Sam Ed Gibson, for appellee.

LAWSON CLONINGER, Judge. Benton Hydraulics, Inc. purchased from appellant, Prudential Insurance Company of America, a group insurance policy which provided medical expense benefits for its employees. Appellee, James A. Jones, was president and general manager of Benton Hydraulics, Inc., and he and his wife owned all the stock.

Appellee thereafter received an accidential injury within the course of his employment for Benton Hydraulics, Inc., and incurred medical expenses totaling $2,008.35. Appellant paid a hospital bill in the sum of $526.92, but refused to pay further benefits when it was determined that appellee had been injured in the scope of his employment. The policy issued by appellant contains the following provision:

> The plan does not cover: Occupational Injury or Disease — charges in connection with injury or disease recognized as a compensable loss by the provisions of any workmen's compensation, occupational disease or similar law under which you are covered or, if you are not a proprietor or partner of the employer, under which you could be covered on a mandatory or voluntary basis, whether or not you have such coverage.

The Arkansas Workers' Compensation Act, Ark. Stat. Ann. § 81-1320 (Repl. 1976) provides:

> (a) No agreement by an employee to waive his right to compensation shall be valid, and no contract, regulation or device whatsoever, shall operate to relieve the employer or carrier, in whole or in part, from any liability created by this Act, except as specifically provided elsewhere in this Act. Provided however, that any officer of a corporation or self-employer who is not a subcontractor and who owns and operates his own business may by agreement or contract exclude himself from coverage or waive his right to coverage or compensation under this Act . . .

The trial court, sitting without a jury, gave judgment for appellee on his complaint for $1,481.43, statutory penalty of 12%, and an attorney's fee of $500.00. Appellant's counterclaim for $526.92 was denied.

The sole issue on appeal is whether appellee's injury was excluded from coverage under the policy issued by appellant.

Appellee, as an officer of a corporation, had a right to agree or contract to exclude himself from coverage under the Arkansas Workers' Compensation Act. Even if an exclusion agreement were in the record, which it is not, the appellee could not prevail. Appellant's policy excludes any injury recognized as a compensable loss by the provisions of any workers' compensation act, where the worker is covered or could be covered, whether he has the coverage or not, unless

the worker is a *proprietor or partner of the employer*. We hold that appellee is not a proprietor, and that he is excluded from recovery under the policy issued by appellant.

Appellee has chosen to ignore the corporate character of his employer, and to claim the status of proprietor. Appellee defines *proprietor* as "A person who has the legal or exclusive right to anything; an owner," which is an acceptable definition; but appellee is not the owner of any part of his employer's business except shares of stock in Benton Hydraulics, Inc. Even the stockholders of a small, family-owned corporation, are not permitted to deny the corporate entity when convenient and claim the benefits of the corporate structure when to do so is advantageous.

Any doubt as to the meaning of the language used in a contract of insurance will be resolved against the insurer. *American Republic Life Insurance Company* v. *Edenfield*, 228 Ark. 93, 306 S.W. 2d 321 (1957). However, when a policy of insurance is unambiguous we cannot construe it to attain a different meaning. *May* v. *Utah Home Fire Insurance Company*, 256 Ark. 163, 506 S.W. 2d 123 (1974). In the case of *Walker* v. *Countryside Casualty Company*, 239 Ark. 1085, 396 S.W. 2d 824 (1965), coverage under a liability policy was excluded for any employee of the insured. The Court found that the injured person was an employee; and thereby excluded from coverage. The Court cited, with approval, the case of *Rhame* v. *National Grange Mutual Insurance Company*, 238 S.C. 539, 121 S.E. 2d 94 (1961), which stated:

> However, in cases where there is no ambiguity, contracts of insurance, like other contracts must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense. If the intention of the parties is clear, the courts have no authority to change the contract in any particular . . .

Provisions in group health insurance polices which exclude liability for occupational injuries are common and they are enforceable. *Hathorn* v. *Continental Bankers Life Insurance Company*, 334 So. 2d 730 (La. App. 1976);*Roman-*

us v. *Blue Cross and Blue Shield Of South Carolina*, 246 S.E. 2d 97 (S.C. 1978).

The judgment of the trial court awarding a recovery, statutory penalty, and attorney's fee to appellee on his complaint is reversed and dismissed, and the trial court is directed to enter judgment for appellant on its counterclaim in the sum of $526.92.

Reversed and remanded.

David A. WEAVERS *v.* Charles L. DANIELS, Director of Labor for the State of Arkansas, and HILTON INN

E 80-125 613 S.W. 2d 108

Court of Appeals of Arkansas
Opinion delivered March 18, 1981

James R. Cromwell, for appellant.

Thelma Lorenzo, for appellees.

DONALD L. CORBIN, Judge. Appellant David A. Weavers was denied benefits under Section 5 (b) (1) of the Employment Security Act, Ark. Stat. Ann. § 81-1106 (b) (1) (1976). Until December 9, 1979, Mr. Weavers was employed as a maintenance worker by Hilton Inn in Little Rock, Arkansas. Mr. Weavers had a history of alcoholism, a condition known to his employer at the time he was hired.

On the morning of December 9, 1979, the appellant telephoned his employer to report that he was ill and would not be at work that day. That evening, well after working hours, he was arrested near his home, charged with public intoxication, and being unable to make bail, was jailed. Consequently, he failed to report to work the next morning, December 10th, but was permitted to call his employer at approximately 2:00 that afternoon at which time he was dismissed.

Appellant raises three issues on appeal. Mr. Weavers alleges that since he was unable to obtain his release from jail because of his indigency, he should not be denied unemployment benefits. Appellant cites *Tate* v. *Short*, 401 U.S. 395 (1971) and *Kaylor* v. *Department of Human Resources*, 32 Cal. App. 3d 732, 108 Cal. Rptr. 267 (1973) as authority for the proposition that a denial of unemployment benefits to an individual unable to report to work because of his inability to pay a bail bond constitutes a denial of equal protection. While appellant's argument is novel, it has no application here. In the case at bar, the issue is one of misconduct, or more specifically recurring absences, after

warnings and without advance notice, and intoxication which rendered the claimant incapable of performing his job. Additionally, the record does not show that the appellant's inability to post bond was due to indigency.

As his second argument, appellant alleged that an employee unable to report to work because he was incarcerated for an offense unrelated to his employment cannot be disqualified from receiving unemployment benefits.

The Board of Review affirmed the decision of the Appeals Tribunal which held that:

> [T]he claimant was discharged from his last employment for misconduct in connection therewith. He was absent from work under circumstances which strongly suggest that he was intoxicated. This was not a situation that was beyond his reasonable control and it must be held that his absences were conduct against the best interest and welfare of the employer.

Mr. Weavers' actions caused him to be absent from work when he was needed and expected by the employer. His recurring, unexcused absences without advance notice hampered the operation of the employer's business. "[A]n employer generally has neither an affirmative duty ... nor is required to tolerate a mode of conduct which has the effect of reducing the efficiency of the employer's operation .... " *Coker* v. *Daniels*, 267 Ark. 1000, 593 S.W. 2d 59 (Ark. App. 1980). The employer had a right to expect the employee to report to work on time on his scheduled work days. His repeated disregard for the employer's interests justified his discharge.

Finally, appellant alleges that there is no substantial evidence to support the referee's findings of intoxication and of prior warnings.

In *Harris* v. *Daniels*, 263 Ark. 897, 567 S.W. 2d 954 (1978), the court stated:

> In appellate review under Ark. Stat. Ann. § 81-1107 (d)

(7), making findings of the Board of Review, as to the facts, conclusive, if supported by evidence and in the absence of fraud, and confining judicial review to questions of law, we must give the successful party the benefit of every inference that can be drawn from the testimony, viewing it in the light most favorable to the successful party, if there is any rational basis for the board's findings based on substantial evidence.

In the case at bar, the Board of Review found that claimant was discharged from his employment for misconduct. His supervisor testified that his absences hampered the operations of the maintenance department. Appellant admitted that he had previously been warned about his conduct.

We find there is substantial evidence to support the decision of the Board of Review.

Affirmed.

GLAZE, J., not participating.

Harold E. SUTTON *v.* STATE of Arkansas

CA CR 80-75 613 S.W. 2d 399

Court of Appeals of Arkansas
Opinion delivered March 18, 1981
[Rehearing denied April 22, 1981.]

E. Alvin Schay, State Appellate Defender, by: *Matthew Wood Fleming*, Deputy Defender, for appellant.

Steve Clark, Atty. Gen., by: *James F. Dowden*, Asst. Atty. Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant Harold E. Sutton was tried before a jury on May 7, 1980, on three charges: aggravated robbery in violation of Ark. Stat. Ann. § 41-2102 (Supp. 1979); criminal attempt to commit capital murder in violation of Ark. Stat. Ann. § 41-701 (Repl. 1977); and theft of property in violation of Ark. Stat. Ann. § 41-2203 (Repl. 1977). The charges arose in connection with the theft of a truck belonging to Steven Benson and shots being fired at Benson during the incident. Appellant was convicted of the aggravated robbery and theft of property charges.

Appellant raises two points on appeal.

I.

Appellant first argues that enhancement of appellant's sentence under Ark. Stat. Ann. § 41-2102 (3)(a)(Supp. 1979) was violative of the double jeopardy clause of the Fifth Amendment.

Appellant was charged with and convicted of a violation of Ark. Stat. Ann. § 41-2102 (Supp. 1979), aggravated robbery, defined as follows:

> Robbery. — (1) A person commits aggravated robbery if he commits robbery as defined in Section 2103 of Act 280 of 1975 [Arkansas Statutes Annotated 41-2103) and he:
>
> (a) is armed with a deadly weapon, or represents by word or conduct that he is so armed; or
>
> (b) inflicts or attempts to inflict death or serious physical injury upon another person.
>
> (2) Except as provided in subsection (3) below, aggravated robbery is a class A felony.

The underlying offense is defined at Ark. Stat. Ann. § 41-2103 (Repl. 1977):

> Robbery. — (1) A person commits robbery if with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.
>
> (2) Robbery is a class B felony.

A 1979 amendment added the following sections to § 41-2102:

> (3)(a) Upon pleading guilty or being found guilty the first time of aggravated robbery with a deadly weapon, such person shall be imprisoned for no less than six (6) years;
>
> . . . .
>
> (4) The sentences provided for in subsection (3) of this Section are mandatory and shall not be subject to supension. [Acts 1975, No. 280, §2102, p. 500; 1979, No. 1118, § 1, p. ___]

Appellant overlooks the fact that one may be convicted of aggravated robbery even though he is not armed with a

deadly weapon. As previously stated, Ark. Stat. Ann. § 41-2102 (1) (b) provides:

> (1) A person commits aggravated robbery if he commits robbery as defined by Section 2103 of Act 280 of 1975. (Arkansas Statutes Annotated 41-2103) and he:
>
> . . . .
>
> (b) inflicts or attempts to inflict death or serious physical injury upon another person.

Under Ark. Stat. Ann. § 41-2102, the jury will consider a punishment of not less than five nor more than fifty years, or life imprisonment and/or a fine up to $15,000 unless they also find specifically that a defendant is armed with a deadly weapon at which point they may consider a minimum of six years instead of five. This amounts to punishing the defendant once for aggravated robbery, which can be committed without using a deadly weapon (see Ark. Stat. Ann. § 41-2102 (1) (b), and only increasing the minimum possible by one year if the trier of fact finds the defendant was armed with a deadly weapon.

The appellant relies upon *Busic* v. *United States*, 446 U.S. 398 100 S. Ct. 1747 (1980); in which the court examined 18 U.S.C. § 924(c) which authorized the imposition of enhanced penalties for a defendant who uses or carries a firearm while committing a federal felony. The Court found that § 924(c) could not be applied to a defendant charged with violating a statute that already authorized enhanced punishment for the use of a dangerous weapon. *Busic, supra,* merely prevented another enhancement provision where the predicate felony statute — aggravated robbery — contains its own enhancement provision. Here, the predicate felony obviously does not have an enhancement provision. We find no error here.

II.

Appellant's second argument is that the trial court abused its discretion and, in effect, penalized the appellant

for exercising his Sixth Amendment right to a jury trial by arbitrarily ruling that the sentences fixed by the jury in this case must be served consecutively rather than concurrently.

How two or more sentences should run lies solely within the province of the trial court. *Acklin* v. *State*, 270 Ark. 879, 606 S.W. 2d 594 (1980); *Graham* v. *State*, 254 Ark. 741, 495 S.W. 2d 864 (1973). There is nothing in the record to reflect that the trial judge abused his discretion.

Finally, neither of the two points raised by the appellant were objected to or raised in the trial below. We call attention to *Wicks* v. *State*, 270 Ark. 781, 606 S.W. 2d 366 (1980) wherein the court said:

> Some courts, especially the federal courts, have a "plain error" rule, under which plain errors affecting substantial rights may be noticed although they were not brought to the attention of the trial court. Federal Rules of Criminal Procedure, Rule 52(b); *State* v. *Meiers*, 412 S.W. 2d 478 (Mo., 1967). In Arkansas, however, we do not have such a rule. *Smith* v. *State*, 268 Ark. 282, 595 S.W. 2d 671 (1980). To the contrary, in hundreds of cases we have reiterated our fundamental rule that an argument for reversal will not be considered in the absence of an appropriate objection in the trial court. Citations to that familiar principle are unnecessary.

Affirmed.

Jimmy P. KIMMONS *v.* Carol L. KIMMONS

CA 80-426 613 S.W. 2d 110

Court of Appeals of Arkansas
Opinion delivered March 18, 1981

Charles R. Garner, by: *Gary D. Person*, for appellant.

No brief for appellee.

TOM GLAZE, Judge. This is an appeal by the appellant father from an order entered on June 16, 1980, wherein the Chancery Court, on its own motion and without a hearing, awarded permanent custody to the appellee mother. Earlier on May 8, 1980, the court had granted the appellant an absolute divorce and also awarded him temporary custody of the parties' minor child. At the end of the May 8 trial, the Chancellor found that the appellee's situation was not conducive for her to have custody of the child, but the Chancellor ordered Arkansas Social Services to continue supervising the parties and directed the agency to make a further report. The next and only action taken by the Chancellor, as reflected by the record before us, was his signing and entering of the June 16 order awarding custody to the appellee. The terms of this order do not indicate a hearing was held or that any evidence was properly before the court when the order was entered. The order does reflect, however, that the Chancellor found that the appellee had

rehabilitated herself, that her rehabilitation was verified by Social Services in its report to the court and that the report was made available to counsel for the parties.

On appeal, the appellant first contends the Chancellor erred in entering the June 16 order without a hearing. We agree. The appellant cites the case of *Weatherton* v. *Taylor*, 124 Ark. 579, 187 S.W. 2d 450 (1916), which we believe is decisive of this issue. In *Weatherton*, the Supreme Court considered the same legal issue which is before us and, in disposing of the issue, stated:

> While chancery courts possess a continuing power over the matter of custody of a child which has been awarded to one of the parents, *it does not follow that an order changing the status can be made without proof showing a change in circumstances from those which existed at the time the original order was made. The original decree constituted a final adjudication that appellant, and not appellee, was the proper one to have the child, and before an order can be made changing the status there must be proof on the subject justifying the change.* [Emphasis supplied.]

Since the court's decision in *Weatherton* in 1916, the Supreme Court has recognized parents' custodial rights as fundamental rights protected by the due process clause of the federal and state constitutions. *Carroll* v. *Johnson*, 263 Ark. 280, 565 S.W. 2d 10, 16 (1978) and *Davis* v. *Smith*, 266 Ark. 112, 583 S.W. 2d 37 (1979). The appellant was without doubt entitled to a hearing before the Chancellor entered any order modifying the May 8 order, changing custody of the parties' child from the appellant to the appellee.

The appellant raises a second issue, contending that a finding made by the Chancellor was erroneous. In this regard, although the Chancellor on May 8 temporarily awarded custody to the appellant, the Chancellor also stated:

> It's my opinion that your (Appellee) present circumstances are not suitable for having custody of the child *but you are the mother and under the circumstances of*

> *the case, you should be entitled to custody* of the child if you rehabilitate yourself and get your home and circumstances in order. [Emphasis supplied.]

The appellant argues that the Chancellor evidently considered the tender years doctrine as the controlling factor in this case, and since the parties' child was only one and one-half years old, he awarded custody to the appellee mother. Of course, no hearing was held after the Chancellor made his remarks on May 8, and no findings or conclusions were a part of the June 16 order which would indicate that he changed custody premised on the tender years doctrine. This being true, we decline to decide on the record before us that the Chancellor applied the doctrine to the facts at bar.

Our courts have long recognized the doctrine and accordingly have been reluctant to deprive a child of tender years of the care and affection of his mother when other things between the mother and father are considered equal. *Self* v. *Self*, 222 Ark. 82, 257 S.W. 2d 281 (1953) and *DeCroo* v. *DeCroo*, 266 Ark. 275, 583 S.W. 2d 80 (1979). However, our 1979 Arkansas General Assembly enacted Act 278, compiled as Ark. Stat. Ann. § 34-2726 (Supp. 1979) which in effect provides that in divorce actions custody of children must be awarded without regard to the sex of the parent. Since there is nothing in the record to show that the Chancellor did or did not consider §34-2726, we are in no position to decide that he did not. Since this case and the issue of custody have not been fully developed in the trial below, this cause must be remanded so that the parties' rights can be clearly determined. See *Arkansas National Bank* v. *Cleburne County Bank*, 258 Ark. 329, 525 S.W. 2d 82 (1975). When this case is fully heard by and presented to the Chancellor, the parties will have the opportunity to properly raise the issue regarding the tender years doctrine if the evidence warrants.

In the instant case, the Chancellor, we believe wisely, continued jurisdiction over the parties with the specific directions that Social Services further supervise the parties and report further to the court. At the May 8 trial, serious allegations and evidence were presented that the appellee mother had failed to properly care for the parties' minor

child. The child, Jennifer, suffered from diaper rash to the point of bleeding; she had infected ears which required the surgical placement of tubes in her ears; and she had not been given her immunization shots. During the fourteen month period between the parties' separation and the May 8 trial, the appellee resided with Jennifer at five different residences and admittedly lived at two of these residences with a man.

Appellant's situation also presents some obstacles to his personally caring for Jennifer. Although he apparently has adequately provided support for Jennifer since he has had physical possession of her, he has had to rely on his sister to provide the necessary care and nurturing Jennifer requires. It was appellant's sister who actually saw that Jennifer received needed medical treatment and who has provided shelter for her. The sister has intervened in the case below seeking custody of Jennifer.

Under the circumstances described, we recommend to the Chancellor that he give serious consideration to the appointment of a guardian *ad litem* for Jennifer to represent her in the future custody proceedings before the trial court. The procedure of appointing a guardian *ad litem* to represent a child's interest in custody litigation has been adopted in many jurisdictions. *Wendland* v. *Wendland*, 29 Wis. 2d 145, 138 N.W. 2d 185 (1965); *Veazey* v. *Veazey*, 560 P. 2d 382 (Alaska 1977); *Paschall* v. *Paschall*, 21 N.C. App. 120, 203 S.E. 2d 337 (1974); and *In re Adoption of Children*, 96 N.J. Super. 415, 233 A. 2d 188 (1967). See also, Podell, *The "Why" Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 Marq. L. Rev. 103 (1973). By virtue of their inherent powers, courts have appointed guardians *ad litem* in custody cases where the evidence is either nonexistent or inadequate to determine the comparative fitness of the parents and to determine where the best interests of the child lie, or in cases where it is apparent that the dispute is centered on the desires of the parents rather than the best interests of the child. *Koslowsky* v. *Koslowsky*, 41 Wis. 2d 275, 163 N.W. 2d 632 (1969).

The case at bar presents a classic example in which the child's welfare and interest should not solely depend upon the parents' attempts to justify why they should be awarded

custody. The court should not be limited to the often biased and distorted picture which can be depicted by evidence strategically introduced or not introduced by the mother and father in a hotly contested custody fight. The negative facts before us as developed by the parties at trial primarily reflect why neither the appellant nor the appellee should have custody. Of course, this adverse information is important to the court, but such a record does not necessarily offer evidence upon which the court may act to serve the child's best interests. The assistance of Social Services can serve to provide other, more positive information to the court, but this agency cannot legally represent the child in preparation for or at the trial to ensure that all the relevant information its investigation may reveal is properly introduced. Moreover, Social Services is at times appointed by the court as a guardian for the parents' child in instances where a Chancellor is unsure that either parent should be awarded custody. With this potential conflict, Social Services is unable to actively represent the child in a custody case between parents when the possibility exists that evidence could develop which may require the appointment of Social Services as custodian.

As established in *Wendland, supra*, a guardian *ad litem* if appointed should be allowed an adequate opportunity to investigate the case, should be permitted to call his witnesses at trial and to cross examine those witnesses called by the parties. In short, he should be permitted to represent his child client as he would any client in preparation for and at trial. The expense of the guardian would, of course, be imposed on the parents, but this additional expense will prove rewarding when the interests of children are better served. Children are not mere chattels in a custody fight, but rather are to be treated as interested and affected parties whose welfare should be the prime concern of the court in its custody determinations.

For the reasons stated herein, we reverse and remand this cause, directing that the order entered by the trial court on June 16, 1980, be vacated and that any future custody proceedings be held consistent with this court's opinion.

Reversed and remanded.

Robert MAYHEW *v.* Doyle LOVELESS

CA 80-401 613 S.W. 2d 118

Court of Appeals of Arkansas
Opinion delivered March 25, 1981

R. W. Laster and *Arnold N. Goodman*, for appellant.

W. J. Walker, for appellee.

MELVIN MAYFIELD, Chief Judge. This case arises out of a conditional sales contract by which Loveless sold a tractor-trailer rig to Mayhew for $8,250 and the assumption of two monthly payments Loveless was making on the rig. After about a year Mayhew got behind in his payments and Loveless repossessed the rig and disposed of it without giving Mayhew the notice required by the Uniform Commercial Code. Mayhew filed suit against Loveless seeking rescission of the contract and in the alternative asked, by amendment, for damages for failure to comply with the provisions of the code. There was a counterclaim by Loveless for a repair bill and some insurance premiums which he alleged he paid for Mayhew but there was no claim for a deficiency under the sales contract.

The chancellor found against Mayhew and gave Loveless judgment for $1,497.95 on his counterclaim. Mayhew has appealed and the only point relied upon is stated as follows:

> The chancellor erred in holding that the appellant was not entitled to recover the value of the collateral, less the debt owed thereon, where appellee failed to comply with the provisions of the Uniform Commercial Code, Ark. Stat. Ann. § 85-9-101, et seq.

Under Ark. Stat. Ann. § 85-9-504 (Supp. 1979) the code allows a secured party, after default, to dispose of the repossessed collateral and apply the proceeds first to the reasonable expenses of retaking and selling and then to the satisfaction of the secured indebtedness. The section goes on to provide that the creditor must account to the debtor for any surplus and that the debtor is liable for any deficiency. It also provides that disposition of the collateral may be by public or private proceedings but requires that every aspect of the disposition must be commercially reasonable and that (with exceptions not applicable in this case) "reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale." As White & Summers, *Uniform Commercial Code* (2d ed. 1980) 1109 says, "The notice requirement is easy to understand and to apply; it is inspired by the forlorn hope that the debtor if he is notified, will either acquire enough money to redeem the collateral or send his friends to bid for it." See also, *Wheeless* v. *Eudora Bank*, 256 Ark. 644, 509 S.W. 2d 532 (1974).

In this case there was no attempt to comply with the notice provisions of the code and there is no evidence that they were waived. Mayhew was behind in his payments and Loveless simply obtained peaceful possession of the rig and without notification of any kind eventually swapped the tractor for another tractor and the trailer for another trailer. Ark. Stat. Ann. § 85-9-507 (1) (Supp. 1979) provides if the

repossessed security is not disposed of in accordance with the requirements of the code, the debtor has a right to recover any loss caused by the failure to comply. How "loss caused by the failure to comply" is to be measured has been the subject of many appellate court opinions. The differences in statutory provisions, factual situations, and judicial viewpoints make the decisions difficult to reconcile.

The Arkansas case of *Norton* v. *National Bank of Commerce*, 240 Ark. 143, 398 S.W. 2d 538 (1966) has become a leading case where suit is brought to recover a deficiency judgment. In that case it was held that since the creditor had wrongfully disposed of the collateral without notice to the debtor, it would be presumed "the collateral was worth at least the amount of the debt, thereby shifting to the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law." Unless this proof is made, the presumption will result in the failure to obtain a deficiency judgment. *Barker* v. *Horn*, 245 Ark. 315, 432 S.W. 2d 21 (1968). If this proof is made, judgment can be rendered for any deficiency that exists after the debt is credited with the amount that reasonably should have been obtained through a sale conducted according to law, *Universal C.I.T.* v. *Rone*, 248 Ark. 665, 453 S.W. 2d 37 (1970).

In this case, however, no deficiency judgment was sought and we have not been cited an Arkansas case involving the right to recover for loss caused by failure to comply with notice requirements where there was no claim for deficiency. The situation has been discussed, though, by Steve H. Nickles in 34 Ark. L. Rev. 1 (1980). Pointing out that one of the purposes and policies underlying the code as set out in section 85-1-102(2)(c) is "to make uniform the law among the various jurisdictions," Nickles suggests this is accomplished when the loss caused by failure to comply with notice requirements is measured by the value of the security at the time of its wrongful disposition less the amount of the debt due before the disposition was made. 34 Ark. Law Rev. at 154. This suggestion is reached as follows:

Prior to the adoption of the Code, a majority of courts

> held that a chattel mortgagee or a conditional vendor with the power of resale was liable for conversion for failing to follow the procedures prescribed by law or the parties' contract with respect to disposing of the collateral. The usual measure of the debtor's damage was the value of the property at the time of the conversion less the balance of the obligation owed the creditor. Section 9-507(1) does not displace the common law conversion remedy for wrongful foreclosure (or at least its measure of damages) but instead, expressly perpetuates it. The section should be interpreted so as to put the debtor 'in as good a position as if the other party [the secured party] has fully performed.' Therefore, the 'loss caused by a failure to comply' with Part 5 of Article 9 must be the difference between the amount which would have been obtained from the resale of the collateral if the secured party had complied with the provisions of Part 5 and that which was actually received. . . . If the debtor's 'loss' under section 9-507(1) is measured in this way it will be identical to the compensatory damages for which the secured party would be liable under a common law conversion theory, i.e., the value of the property at the time of conversion less the outstanding balance on the debt at that time.
>
> . . . .
>
> . . . The *Norton* approach is nothing more than the common law conversion theory with a twist, i.e., the presumption regarding the property's value.

Nickles, *Uniform Commercial Code*, 34 Ark. L. Rev. 143-52, 156.

We agree with the measure of the debtor's "loss" suggested by Nickles and this is the measure urged by the appellant — the value of the collateral less the debt owed thereon. While we agree with his rule of law, we cannot find for him under the evidence.

Mayhew introduced evidence from an expert witness that the value of the collateral was a minimum of $26,000

and a maximum of $29,000. However, this witness had not driven the tractor and admitted he had "just kind of given it a sidewalk appraisal." He had seen the rig "probably within thirty days" of its repossession but did not know whether the tractor engine had a cracked block or whether the trailer had been broken in two. Loveless testified that the tractor was worth less than $8,000 when he traded it about ten days after it was repossessed. This value took into consideration that it had a cracked engine block which would cost $5,000 to repair. He testified the trailer had been "broken in two" and he traded it "sight unseen" for another trailer worth $2,500. Thus the total value of the rig according to his testimony would not exceed $10,500. By stipulation it was agreed that the balance due on the debt at the time of repossession was $11,238.47 ($2,950 owed to Loveless and $8,288.37 owed on the monthly payments assumed by Mayhew.) So, if the chancellor accepted the value of the collateral at $10,500, as testified to by Loveless, the value of the collateral at the time of repossession was less than the amount due on the debt and the failure to comply with notice requirements before sale has not caused Mayhew any loss.

Even though we try chancery cases de novo, we do not reverse unless the chancellor's findings are clearly against the preponderance of the evidence. *Hackworth* v. *First National Bank*, 265 Ark. 668, 580 S.W. 2d 465 (1979); *Loftin* v. *Goza*, 244 Ark. 373, 425 S.W. 2d 291 (1968); Rule 52, Arkansas Rules of Civil Procedure. In fact, we must affirm the decree when it appears correct from the record as a whole even if the chancellor based his decision upon the wrong reason. *Morgan* v. *Downs*, 245 Ark. 328, 432 S.W. 2d 454 (1968).

Affirmed.

CORBIN and GLAZE, JJ., not participating.

FOGLEMAN, Special Judge, joins in this opinion.

John ANDRES et al *v.* Adolph ANDRES
and Marie ANDRES et al

CA 80-425 613 S.W. 2d 404

Court of Appeals of Arkansas
Opinion delivered March 25, 1981
[Rehearing denied April 22, 1981.]

Eugene Hunt, Robert D. Smith, III, and *H. Vann Smith*, for appellants.

Acchione & King, Howard C. Yates, William L. Owen and *Allen Gates*, for appellees.

GEORGE K. CRACRAFT, Judge. Appellants brought this action in November of 1979 against appellees. They alleged that between the years 1938 and 1942 appellee, Adolph Andres, purchased by separate deeds lands aggregrating 440 acres which were acquired by funds produced from their labor, but title to which had been placed in the name of Adolph. They contend that he had refused to convey to them their interest therein and prayed that the court declare that Adolph held title thereto as trustee for their use and benefit under resulting, constructive or implied trust. They also prayed that a deed executed by Adolph Andres and his brother, John, to the appellees, Mark Stelljes and Elizabeth Stelljes, be set aside on the grounds that at the time of its execution John Andres was mentally incompetent. At the conclusion of the appellants' evidence appellees moved to dismiss the complaint by demurring to the evidence. The court sustained that motion as to the prayer for the imposition of a trust, but denied it as to the capacity of John Andres to make the deed in question. After hearing further evidence the trial court found that John Andres did not lack the capacity to execute the deed and dismissed the complaint of the appellants for want of equity. The appellants appeal from both rulings of the court.

The evidence indicated Frank Andres immigrated to the United States from Switzerland in 1928 and settled with his wife and seven children in St. Vincents in Conway County. Subsequently, Frank Andres purchased 160 acres of land which was referred to throughout the testimony as the "home place." The title to this tract is not in issue in this case. Prior to his death in 1939 he purchased 80 acres of land but had the title taken in the name of his son, Adolph Andres, as a gift.

Shortly after the conveyance to Adolph the father died. Adolph, his mother, and brothers and sisters, John, Frank,

Marie and Fides, continued to reside on the home place. Adolph, as the only adult child, was the "head of the household." He farmed the home place and rented additional acreage on which he raised cotton. Between 1939 and 1942 he purchased by separate deeds the tracts now in issue totalling 440 acres for which he paid $1.00 per acre. One 40 acre tract was purchased by John, but taken in the name of Adolph, during Adolph's absence from the farm during the winter. Adolph was the owner of some property and rented other lands, but none of the younger brothers and sisters had any property whatsoever. During the period in which the lands were acquired the younger brothers and sisters were living on the home place with Adolph and worked in the fields, did the family chores, attended livestock and assisted in maintaining the household.

There was evidence from the younger brothers and sisters that they all worked alongside of Adolph, pooling the family income, and that it was from these funds that the lands were purchased by Adolph. They testified that when the lands were purchased "we had a family conference." One of the elder sisters who worked in Morrilton, and her brother Frank, while in military service, were said to have sent money home to their mother from time to time.

In 1961 Adolph conveyed an undivided one-half interest in the tracts to the appellant John, who testified that he was holding his interest in trust for the others but that there had never been any discussions as to the respective interests of the parties or in what manner the property was to be divided.

RESULTING TRUST

Appellants contend that the court erred in granting the motion made at the conclusion of their evidence asserting that the court is required on such a motion to give the evidence its strongest probative value in favor of the appellants and to grant the motion to dismiss (demurrer to the evidence) only if the evidence, when so considered, fails to make a prima facie case. *Lafayette County Industrial Devel. Corp.* v. *First National Bank*, 246 Ark. 109, 436 S.W. 2d 814. Appellees argue that the "prima facie" rule does not apply

in a case seeking to impose a resulting trust where the proof is required to be "full, clear and convincing." *Nelson* v. *Wood*, 199 Ark. 1019, 137 S.W. 2d 929. We find the appellants' proof to fail whichever be the proper test.

Appellants stated in oral argument, and we agree, that what is sought to be imposed is a resulting trust. In general a resulting trust is said to arise when property is bought by one person with money or assets of another and title is taken in the name of the purchaser rather than of the person furnishing the consideration. In order to constitute a resulting trust the purchase money or a specified part of it must have been paid by another or secured by another at the same time, or previous to the purchase, and must be a part of the transaction. In other words, the trust results from the original transaction at the time it takes place and at no other time. *Bland* v. *Talley*, 50 Ark. 71, 6 S.W. 234; *Castleberry* v. *Castleberry*, 165 Ark. 505, 264 S.W. 979; *Mortensen* v. *Ballard*, 209 Ark. 1, 188 S.W. 747; *Cherokee Carpet Mills, Inc.* v. *Worthen Bank and Trust Co.*, 262 Ark. 776, 561 S.W. 2d 310.

The testimony is typical of family farm situations. Adolph was the only adult among the children of the family at that time. His brothers and sisters were still in their teens. As head of the household he farmed the home place and rented other acreages close by. These lands and their products provided all of the family maintenance and income. As in all farm families the younger brothers and sisters did their chores on the farm. There is no evidence that they were ever paid for this work or were expecting to be paid. They were fed, clothed, housed and educated from the income derived from the lands farmed or leased by Adolph. There is no evidence that he ever had in his possession any money belonging to any of them.

Although there was evidence that some of the children who did not live in the household had sent money home to help support the family, there was no evidence that they ever paid any money to Adolph or that Adolph had in his possession at any time any specified amounts of money belonging to any of them.

The case of *Castleberry* v. *Castleberry*, supra, cannot be distinguished in any material part. There the court declared:

> The law is well settled that in order to create a resulting trust, the purchase money or some part must be paid by another or secured by another previous to or at the time of the purchase. Here at the time of the alleged agreement, no money was put up or secured by any of the parties here with which to purchase any lands, except E. N. Castleberry who owned a horse of the value of $50. None of the other parties to the alleged agreement had any property whatever. We think that the most that can be said of the relationship here is that the parties agreed to live together, work, make a living, bargain for, and acquire lands, to be paid for out of their joint earnings, which we think falls far short of establishing a resulting trust.
>
> A resulting trust has been defined by this court in *Kerby* v. *Feild*, 183 Ark. 714, 38 S.W. 2d 308, as follows: 'In order to constitute a resulting trust, the purchase money or a specified part of it must have been paid by another or secured by another at the same time, or previously to the purchase, and must be a part of the transaction. In other words, the trust results from the original transaction at the time it takes place and at no other time, and it is founded on the actual payment of money and upon no other ground. *Red Bud Realty Co.* v. *South*, 96 Ark. 281, 131 S.W. 2d 340. . . .

Appellants had the burden of proving by clear and convincing evidence not only that the funds making up the purchase price belonged to them, but also the definite amount provided by each of them, *Harbour* v. *Harbour*, 207 Ark. 551, 181 S.W. 2d 805. The evidence presented falls far short of establishing either element.

CONSTRUCTIVE OR IMPLIED TRUST

Appellants' evidence also failed to establish a constructive or "implied trust." Constructive trusts are said to arise and be imposed in favor of persons entitled to a beneficial

interest against one who secured legal title either by an intentional false oral promise to hold title for a specified purpose, and having thus obtained title, claims the property as his own, or who violates a confidential or fiduciary duty or is guilty of any other unconscionable conduct which amounts to constructive fraud. *Armstrong* v. *Armstrong*, 181 Ark. 597, 27 S.W. 2d 88; *Walker* v. *Biddie*, 225 Ark. 654, 284 S.W. 2d 840; *Nelson* v. *Wood*, supra. Where actual fraud is practiced in acquiring legal title, the arising trust is referred to as a trust ex maleficio. *Barron* v. *Stuart*, 136 Ark. 481, 207 S.W. 22.

The term "implied trust" includes constructive trusts, trusts ex maleficio and resulting trusts, all of which arise by implication of law. *Ripley* v. *Kelly*, 207 Ark. 1011, 183 S.W. 2d 794; *Stacy* v. *Stacy*, 175 Ark. 763, 300 S.W. 437. Resulting trusts, trusts ex maleficio and constructive trusts are "implied trusts." Such trusts arise whenever it appears from the accompanying facts and circumstances that the beneficial interest should not go with the legal title. *Stacy* v. *Stacy*, supra; *Warren* v. *Wheatley*, 231 Ark. 707, 331 S.W. 2d 843; *Hunt* v. *Hunt*, 202 Ark. 130, 149 S.W. 2d 930.

The evidence does not show that the title was obtained by Adolph upon any false or fraudulent agreement to take title in his name for their benefit or to hold title for a specific purpose or that it was the clear intention of the parties that he do so. None of the appellants so testified. They "figured" that they might acquire an interest someday or "hoped" that they would be included in some final disposition, but there are no words implying that Adolph had ever made any express or implied promise to that effect or that the purchases had ever been discussed in terms of agreement. There was no showing that he was under any confidential or fiduciary duty to do so. Simply because the parties were related or lived in the same household does not alone establish a confidential relationship. *Jones* v. *Gachot*, 217 Ark. 462, 230 S.W. 2d 937; *Bottenfield* v. *Wood & Miller*, 264 Ark. 505, 573 S.W. 2d 307; *Castleberry* v. *Castleberry*, supra.

LACHES

The last of these tracts was acquired by Adolph in 1942.

A period of thirty-eight years elapsed before any of the appellants claimed that the purchases were being made for their use or benefit. None of them sought to assert any right of equitable ownership until after natural gas was discovered in the area and a well drilled on the property. The chancellor held that they were barred by doctrine of laches as a result of this long delay. We agree.

In *Castleberry* the court commented on similar circumstances as follows:

> At the time of E. N. Castleberry's death in 1916, his son Arthur Castleberry (one of the appellants), was two years of age. Arthur and his mother continued to live on the property for a few years then rented it out, sold timber from some of the land, and operated it without any complaint from these appellees until shortly after 1935 when this litigation was commenced. Thus appellees waited nearly twenty years following E. N. Castleberry's death to assert claims to this property. We think they are too late.

VALIDITY OF JOHN ANDRES'S DEED

In 1974 Adolph made tentative arrangements with the appellee, Stelljes, to move onto the property at a location where they could be helpful in looking after John, who had become lonesome after the death of his mother. It was testified that after discussing that matter with John, Adolph and his wife joined with John in a deed dated April 9, 1974, in which they conveyed 40 acres of the property to Mark and Elizabeth Ann Stelljes, who thereafter resided in a trailer on the property.

Appellants offered testimony tending to prove that John Andres was mentally incompetent to execute a deed on that date and sought to have the deed in question set aside. Dr. Robert D. Brooks, a psychiatrist in St. Louis, examined Andres in August 1974, and found that John suffered from a psychotic condition at that time. It was his further finding that John was incapable of making valid judgments, and concluded that the history given by John "strongly sug-

gested" that he could have been ill to some extent for at least the preceding six months. There was testimony from other witnesses tending to show incompetency.

There was, however, testimony that the deed to Stelljes was thoroughly discussed by John, Adolph and Stelljes, and that in these discussions John had placed some stipulations on the transaction which were subsequently met. There was testimony that on the date on which the deed was signed and for some time before and after that date, John was perfectly normal and was capable of executing a valid deed. There was testimony not only as to his mental condition at the time, but that John had spent a full day after the execution of the deed helping the Stelljeses move their trailer onto the property. During that entire period they noticed nothing abnormal about his activities. There was evidence from one of the appellants that John had informed her about the execution of the deed within a month after it was delivered.

The fact that John may have lacked the capacity to execute a deed in August or that his incapacity may have existed at some earlier date is not controlling. The determination of whether a deed is void because of the mental capacity of a grantor is measured by his mental ability *at the time* of the execution of the deed. If he is possessed of the requisite capacity *at that time*, the deed is valid. *Donaldson* v. *Johnson*, 235 Ark. 348, 359 S.W. 2d 810. The burden is upon the attacking party to establish mental capacity, *Culling* v. *Webb*, 208 Ark. 631, 187 S.W. 2d 173.

The testimony of the psychiatrist is not conclusive. It must be considered along with all other evidence bearing on the issue. There was sufficient evidence to warrant the finding that John did have the required mental capacity and awareness on the date this deed was executed.

The findings of the chancellor will not be reversed unless clearly against a preponderance of the evidence. Since the question of a preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the chancellor. *Hackworth* v. *First National Bank of Crossett*, 265 Ark. 668, 580 S.W. 2d 465.

We affirm.

FARM BUREAU MUTUAL INSURANCE
COMPANY OF ARKANSAS, INC. *v.*
H. W. KIZZIAR and Jessamine KIZZIAR

CA 80-458 613 S.W. 2d 401

Court of Appeals of Arkansas
Opinion delivered March 25, 1981

Laser, Sharp & Huckabay, for appellant.

Cliff Jackson, for appellees.

GEORGE K. CRACRAFT, Judge. The appellant, Farm Bureau Mutual Insurance Company of Arkansas, Inc., appeals from an award of attorney's fee against it in the amount of $20,000 pursuant to provisions of Ark. Stat. Ann. § 66-3238 (Repl. 1980), asserting that the award was excessive. Appellees, Kizziars, cross-appeal stating that the award was inadequate.

The appellees were engaged in an egg production business in Hot Spring County, as a part of which they maintained two separate chicken houses. In January of 1978, during a severe winter storm accompanied by substantial amounts of snow and other forms of frozen precipitation the appellees' chicken houses collapsed. The policy of insur-

ance issued by the appellant to the appellees insured the chicken houses against loss "by wind and hail," but specifically excluded loss due to "ice, snow or snowstorm." The appellant denied liability under the policy on the ground that the loss in question was the result of ice, snow or snowstorm, and was therefore excluded. Appellees contend that the loss was not the result of ice or snow but the result of hail and sleet which were not excluded. The case was tried to a jury which found that the loss resulted from sleet and was not therefore within the exclusion, and returned a verdict for the face amount of the policies of $76,000. Subsequently the trial court, after hearing evidence on the value of the attorney's services, entered judgment for the amount awarded by the jury plus twelve percent penalty, and awarded a $20,000 attorney's fee. The appeal and cross-appeal are taken only from that part of the judgment awarding attorney's fees.

Appellant contends that the award was grossly excessive, that the court did not properly consider the governing factors to be taken into consideration in an award of attorney's fee, and considered elements which were improper. In *Equitable Life Assurance Society* v. *Rummell*, 257 Ark. 90, 514 S.W. 2d 224, the court declared that the purpose of this statute is to permit an insured to obtain the services of a competent attorney and the amount of the allowance should be such as well prepared attorneys will not avoid this class of litigation or fail to devote sufficient time for thorough preparation. It contemplates not a speculative or contingent fee, but such a fee as would be reasonable for a litigant to pay his attorney for prosecuting such a case.

In *Rummell* the court reaffirmed its prior declarations in *Old Republic Insurance Co.* v. *Alexander*, 245 Ark. 1029, 436 S.W. 2d 829, as to the necessary factors to be considered:

> In *Old Republic* we enumerated as pertinent factors to be considered in a case such as this the time and amount of work required of the attorney, the ability to meet the issues that arise and the sum recovered or the amount involved in the action. Similar factors to be used as guides to determining reasonableness of a fee are set out in the Code of Professional Responsibility promul-

gated by the American Bar Association and adopted by this court. See DR 2-106 (B); EC 2-18. They are:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

3. The fee customarily charged in the locality for similar legal services.

4. The amount involved and the results obtained.

5. The time limitations imposed by the client or by the circumstances.

6. The nature and length of the professional relationship with the client.

7. The experience, reputation, and ability of the lawyer or lawyers performing the services.

8. Whether the fee is fixed or contingent.

Appellees' attorney testified, and two expert witnesses agreed, that the question presented by this case was a most novel one in this state and required extensive research and skill in its presentation.

The attorney testified that although he did not keep accurate time records, he had carefully reviewed his file and was definite in his assertion that he and his partners had expended in excess of two hundred and fifty hours in preparation and trial of this case. He and his expert witnesses, Winslow Drummond, an attorney with vast experience in defending such cases, and William Wilson, an attorney with similar experience in prosecuting such cases, all testified that they had given careful consideration to each of the factors set out in *Old Republic* and that in their opinion a reason-

able fee in this case should not be less than $25,000.

The appellant urges as ground for reversal that appellees' attorney at no time submitted an itemized list or time sheets reflecting with accuracy the number of hours expended, relying on language in *Old Republic* as follows:

> We find nothing affording any satisfactory means by which the time and effort spent in preparation for trial can be measured with any degree of accuracy. We are unaware of resort to this important factor in the trial judge's award, as his only reference to any guideline was his consideration of the *responsibility* assumed by the attorney in accepting employment and preparation for trial. These factors alone do not, in our opinion, support the amount allowed. (Emphasis supplied.)

In *Old Republic* no testimony was taken by the court on the award of attorney's fees. The attorney did not testify with regard to the time expended or other factors pertinent to the issue. There were no supporting opinions from others who were knowledgeable of the facts and circumstances. In the case at bar appellees' attorney did so testify and each of the experts who testified in his behalf, as well as the court, had that information before them in arriving at their respective determinations of what would constitute a reasonable fee.

It is apparent from the testimony of all three attorneys who testified with regard to the fees, that they had arrived at their determination of a reasonable fee by considering and following the accepted guidelines laid down in *Old Republic*.

The fact that the court in its discretion awarded a lesser sum does not warrant reversal. The allowance of fees by the trial court must be affirmed unless the appellant demonstrates, or the record shows, that the allowance is excessive, inadequate or unreasonable. We recognize the superior perspective of the trial judge in assessing the evidence bearing on the applicable factors because of his intimate acquaintance with the record and the quality of services rendered. There is no fixed formula or policy to be consid-

ered in arriving at such fees other than the rule that the appropriately broad discretion of the trial court in such matters must not be abused. *Equitable Life Assurance Society* v. *Rummell*, supra; *Federal Home Life Insurance Co.* v. *Hase*, 193 Ark. 816, 102 S.W. 2d 841.

We cannot find that the appellant has demonstrated or that the record shows that the trial court abused his discretion in making the allowance.

We affirm.

COOPER, J., and GLAZE, J., not participating.

SPRINGDALE FARMS *v.* Charles L. DANIELS, Director, and Nolan LYLE

E 80-256 613 S.W. 2d 117

Court of Appeals of Arkansas
Opinion delivered March 25, 1981

No briefs filed.

GEORGE K. CRACRAFT, Judge. The appellant appeals from an order of the Board of Review affirming a decision of the Appeal Tribunal that the appellant's appeal from the initial determination by the agency was untimely filed. The record discloses that during the month of July 1980, the appellant-employer had four former employees make application for benefits under the Employment Security Act. According to the evidence the employer denied that any of the employees were entitled to benefits, and filed a timely response with the agency. On September 4th the appellant-employer had not heard from the Employment Security Division as to the disposition of any of the four claims. He thereupon called their office and was advised by a Mr. Unger that three of the claimants had not followed up on their claims and these claims had been denied. He was informed that under such circumstances no notification would be given to the employer. He was then informed that the fourth employee, Nolan Lyle, had been allowed benefits by the agency on August 8th, and a notice of that determination mailed to him. The employer responded that he had received no such notice and requested an appeal.

On that same day he wrote a letter to the Employment Security Division again setting out the circumstances and asserting that he had not received the notice. He again requested appeal of the determination as to the employee, Nolan Lyle. The Referee set the matter down for a hearing on appeal stating on the notice that its purpose was "to determine if the appeal was timely and if the claimant was disqualified at having been discharged for misconduct in connection with the work." Notice of that appeal and the date same was to be heard was mailed to and received by the employer.

On September 25th a hearing was held on both issues. Evidence as to the reason the employee left the job was taken but no finding was made by the Tribunal on this point. On the second point (timeliness of the appeal), the employer was asked if he had received a notice of the agency's determination of entitlement to benefits and he denied that he had. The employer again recounted as to how he had learned of the allowance of that claim and referred to his letter to Mr. Unger requesting the appeal. There was no other evidence of any kind taken on the question of the timeliness of the appeal. There is no documentation in the record as to any notice having been sent to him. There was no evidence that such a notice had been mailed or even that it had been prepared. No copy of such notice appears in the record. The only other reference to the notice in question was found in the notice of appeal signed by Mr. Unger on September 8, 1980, which contained the following notation: "Please note that the employer did not receive notice of determination. Our 501(3) was apparently lost in the mail."

The opinion of the Appeal Referee stated: "The record shows that the determination in this case was mailed or delivered on August 8, 1980, and the appeal was filed on September 8, 1980, which is after the expiration of the fifteen days allowed by law." The record which we have before us for review shows nothing with regard to the mailing or delivery of a copy of the determination made by the agency. There is no evidence in the record to sustain that finding by the Referee, which was affirmed by the Board of Review.

Section 6(d)(2) of the Arkansas Employment Security Act expressly provides that if the appeal is not perfected within the fifteen day period "as a result of circumstances beyond the appellant's control, such appeal may be considered as having been filed timely." The only evidence in the record is that the notice was not received, a circumstance beyond the appellant-employer's control. We therefore reverse the decision of the Board of Review and remand the case for a determination on the merits of appellant's appeal.

Reversed and remanded.

Jimmy Fredrick SNYDER *v.* ALCOHOLIC BEVERAGE CONTROL BOARD

CA 80-447 613 S.W. 2d 126

Court of Appeals of Arkansas
Opinion delivered March 25, 1981

David F. Guthrie, for appellant.

Donald R. Bennett, for appellee.

JAMES R. COOPER, Judge. This is an appeal from a decision of the Pulaski Circuit Court affirming a decision by the Alcoholic Beverage Control Board denying a retail liquor permit to appellant. Appellant filed his petition for review in the Circuit Court of Pulaski County under Ark. Stat. Ann. § 5-713 (Supp. 1979).

Based on certain findings, the Board found that it would not be to the convenience and advantage of the public to issue the permit applied for by appellant. Under Ark. Stat. Ann. § 48-301 (Repl. 1977) the Alcoholic Beverage Control Board is charged with the responsibility of restricting the number of permits in this state to dispense liquor. It is required to determine whether the public convenience and advantage will be promoted by the issuance of permits by increasing or decreasing the number thereof. Appellant argues that the decision of the Board, affirmed by the trial court, was not supported by substantial evidence and was arbitrary, capricious and an abuse of discretion.

Ark. Stat. Ann. § 5-713 (Supp. 1979) provides in pertinent part:

> (H) The court may affirm the decision of the agency or remand the cause for further proceedings. It may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) in violation of constitutional or statutory provisions;
>
> (2) in excess of the agency's statutory authority;
>
> (3) made upon unlawful procedures;
>
> (4) affected by other error or law;
>
> (5) not supported by substantial evidence of record;

or

(6) arbitrary, capricious, or characterized by abuse of discretion.

Upon judicial review of administrative decisions, we must review the entire record and determine whether there is substantial evidence to support the administrative findings. *Citizens Bank* v. *Ark. State Banking Board*, 271 Ark. 703, 610 S.W. 2d 257 (1981).

The Board's findings are:

1. That there is no evidence contained within the record to reflect that applicant Jimmy Fredrick Snyder is not legally and morally qualified to hold the applied for permit.

2. That there is evidence contained within the record that the premises sought to be permitted is not suitable at present for sale of retail liquor and would have to undergo significant adaptation;

3. That there is evidence contained within the record that there are significant numbers of residents in the area who both oppose and recommend the granting of the applied for permit;

4. That the Chief of Police of the Camden Police Department has registered written objection of the permit;

5. That Lieutenant Paladino of the Camden Police Department did appear at said hearing and state that the area in which the sought to be permitted premises are located is one of considerable trouble to the Camden Police and that the immediate area is well saturated with retail beer outlets at the present time;

6. That the building sought to be permitted is immediately across the street from where significant numbers of children play.

It does not appear that the first finding of fact would have any bearing on the denial of the application since it found no evidence to indicate that Mr. Snyder was not morally and legally fit to possess the permit. Finding number 3 is not particularly relevant as to whether or not the public convenience and advantage would be served by the issuance of this permit, since any application for a beer or liquor permit would be certain to create both opposition and support. Finding number 4 related to the fact that chief of police objected to the permit is of some significance. The testimony indicated that the chief of police believed that there were enough permits in the Camden area and that he would more than likely oppose any additional permits. This specific application was the one before the Board and whether or not it should have been issued should have been determined based on the evidence related to public convenience or advantage. Support or opposition by law enforcement officials may be based on their beliefs as to public convenience or advantage, but the Board must make its own determination on this issue based on evidence presented to it. Finding number 5 related to the fact that Lieutenant Paladino of the Camden Police Department indicated that the area was one of considerable trouble and that the area was well saturated with retail beer outlets. This finding is totally irrelevant, since the application was not for a beer outlet but for a retail liquor outlet. In fact, appellant already possessed a retail beer permit.

This leaves for consideration findings 2 and 6. Finding number 2 indicated that the premises were not suitable at present and would have to undergo significant alterations. The evidence indicates that the present operation consisted of a grocery store, gas station, and retail beer outlet. Appellant indicated that he intended to dispose of the grocery operation as well as the gasoline operation to make room for the retail liquor outlet if it was approved. Virtually any existing business which sought to change to a retail liquor outlet would require some modifications, if only the addition of shelving and other items to make the operation more convenient for customers. We cannot see how this finding relates to the public convenience and advantage.

Finding number 6 related to the fact that the building was immediately across the street from an area where significant numbers of children played. This finding could relate directly to the public convenience and advantage in the issuance of this permit. The evidence in this case does not show how the issuance of a retail liquor permit would be more detrimental to the children who played across the street than was the existence of the retail beer permit at the same location.

We recognize that the legislature intended that the number of permits in the State of Arkansas should be limited, and that permits should be issued or revoked based on the public convenience and advantage. To carry out the legislative intent and the requirements of the statute the Board must look at factors which directly weigh on the public convenience and advantage.

There is no evidence in this case to indicate that the public would be inconvenienced or would be placed at a disadvantage by the issuance of this permit. In fact, the Board seems to have based its decision primarily upon the fact that there was oppositon from a significant number of persons, including the chief of police and a lieutenant on the police department of the city of Camden. The number or official position of persons who object or support the issuance of retail liquor permits is of no significance under the statute. The reasons those persons oppose or support specific permit applications may be very significant. The reasons may clearly show whether the public convenience or advantage will be served.

In this case the Board's findings are not related to the public convenience or disadvantage and its decision is not supported by substantial evidence. Therefore, the case is reversed and remanded with directions to return the case to the Alcoholic Beverage Control Board for proper action consistent with this opinion.

Reversed and remanded.

Gary Kenneth HENSON *v.* William L. MONEY
and Betty Sue MONEY

CA 80-359 613 S.W. 2d 123

Court of Appeals of Arkansas
Opinion delivered March 25, 1981

Barron, Coleman & Barket, for appellant.

L. David Stubbs, for appellees.

DONALD L. CORBIN, Judge. This is an appeal in an adoption case from the probate court of Desha County. The appellant, Gary Kenneth Henson, is the natural father of Gary Kenneth Henson, II, the minor adoptive child. The appellees are the former Mrs. Henson (Betty Sue Money) and her present husband, Dr. William L. Money. The court in its final order of adoption ruled that pursuant to Ark. Stat. Ann. § 56-207 (a)(2) (Supp. 1979) appellant for a period of at least one year had failed to significantly, without justifiable cause, provide for the care and support of the minor child as required by the terms of an Oklahoma divorce decree dated July 28, 1972; and that the consent of the appellant as father of the minor child was not required in the adoption proceedings.

Appellant raises one point on appeal:

THE COURT ERRED IN GRANTING THE PETITION FOR ADOPTION BECAUSE THE APPELLEES DID NOT ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT THE APELLANT FAILED SIGNIFICANTLY TO SUPPORT OR COMMUNICATE WITH THE MINOR CHILD WITHOUT JUSTIFIABLE CAUSE FOR A PERIOD OF MORE THAN ONE YEAR.

The statute that is the basis for this action is:

Ark. Stat. Ann. § 56-207(a) (2) (Supp. 1979). Persons as to whom consent and notice not required. — (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.

A recent line of cases interprets this provision of the revised Uniform Adoption Act of Arkansas. In *Harper* v. *Caskin*, 265 Ark. 558, 580 S.W. 2d 176 (1979), the Court required that a party seeking to adopt a child without the consent of a natural parent bears the heavy burden of proving by clear and convincing evidence that the parent has failed significantly and without justifiable cause to communicate with the child or to provide for the care and support of the child as required by law or judicial decree. The clear and convincing standard was reaffirmed in *Pender* v. *McKee*, 266 Ark. 18, 582 S.W. 2d 929 (1979). This case further interprets the statute to hold:

> The question was whether the father has "failed significantly" for a period of one year to support his child "without justifiable cause." "Failed significantly" certainly does not mean "failed totally." It only means that the failure to support must be significant, as contrasted with an insignificant failure. It denotes a failure that is meaningful or important.

Here, the court found there was sufficient evidence to support its findings that appellant had failed significantly to support his son. There was no evidence to show that the appellees' conduct precluded appellant from making his support payments directly to the Oklahoma court clerk pursuant to the provisions of the Oklahoma divorce decree. In fact, appellant admitted to a substantial income and that he voluntarily chose not to pay the support "out of spite" to his former wife, one of the appellees herein. The trial court found this refusal to pay support to be an arbitrary act without just cause or adequate excuse. See *Roberts* v. *Swim*, 268 Ark. 917, 597 S.W. 2d 840 (Ark. App. 1980).

Rule 52(a) of the Arkansas Rules of Civil Procedure provides that the findings of fact by a trial judge shall not be

set aside unless clearly erroneous (clearly against the preponderance of the evidence). We find no error by the trial judge. The sporadic payments by the appellant father and his avowed reason of spite in not paying child support for a 51-week period, when financially capable of doing so, places this case squarely within the four corners of *Pender* v. *McKee, supra*. The test of the statute was met if the child's father failed, in a meaningful or important aspect, to support him, without justifiable cause, for any consecutive period constituting a total of one year between the time of the divorce decree on July 28, 1972, and the time of the filing of the petition for adoption on the 9th day of April, 1979. Delinquency in support is not an ambulatory thing which can be recalled, cancelled out or nullified merely by a change of the father's mind or desire. *Pender* v. *McKee; supra.* Resumption of payment of support for a brief period, particularly after commencement of the adoption proceeding or just prior thereto, is not sufficient to bar an adoption without the consent of the delinquent father by starting a new one-year period of non-support under the statute. *Pender* v. *McKee, supra*.

The probate judge correctly held that the consent of this father was not required.

Affirmed.

GLAZE, CLONINGER and COOPER, JJ., dissent.

TOM GLAZE, Judge, dissenting. I must respectfully dissent. The trial court based its decision in this cause on our Supreme Court's holding in *Pender* v. *McKee*, 266 Ark. 18, 582 S.W. 2d 929 (1979). Although the decision is instructive regarding certain aspects of the case at bar, it is in no way controlling. I do believe that the trial judge was correct in relying on *Pender* in his finding that the appellant had failed to significantly support the parties' minor child for a period of one year. However, I believe that he has misread the *Pender* decision when deciding that appellant failed to pay the court ordered child support without justifiable cause. In his findings, the trial judge found that the appellant testified that the reason he did not pay child support was

that visitation was made so difficult that, to him, visitation appeared to be contingent upon payment. At this point in his findings, the trial judge indicated that he did not feel that this was any justification for nonpayment of support because of the *Pender* decision. I strongly disagree with this interpretation of the decision in *Pender*. Some confusion may have arisen because of a statement by the court in *Pender* to the effect that a father's duty to support his child cannot be excused on the basis of the conduct of others, unless that conduct prevents him from performing his duty. In support of this statement, the court in *Pender* cites four of its decisions, all of which arise out of divorce and support actions initiated in chancery court proceedings.

It is true that ordinarily the chancery court has no power to remit accumulated court ordered support payments. *Kirkland* v. *Wright*, 247 Ark. 794, 448 S.W. 2d 19 (1969). There are, however, circumstances in which the court *is* justified in withholding judgment for unpaid child support installments such as when the mother, having custody, deprives the father of temporary custody or visitation rights by failing to comply with the terms of a valid decree governing those rights. In such cases, the chancery court is not required to give judgment for arrearages accruing during the time the mother's actions have defeated the father's visitation rights. *Bethell* v. *Bethell*, 268 Ark. 409, 597 S.W. 2d 576 (1980); *Holley* v. *Holley*, 264 Ark. 35, 568 S.W. 2d 487 (1978); *Sharum* v. *Dodson*, 264 Ark. 57, 568 S.W. 2d 503 (1968); *Massey* v. *James*, 251 Ark. 217, 471 S.W. 2d 770 (1971); and *Antonacci* v. *Antonacci*, 222 Ark. 881, 263 S.W. 2d 484 (1954). The facts in the *Massey* and *Antonacci* cases are similar. In *Massey*, the parties agreed that the mother would have custody of the parties' son for nine months and that the father would have custody during the three summer months. The agreement also required the father to make child support payments of $60 per month during the periods that the son was with the mother. When the divorce decree was entered, the father was living in Arkansas and the mother was living in California with the child. The decree provided that the father would bear the expense of bringing the child to Arkansas for the summer and returning the child in the fall. Sometime after the divorce, the father, who had remar-

ried, drove to California to pick up his son for the return trip to Arkansas. The mother interposed various obstacles to the change of custody and trip to Arkansas. The court did not require Massey to pay the child support for the summer months and, in so holding, stressed the fact that there was no indication that the son would suffer if the payments were not made.

In the instant case, the parties were divorced in Oklahoma, she was awarded custody and support and later moved to Arkansas. Approximately two years later, she married Dr. Money. At this time, the appellee, now Mrs. Money, informed the appellant that Dr. Money desired to adopt the parties' son, Gary. The appellant refused. Irrespective of appellant's refusal, Dr. and Mrs. Money filed an action to adopt Gary. Appellant would not agree and the action was dropped by Dr. Money. This action is at least the third effort, legal or otherwise, that Dr. Money has pursued in an attempt to adopt Gary. Appellant has related that he has had difficulties in obtaining his visits with his son and testified that he was refused visitation if he failed to make a child support payment. Appellant testified at trial that he knew his son was being financially cared for and for a fifty-one week period he refused to send support because of spite due to the problems he encountered in trying to exercise visitation rights with his son. On the other hand, appellant did support his son over a nine year period except for the fifty-one week period previously mentioned. He admittedly was late in his payments from time to time, but Mrs. Money never attempted to seek enforcement of the child support during the fifty-one week period nor at any other time. Rather, she allowed the fifty-one week period to build up in child support arrears with the obvious purpose of filing the adoption proceedings which she has manifested an intent to consummate since her marriage to Dr. Money.

We review *de novo* the proceedings below and will affirm unless the decision is clearly erroneous according to Rule 52 of the *Arkansas Rules of Civil Procedure*. From the record, I believe that the appellant was justified to withhold child support under the circumstances described by the evidence below, which is a legal consideration that the trial

judge failed to apply. The evidence clearly reflects that appellant encountered visitation problems because of difficulties existing between appellant, Dr. and Mrs. Money. Our courts would not, nor would I, allow a father to avoid his duty to pay child support when he is so obligated. Neither should the mother be permitted to in any way withhold or make difficult the visitation privileges to which a father is entitled. Only when a mother has withheld or made difficult the visitation rights have our courts justified the nonpayment of child support. The facts at bar justified, under our case authority, the appellant to withhold support, and I would, therefore, deny the adoption. Therefore, I would reverse and remand with directions to vacate the trial court's decree of adoption.

I am authorized to state that Cooper and Cloninger, JJ., join in this dissent.

Randy SPRINGER *v.* Charles L. DANIELS, Director of Labor, and METROPOLITAN FENCE COMPANY

E 80-275 613 S.W. 2d 121

No briefs filed.

TOM GLAZE, Judge. The claimant, Randy Springer, brings this appeal from an adverse decision by the Board of Review that he is ineligible for unemployment benefits under Section 4 (c) of the Arkansas Employment Security Law. Section 4 (c) provides that claimants will be eligible for benefits if they are unemployed, physically and mentally able to perform suitable work, available for work and do those things which a reasonably prudent individual would be expected to do in order to secure work. The Board held that Springer was not unemployed as that term is used under Section 4 (c) because he remains attached to Metropolitan Fence Company, the employer and corporation, as an officer, director and stockholder. Springer and his father each own forty-nine per cent of the stock in the company and an accountant owns two per cent. The Board adopted the decision of the Appeal Tribunal that Springer is self-employed because of the position held and the interest he retains in the Company. The Board found that the slow-down in work this employer corporation has experienced is simply one of the market vagaries of being self-employed.

The Board relied on our earlier case of *Alexander* v. *Walnut Fork Design*, 267 Ark. 1130, 593 S.W. 2d 493 (Ark. App. 1980) wherein our Court affirmed the Board's denial of benefits under Section 4 (c) to a claimant who was a stockholder and president of a closed corporation employer which no longer had work. The reason claimant was denied benefits in *Alexander* was that he refused to seek work and, therefore, was not available for work or doing those things one would normally do in order to find employment as is required under Section 4 (c).

In the instant case, Springer last worked on August 22, 1980, because the Company was out of work. He was not expected to be rehired by the Company until the Spring of 1981. Unlike the claimant's refusal to work in *Alexander*, Springer filed with the Arkansas Employment Security

Division for job services on August 25, 1980, and also applied for work at three businesses. The record reflects that Springer was at all times available for and actively seeking work. He complied with all of the requirements set forth in Section 4 (c).

It appears that the Board denied benefits to Springer merely because he is an officer and retains a shareholder's interest in the Company. However, he is also an employee of the Company, and it is horn book law that a corporation is a distinct, separate entity from its stockholders and officers. *Shipp* v. *Bell & Ross Enterprises, Inc.*, 256 Ark. 89, 505 S.W. 2d 509 (1974). Springer did state that he was self-employed, but the Board in its findings recognized that he, in fact, worked for a corporation. A grave injustice would be done if benefits were denied a claimant who would otherwise be eligible except that he erroneously stated that he was self-employed. Springer and the Company are separate, and there is nothing in the record which would indicate that they should be treated as one. The Company is the employer and Springer was its employee.

For the foregoing reasons, we hold that the Board's decision is contrary to law, and there is no substantial evidence to support its finding that Springer was employed under Section 4 (c).

Reversed and remanded.

John Clifton GAYLORD *v.* STATE of Arkansas

CA CR 80-69 613 S.W. 2d 409

Court of Appeals of Arkansas
Opinion delivered March 25, 1981
[Rehearing denied April 22, 1981.]

Larry R. Froelich, for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell*, Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. This appeal is a result of the appellant's, John Clifton Gaylord, conviction on the charges of the manufacture of a controlled substance (marijuana) and its possession with intent to deliver. He was sentenced to five years imprisonment and a $2,000 fine. Gaylord raises one primary issue: The trial court erred in refusing to suppress the marijuana evidence since it was seized by law enforcement officers in an illegal warrantless search.

For the most part, the facts are not in dispute. Gaylord, before and at the time of his arrest, was a resident of Stone County and was being visited by his step-brother, Harold Hall, and a friend, Raymond Hine. Hall and Hine were from Florida. The three men were occupying two premises on some acreage outside Mountain View, Arkansas, near the community of Pleasant Grove. The course of events which led officers to the discovery of the marijuana grown and located on one of the two described premises actually commenced in Mountain View.

Just after midnight on August 28, 1979, two officers, Larry Clark and Jackie Heck, responded to a telephone call from a person requesting that they investigate a van with a Florida license tag which was parked blocking a private driveway. During the time Clark and Heck checked out the van, Hall had returned to the vehicle. The officers discovered some marijuana in the van and on Hall and subsequently arrested and charged him with possession of a controlled

substance. By this time, three additional law enforcement officers, McCasland, Alexander and Avey, had joined Clark and Heck in the investigation and arrest of Hall, and Clark had nothing else to do with the subsequent events.

The officers were dissatisfied with the information that Hall gave them, so they began to conduct an investigation in the early morning hours on August 28 to determine where Hall lived, and the source of the marijuana they had found. Two of the officers, McCasland and Alexander, eventually encountered Gaylord and Hine, who were driving a vehicle. The officers stopped them and when Gaylord was unable to produce a driver's license or a proper motor vehicle registration, the officers arrested Gaylord and Hine and took them to jail. By the time they arrived at the jail, both Gaylord and Hine had identified themselves, stated who Hall was and explained where they lived. It was now about 6:30 or 7:00 A.M. on August 28, and all four officers, McCasland, Alexander, Heck and Avey, decided to find the house where the three men lived to determine if someone else was there, and as one officer said, "... to see what he (Hall) was hiding."

In driving to the men's residence, the officers proceeded along a private road and were required to go around a gate with a "No Trespassing" sign which was apparently placed there by a neighbor who owned property over which the road traversed before reaching the dwelling where the men lived. They then continued on the road up a canyon for approximately two miles where the officers then came to a second gate with a "Beware of Dog" sign. The gate had no fence attached. It was locked, but the hinges were not in place so the officers merely picked the gate up and set it back to gain access to the other side. The officers were then able to drive to the house where the men lived by following a cut-off road. No one was occupying the house when the officers arrived and departed their vehicle. Officer McCasland testified that he looked inside a tent located behind the house and it contained marijuana. Officers Alexander and Avey had walked up a hill in the road near the house and saw the marijuana patch.

It was the evidence obtained by the officers from this

marijuana patch which was the basis for Gaylord's conviction. All other evidence which was seized and garnered by the officers, including contraband found in the tent and house, was duly suppressed by the judge at the trial of this cause. The trial judge denied Gaylord's motion to suppress the marijuana evidence from the marijuana patch found on his property, thereby rejecting Gaylord's contention this evidence was seized illegally without a search warrant. The State argued at trial, and now argues on appeal, that no search warrant was necessary because the marijuana patch discovered by the officers was in plain view and in an open field, an area not protected by the Fourth Amendment. The Supreme Court in *Hester* v. *United States*, 265 U.S. 57 (1924), held that the Fourth Amendment to the Constitution only protects against unreasonable searches and seizures of persons, houses, papers and effects and does not extend to open fields and forested areas. Consistent with *Hester*, our Arkansas appellate courts have found on many occasions an open field to exist and permitted searches without a warrant. *Gustafson* v. *State*, 267 Ark. 830, 593 S.W. 2d 187 (Ark. App. 1979); *Ford* v. *State*, 264 Ark. 141, 569 S.W. 2d 105 (1978); *Sanders* v. *State*, 264 Ark. 433, 572 S.W. 2d 397 (1978); and *Bedell* v. *State*, 257 Ark. 895, 521 S.W. 2d 200 (1975). It is also settled law that property seized that is located on one's person, at one's residence or within the "curtilage" surrounding the residence may not be seized without a search warrant, or pursuant to other legal means. *Durham* v. *State*, 251 Ark. 164, 471 S.W. 2d 527 (1971). The court in *Sanders* recognized the definition of curtilage of a dwelling-house to be a space necessary and convenient, habitually used for family purposes and for the carrying on of domestic employment.

From a review of the facts at bar, we have no doubt that the marijuana patch was located in an open field rather than being part of the curtilage of Gaylord's dwelling. The record reflects that the marijuana field was fifty to sixty yards behind the house, and there is no evidence that any family use or domestic employment was performed on or around this area except for the illegal cultivation of marijuana. On the other hand, there was evidence introduced, including photographs, which showed that the marijuana was grown in a wooded area. Our Supreme Court in *Bedell* and *Ford, supra,*

held similar wooded areas to be an open field and not subject to Fourth Amendment protection.

Gaylord next argues that the officers were required to go through the yard and curtilage of the dwelling-house to find the contraband and that the evidence discovered was the direct result of an unauthorized entry upon the curtilage. In this connection, Gaylord relies on *Durham* v. *State, supra*, wherein the investigating officers found some stolen rifles in an open field about two hundred yards from the defendant's residence. The officers had discovered a trail which led to the guns while they were in the defendant's yard. The evidence showed that the trail could not have been seen from any place other than the yard. Since the seizure of the guns originated from the constitutionally protected curtilage area, the *Durham* court held the evidence inadmissible since the officers obtained it without a search warrant.

The facts at bar are distinguishable from those in *Durham*. However, it is important to note that the curtilage/open fields distinction which was first noted in *Hester* v. *United States, supra*, appears to have been modified by the Supreme Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967).[1] In *Katz*, the court said:

> (T)he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. ... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Since the *Katz* decision, the United States Supreme Court has consistently held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable" or a "legitimate expectation of privacy" that had been invaded by government action. See *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979).

[1] 1 W. Ringel, *Searches & Seizures, Arrests and Confessions*, § 8.4 (1980).

1 Wharton's *Criminal Procedure*, § 150 (12th Ed. C. Torcia 1974).

The Arkansas Supreme Court, however, has not expressly mentioned the privacy standard enunciated in *Katz* in any of the open field cases it has decided since 1967. This includes the *Durham* case upon which Gaylord relies. In our own court's decision in *Gustafson* v. *State, supra*, we did apply the privacy concept to an open field case but did not mention *Katz* in doing so. In *Gustafson*, the officers went to the defendant's apartment merely to ask questions concerning stolen CB equipment. After talking with the defendant and also viewing an antenna on top of defendant's apartment, the officers became suspicious. One of the officers later saw the defendant leave his apartment with an arm load of equipment and run into a wooded area behind his apartment. The officer, without a warrant, located the equipment, determined it was stolen and arrested the defendant. We held on appeal that the defendant had no reasonable expectation of privacy in the wooded area behind his apartment and it was not within the purview of one's "curtilage" as defined in *Sanders* v. *State, supra*.

In *Dean* v. *Superior Court for County of Nevada*, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (1973), the court, in considering the *Hester* open field doctrine and the privacy standard in *Katz*, stated:

> A generalized expression of Fourth Amendment doctrine usually excludes 'open fields' from the scope of constitutional protection. . . . Consistently with *Katz* v. *United States, supra*, the courts recognize that a test phrased in terms of 'constitutionally protected areas' often falls short; that a more fundamental test is whether the person has exhibited a reasonable expectation of privacy covering the area of the search or seizure. . . . The immediate question, then, is whether the marijuana field lay within the owner's reasonable expectations of privacy. [Citations omitted.]

The basic test set out above in *Dean* is the same standard that we adopted in *Gustafson*. Applying this test to the facts at bar, we must decide whether the marijuana patch lay within Gaylord's reasonable expectations of privacy. In considering this question, Gaylord reminds us that the officers'

view of the marijuana patch was first obtained while on the curtilage of his dwelling, and as mentioned earlier, he argues all evidence obtained due to the invasion of the curtilage must be suppressed under the Arkansas Supreme Court's holding in *Durham* v. *State, supra*. We cannot agree.

First, it is not clear from the record whether the officers were standing on or near the curtilage when they saw the marijuana. Under the test required under *Gustafson* and *Dean*, we need only to determine if Gaylord exhibited a reasonable expectation of privacy covering the marijuana patch that was searched. If the officers observed the marijuana in open view, it is of no import if they were standing on the curtilage. In *United States* v. *Santana*, 427 U.S. 38 (1976), the court held that there was no reasonable expectation of privacy in the doorway of one's home, and consequently, the warrantless felony arrest of defendant in her doorway did not violate the Fourth Amendment. The court stated:

> While it may be true under the common law of property the threshhold of one's dwelling is 'private' as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a 'public' place. She was not in an area where she had any expectation of privacy.

Driveways and walkways used to approach a dwelling are portions of the curtilage as traditionally defined, but under *Katz*, the expectation of privacy in such areas is not generally considered reasonable. See *United States* v. *Magana*, 512 F. 2d 1169 (9th Cir.) *cert. denied* 423 U.S. 826 (1975); and *State* v. *Nine*, 315 So. 2d 667 (La. 1975).

In the instant case, the actions employed by the officers in initially arresting Gaylord and Hine were questionable. In following up their investigation of Hall, however, they certainly were permitted to go to the residence where Hall, Gaylord and Hine lived to ask questions of anyone they may find. Although the officers encountered a gate with no fence as they approached Gaylord's property, there were no "No Trespassing" signs and the gate could be and was easily

removed. Without question the house and tent which was on the curtilage were subject to a reasonable expectation of privacy, and since there was a warrantless intrusion into these areas before any warrant was obtained, the trial court correctly excluded the evidence and contraband obtained from these areas. The evidence is unrebutted, however, that the officers who saw the marijuana patch were merely standing in the road on a hill not far from Gaylord's dwelling. These officers did not find a trail, as in *Durham*, which led their search to the marijuana in the wooded area behind the dwelling. From the road the officers could see the area in question and Gaylord had in no way attempted to hide or obstruct the view from any person who may be present on this road near the dwelling. We hold that Gaylord exhibited no expectation of privacy which would cover the marijuana field he was cultivating and since the officers had a plain view of the contraband, there was no search in the constitutional sense. Therefore, we hold the trial court correctly denied Gaylord's motion to suppress the evidence obtained from the marijuana field.

A second issue for reversal was raised by Gaylord in connection with a search warrant which was obtained by the officers sometime after they had found the contraband on the Gaylord premises. Of course, our decision contemplates that no warrant was necessary for the marijuana found in the open field, and all the other evidence seized pursuant to the warrant was suppressed. Therefore, this issue involving the warrant is moot.

For the foregoing reasons, we affirm.

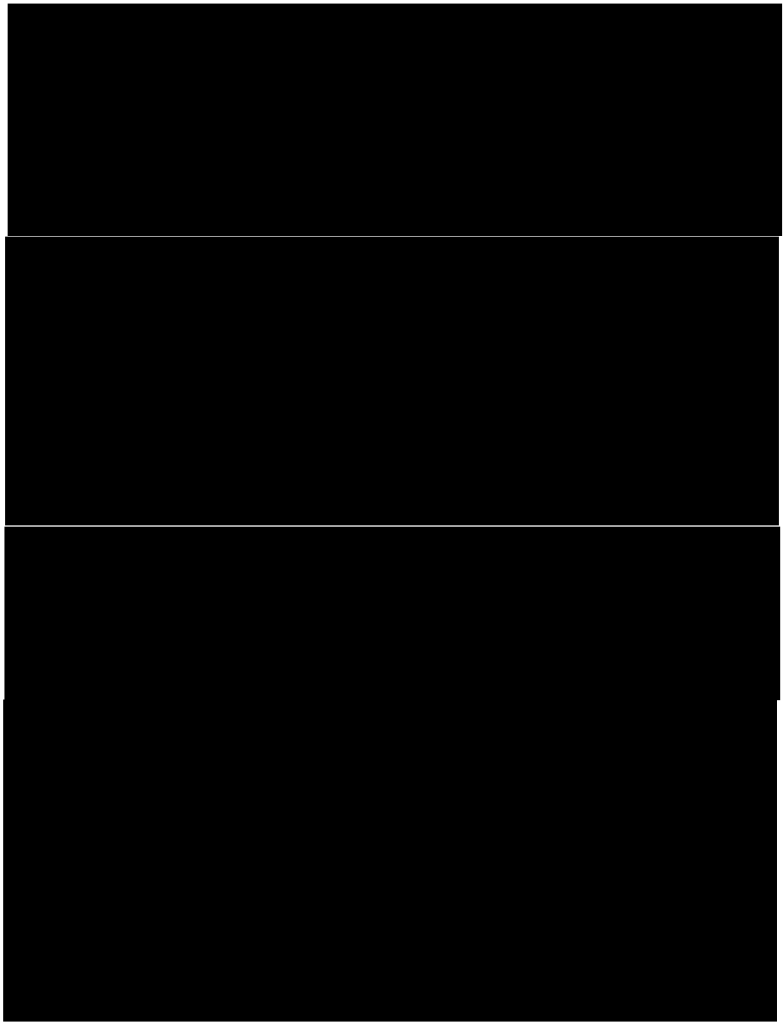
Affirmed.

CLONINGER, J., dissents.

NIBCO, INC. *v.* Joe METCALF and
Charles DANIELS, Commissioner of Labor

E 80-81 613 S.W. 2d 612

Court of Appeals of Arkansas
Opinion delivered April 8, 1981



Coleman, Gantt, Ramsey & Cox, by: *Jeff Starling*, for appellant.

Carolyn Parham, for appellees.

MELVIN MAYFIELD, Chief Judge. Nibco, Inc., the former employer of Joe Metcalf, has appealed from the decision of the Board of Review allowing Metcalf unemployment benefits. It is Nibco's contention that Metcalf was disqualified to receive benefits because he was discharged for misconduct in connection with his work and, for reversal, Nibco argues that the allowance of benefits is not supported by substantial evidence.

The essential facts are not in dispute. Metcalf was employed by Nibco from July 9, 1975, until February 7, 1980. In August of 1979, he underwent surgery for an ankle injury and was off work until November when his doctor released him and he returned to his regular job of running a machine while standing on his feet. On December 12, 1979, he was transferred to a job which required considerable moving around which included walking on sand. He felt this job was too hard on his ankle and at noon, after going to the office with his foreman, he followed his employer's suggestion and went back to see his doctor. He returned to work the next day with a note from his doctor saying he could do only light duty because of his ankle, but was told by Nibco he could not go to work until he could return to regular duty. Nibco did have light duty available. It was only provided, however, for employees who were hurt on the job and because there was a dispute about Metcalf's injury occurring on the job, Nibco would not give him light duty.

By letter dated January 11, 1980, Nibco's personnel manager sent Metcalf their accident and sickness form for his doctor to fill out and return. The second paragraph of the letter stated:

> Joe, as discussed, we need this in order that we may know when to expect you back to work and this is also

> necessary if you qualify for accident and sickness payment. Joe, we need you to sign where we have marked in red and have your doctor fill out places marked in blue. As per our conversation you are to return this no later than week ending January 19, 1980.

By letter dated January 18, 1980, Nibco again wrote Metcalf. This letter stated that the physician's statement referred to in the previous letter had not been received and unless Nibco heard from Metcalf before January 24, 1980, he would be considered to have quit voluntarily and his employment would be terminated.

On January 22, 1980, Metcalf's attorney wrote Nibco saying that Metcalf had brought him Nibco's letters of January 11 and 18. The attorney's letter stated that Metcalf felt he could satisfactorily perform the duties of his original job within the "light duty restrictions" placed upon him by the doctor and that Nibco's "refusal" to allow him the opportunity of returning to work and testing his skills was causing him to continue to be totally disabled during this period of time. With reference to the statement that Nibco asked Metcalf to have completed by his doctor, the letter stated: "I have advised Mr. Metcalf against submitting that statement to Dr. Dickson in view of the fact of his contention that his problems are job related, and therefore are not eligible for submission for consideration under a group sickness or accident plan."

On January 23, 1980, Nibco wrote to Metcalf thanking him for the letter from his attorney and for "letting us know that you have no claim under our group accident and sickness plan." The remainder of the letter said:

> The fact still remains that we need to know from your doctor when we can expect you back to work with no restrictions. The last thing we have from your doctor is that you can return to work doing light duty only. Again, we need to know from your doctor approximately how long it will take before we can expect you back without these restrictions.

> Now that we know this isn't for an accident and sickness claim, I trust you will get the attached filled out by your doctor and return to us no later than Feb. 2, 1980 in order that we may know what to expect as far as your returning to work.
>
> Please sign where we have checked in red and have your doctor fill out areas checked in blue.

There was no response to this letter and on February 2, 1980, Nibco's personnel manager wrote Metcalf again, saying:

> In reference to my letter of January 23, 1980, we still have not received from your doctor a statement giving us approximate date we can expect you back to work with no restrictions. Joe, if I do not hear from you on this matter *before* Thursday, February 7, 1980, I will, as per our company policy, consider you to have quit voluntarily and your employment will be terminated.
>
> If you have any questions please call.

When there was no response to this letter, Nibco terminated Metcalf's employment, and the question before us is whether the failure to furnish the requested information constituted "misconduct" which disqualified Metcalf for unemployment benefits under Ark. Stat. Ann. § 81-1106 (b)(1) (Repl. 1976).

We have been furnished excellent briefs which have reviewed and discussed most of our appellate decisions involving this question.[1] Misconduct as used in section 81-

[1]In addition to the cases cited in the body of this opinion, the briefs reviewed and discussed the following decisions involving misconduct: *Parker* v. *Ramada Inn*, 264 Ark. 472, 572 S.W. 2d 409 (1978); *Coker* v. *Daniels*, 267 Ark. 1000, 593 S.W. 2d 59 (Ark. App. 1980); *Hall* v. *Daniels*, 269 Ark. 748, 600 S.W. 2d 436 (Ark. App. 1980); *Frierson* v. *Daniels*, 269 Ark. 724, 600 S.W. 2d 446 (Ark. App. 1980); and *Patterson* v. *Daniels*, 268 Ark. 854, 596 S.W. 2d 355 (Ark. App. 1980), all of which have been designated for publication.

However, citations to *Neal* v. *Daniels*, decided by the Court of Appeals on June 18, 1980, and *Horner* v. *Daniels*, decided by the Court of

1106(b)(1) has been defined in the cases of *Stagecoach Motel* v. *Krause*, 267 Ark. 1093, 593 S.W. 2d 495 (Ark. App. 1980); *B. J. McAdams, Inc.* v. *Daniels*, 269 Ark. 693, 600 S.W. 2d 418 (Ark. App. 1980); *Milner* v. *Daniels*, 269 Ark. 762, 600 S.W. 2d 429 (Ark. App. 1980); and *Willis Johnson Co.* v. *Daniels*, 269 Ark. 795, 601 S.W. 2d 890 (Ark. App. 1980). And while the language used is not exactly the same in each case, they say that misconduct involves: (1) disregard of the employer's interests, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer.

To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good faith error in judgment or discretion. There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design.

In *Stagecoach, supra*, the allowance of benefits was upheld where the motel's desk clerk was discharged for failure to collect room rent in advance in keeping with the employer's policy. In *B. J. McAdams, Inc., supra*, the allowance of benefits was upheld where the employee was a truck driver who had three accidents in an eleven-month period and the employer argued there was a pattern or course of conduct showing the employee was "not only negligent but his actions in violating the policies and directives of his employer were willful." And in *Willis Johnson Co., supra*, the allowance of benefits was upheld where the employee was a route salesman who misrepresented his daily stops by falsifying the log he was required to keep.

Appeals on June 25, 1980, are to cases not designated for publication and under the Supreme Court and Court of Appeals Rule 21(4) are not to be cited, quoted, or referred to in any argument or brief presented to any court (except in continuing or relating litigation upon an issue such as res judicata, collateral estoppel or law of the case.)

In these cases, and other cases cited in the briefs, the appellate court simply found that the decision appealed from was supported by substantial evidence and the decision was affirmed. The duty of the appellate court to affirm in that situation is well established. *Terry Dairy Products Company, Inc.* v. *Cash*, 224 Ark. 576, 275 S.W. 2d 12 (1955) and *Harris* v. *Daniels*, 263 Ark. 897, 567 S.W. 2d 954 (1978).

On the other hand, in *Milner, supra*, the denial of benefits was not supported by substantial evidence and was reversed where the misconduct found by the appeals referee and approved by the Board of Review was the employee's refusal to leave the store where he was employed when his manager told him he was not working that day (Sunday) and ordered him to leave. The referee terms this refusal to leave as "unreasonable" and the Court of Appeals said "We are not convinced of its unreasonableness in view of the claimant's undisputed understanding of his union's contract with the company. Nor are we willing to equate unreasonableness, even if we could find it in this record, with 'misconduct.' "

In *Hodges* v. *Producers Rice Mill*, 270 Ark. 188, 603 S.W. 2d 479 (1980), denial of benefits was reversed where the employee was discharged for misconduct where he did not return to work until the next Monday after being released by his doctor on Wednesday. The employee testified that he did not return to work on Thursday or Friday because he was experiencing intense and excruciating pain from his hemorrhoid operation and, in order to get relief, was soaking in his bathtub as instructed by his doctor. The court pointed out that this testimony was uncontradicted and held that "The evidence falls far short of showing that claimant . . . wilfully failed to return to work on Thursday or Friday. . . ."

And in *St. Vincent Infirmary* v. *Ark. Employment Security Division*, 271 Ark. 654, 609 S.W. 2d 675 (Ark. App. 1980), the court reversed the Board of Review which found that two employees of a day care center for small children were not discharged for misconduct. Holding that there was no substantial evidence to support the board's decision, the court said:

> It is undisputed that both appellees left the hospital grounds without permission, and without clocking out; that they were absent during the busy period of the day; the time when they were gone, regardless of length, did not correspond with appellees' normal lunch period; and their absence placed the day care center in violation of regulations concerning the ratio of adult employees to the number of children present.
>
> ... Here we have clear instances of misconduct on the part of both discharged employees and an absence of any substantial evidence to show that they were discharged for any reason other than misconduct in connection with their work. The actions on their part, which led to their discharge, were intentional, and displayed a substantial disregard of the employer's interests, and of the employees' duties and obligations. The record contains no evidence to the contrary.

In the case at bar it is undisputed that Metcalf returned to work for light duty and that Nibco told him he could not go to work until he could return for full duty. It is also undisputed that on four different occasions Nibco wrote Metcalf asking for information about when they could expect him back to work without light duty restrictions. Metcalf's attorney responded to the second letter saying he had advised Metcalf not to submit a doctor's statement for the company's group sickness and accident insurance because Metcalf contended the accident was job related (and apparently covered by Workers' Compensation insurance). Nibco's last two letters, however, made it clear that they understood Metcalf was not making a claim under the group sickness and accident insurance plan but that they still needed to know when to expect his return to work without restrictions. Metcalf seems to argue that he had a 10% permanent disability as a result of the injury to his ankle and since Nibco would not let him return to work until he was 100% well, it was impossible to let them know when he expected to return to work. The trouble with that argument is that Metcalf did not so inform Nibco. It is undisputed that Nibco's last two letters were not even answered.

We agree with Nibco's contention that it has a legitimate interest in information concerning when and if injured employees will be able to return to work without light duty restrictions. Certainly such information is needed to properly plan for labor requirements. The intentional or deliberate failure to furnish such information is a willful disregard of the employer's interest and of the standards of behavior which it has a right to expect of its employees. There is no substantial evidence in this case to support a finding that the failure to furnish this information was not intentional or deliberate. The decision of the Board of Review is therefore reversed and the matter remanded for the entry of an order disallowing the claim for unemployment benefits.

COOPER and GLAZE, JJ., dissent.

McILROY BANK & TRUST *v.* SEVEN DAY BUILDERS OF ARKANSAS, INC.

CA 80-466 613 S.W. 2d 837

Court of Appeals of Arkansas
Opinion delivered April 8, 1981
[Rehearing denied May 6, 1981.]

[redacted]

Rose Law Firm, P.A., by: *Webster L. Hubbell* and *Jerry C. Jones*, for appellant.

Eichenbaum, Scott, Miller, Crockett, Darr & Hawk, P.A., by: *C. Richard Crockett* and *Frank S. Hamlin*, for appellee.

GEORGE K. CRACRAFT, Judge. Appellant, McIlroy Bank and Trust, brings this appeal from a judgment of the Circuit Court of Pulaski County in which it was found that a five year lease agreement entered into with the appellee, Seven Day Builders of Arkansas, Inc., on September 16, 1975, was in fact a conditional sale of equipment on which usurious interest had been charged and paid. On those findings the

trial court entered judgment under 12 U.S.C. 1831 (a) (b) for $48,771.82, double the amount of interest found to have been paid to appellant under the agreement. The court further found that though the action was originally brought in replevin, the leased equipment had been repossessed by self-help and not thereafter disposed of as provided by law and that failure to do so amounted to a conversion. On those findings the trial court entered judgment against appellant for the sum of $55,000, the market value of the equipment on the date of the taking, but refused to take into account or setoff against the judgment the sum of $32,661.89, which was found to be the balance due appellant under the contract. The court ruled that as appellee had been adjudicated a bankrupt prior to the entry of the judgment, appellant's claim for the balance due could only be asserted in the bankruptcy court.

Due to the numerous points of error urged by this appeal a preliminary recital of the facts would unduly lengthen this opinion. The facts pertinent to a determination of each point will be separately discussed.

I.

THE COURT DID NOT ERR IN FINDING THAT THE LEASE AGREEMENT WAS IN FACT A SECURITY TRANSACTION.

The threshold question is whether the contract by which appellant, McIlroy Bank and Trust, purported to lease certain equipment to appellee, Seven Day Builders, Inc., for a term of five years was in actuality an installment sales contract containing an excessive rate of interest. We are of the opinion that the preponderance of the evidence fully supports the trial court's finding that the purported lease was in fact a credit sale which provided for excessive interest and was subject to those penalties afforded under 12 U.S.C. 1831 (a) (b).

This case cannot in any material aspect be distinguished from *Bell* v. *Itek Leasing Corporation*, 262 Ark. 22, 555 S.W. 2d 1 (1977), in which the court held that an instru-

ment which purported to be a lease was in fact a financing transaction. In the case now under review, as in *Bell*, the appellant is a banking institution that does not engage in manufacturing or leasing of equipment, but is chartered by this state to perform banking functions. This lease, too, puts all of the risks upon the lessee. It provides that the rent would be paid without abatement for any reason and required the lessee to pay all taxes and insurance. It was testified that the lease was intended to be a "net lease" and in detailed language imposes all risk of loss on the lessee.

As in *Bell*, this contract provides the same remedies upon the lessee's default in the payment of rent as would be available to a conditional seller or to a mortgagee upon a similar deficiency. That is, the lessor can expressly declare all remaining payments to be due up to what would have been the term of this lease, whether or not the leased equipment or any part of it should have been repossessed, relet or sold. Thus, as in *Bell*, the lessee may be held responsible for rent not yet due.

The appellant attempts to distinguish this case from the controlling decision because there was no down payment required. Paragraph four of the document requires that the basic rent "shall be paid in advance." In *Standard Leasing Corporation* v. *Schmidt Aviation*, 264 Ark. 851, 576 S.W. 2d 181, the court in holding a similar transaction to be a cloak for usurious charges stated:

> The instrument then provided for thirty-six monthly rental payments of $107.65, with the first and last to be paid in advance — apparently as a down payment.

Although the contract under review does not specifically refer to a down payment, the trial court might conclude, as in *Standard Leasing*, that the requirement of the payment in advance of the basic rentals had that effect.

The appellant further attempts to distinguish the transactions because in *Bell* the lessee was found to have had the option of purchasing the equipment for a "normal amount" at the end of the lease. It is pointed out that the provisions in

this lease now before the court provided that the option to purchase was to be at a price "equal to fair market value" and that the "anticipated value would be $7500." It further provided for appraisal in the event the parties might not agree upon that value. There was, however, testimony before the court that the parties had agreed that the price would be $7500 but the provision for appraisal had been inserted to make certain that the transaction qualified under the Internal Revenue Code for such transactions. That sum was equal to ten percent of the original purchase price. In *Bell* the lease was silent with regard to the purchase of the property at the expiration of the lease, but there was oral testimony that it could have been purchased for ten percent of the price. In *Standard Leasing* the document in question specifically stated that there would be no option to purchase at the end of the term. However, there was evidence that lessor's representatives had stated to the lessee that at the end of the term the property would be vested in them absolutely. The court in both cases held that the trial court could infer from this testimony that the provisions of the lease with regard to the disposition of the property at the end of the term was a sham designed merely to cloak the usurious transaction.

We cannot find any material distinction between the document involved in this appeal and those in the two preceding cases. The trial court was correct in its determination that the document in question was in fact a financing transaction.

II.

THE TRIAL COURT PROPERLY FOUND THE TRANSACTION TO BE USURIOUS.

The proper statute to apply in determining both the existence of and penalty for usury is 12 U.S.C. 1831 (a) (b). That section permits a state bank to make loans at a rate of interest no higher than five percent in excess of the discount rate on ninety day commercial paper in effect in the Federal Reserve District where the loan is made and provides a penalty for the charge of excessive interest in double the amount of interest paid within two years of the commence-

ment of an action to recover it. Our Supreme Court has recently held that such acts of Congress effectively pre-empt state limitations and penalties in usury cases. *McGinnis* v. *Cooper Communities, Inc.*, 271 Ark. 503, 611 S.W. 2d 767 (1981).

Appellant next argues that the court erred in holding that the maximum rate of interest chargeable on that date was eleven percent and that the rate charged in the subject transaction exceeded twelve percent per annum. This issue was not presented to the trial court and cannot be raised for the first time on appeal. *Green* v. *Ferguson*, 253 Ark. 601, 562 S.W. 2d 89. However, we note that the parties stipulated that the discount rate on the date in question was six percent. The trial court's finding that eleven percent was the highest rate permissible was correct. On substantial evidence the court also found that the rate charged was in excess of twelve percent per annum. No one at any time questioned that the appellant expected to receive and did receive a yield of twelve percent on its investment.

III.

APPELLEE WAS NOT ESTOPPED TO RAISE THE QUESTION OF USURY.

The appellant contends that, in any event, the appellee corporation was estopped to raise the defense of usury because at the time the instrument was executed the drafting attorney, James Gallman, was also acting as attorney and as a corporate officer for appellee. The record does reflect that at the time he was a member of the firm which regularly represented the appellant bank and that he also represented the appellee corporation in which he was an officer and major stockholder. The appellant argues that because of the relationship the attorney maintained with the bank, any business transaction between the attorney and the bank was subject to close scrutiny and that the circumstances of the case require that appellee be estopped to assert this defense because of that interrelationship. This issue was not raised in the court below, and should not be considered by this court for the first time on appeal. *Green* v. *Ferguson*, supra.

In any event, for us to hold under these circumstances that appellee was estopped to assert these defenses would not only require that we disregard the fact that the attorney and appellee corporation were separate entities, but find fraud and overreaching where the record shows neither.

There is no evidence that the attorney drafted the instrument with a future defense of usury in mind or that he was influenced by any desire to gain unfair advantage for himself or appellee. The agreement was drafted two years before *Bell* was decided. There was evidence that the same form had been used by appellant in similar transactions with other customers and that it embodied terms not then uncommon in such agreements. There is no evidence in the record suggesting that he did not utilize the yield figure required by the bank or otherwise exerted any influence he might have had over the appellant other than obtain a "twelve percent yield" rather than the fourteen percent charged other customers in similar transactions. We find no conduct on the part of the attorney which, if imputed to the appellee because he was an officer of that corporation, would raise an estoppel to bar these defenses.

IV.

THE TRIAL COURT ERRED IN ITS COMPUTATION OF THE PENALTY FOR USURY.

Appellant next assigns as error the manner in which the judgment for excessive interest charges was calculated by the trial court. Upon finding that the total amount of interest paid during the life of the instrument was $22,597.36, the court entered judgment for double the amount or $48,771.82. 12 U.S.C. 1831 (a) (b) which authorizes this penalty in pertinent part is as follows:

> (b) If such greater rate of interest has been paid, the person who paid it may recover in a civil action commenced in a court of appropriate jurisdiction not later than two years after the date of such payment an amount equal to twice the amount of the interest paid from the state bank taking or receiving such interest.

The statute is clear in its terms. The remedy is provided only for those who bring a civil action to recover the penalty within two years of the payment of the excessive interest. Although no cases have been cited us in which the wording of this particular section has been expressly construed, the federal courts in applying similarly worded usury statutes have held that excessive interest paid more than two years before an action is brought cannot be recovered. *McCarthy* v. *Rapid City First National Bank*, 223 U.S. 493; *Hase* v. *Pittsburg National Bank*, 526 F. 2d 1083.

Appellee has first asserted its claim for usury under 12 U.S.C. 1831 (a) (b) in an amendment to its counterclaim filed on December 28, 1979. The recovery should therefore have been calculated only with reference to interest taken by the appellant subsequent to December 28, 1977. All claims based on interest paid more than two years before the claim was asserted were barred under the statute. We agree with appellant that the trial court erred in not so limiting the recovery.

V.

THE TRIAL COURT ERRED IN CALUCLATING DAMAGES AWARDED APPELLEE.

In its brief the appellant asserted several points of error in the trial court's award of damages for conversion of the equipment. Several of these points are so interconnected that they will not be addressed separately in this opinion.

According to its terms the first payment under the agreement was due in November of 1975. Payments were shown to have been made until October 1978, at which time the appellee defaulted. For some period thereafter negotiations were conducted between the parties in an effort to arrive at a satisfactory discharge of the remaining obligation under the contract. On June 5, 1979, the appellee's attorney, James Gallman, who was no longer a stockholder or officer of appellee but who had guaranteed the obligation, communicated to the appellant bank that he had been successful in arranging financing with which the obligation of appellee on the equipment could be discharged. The appellant

refused to accept this offer unless other obligations were also discharged at the same time. On June 6, 1979, the attorney communicated this response to the then president of appellee corporation, relating that the bank had insisted that unless there was a complete payoff it would take the machine.

The following day the appellant filed an action in replevin seeking to repossess the equipment. Although the complaint and summons were served on the appellee and it was advised that a hearing on the order for delivery would be heard within five days, no such order was ever sought or obtained. On June 7th the machine was repossessed by self-help but was never disposed of by appellant. A year later at the time of the trial the equipment was still in appellant's possession, being used by it in connection with its own business. The trial court treated this action as failure to comply with the provisions of the statutes governing replevin actions and constituted a conversion. The trial court found that the fair market value of the equipment at the time of the taking was $55,000 and entered judgment against the appellant for that amount. While the trial court also found that the balance due appellant under the agreement was $32,-308.37, it refused to enter judgment against appellee for that amount or allow it to be setoff against appellee's judgment because it was then in bankruptcy.

Appellant argues that the trial court erred in these findings and that they were not required to proceed in the replevin action if the possession of the machinery could be obtained by self-help. We agree that the initial retaking was not wrongful. Self-help was authorized not only in the instrument but by Ark. Stat. Ann. § 85-9-503 (Supp. 1979), which provides that in taking possession of collateral the secured party can proceed without judicial process if it can be accomplished without breach of the peace. There was no evidence that it was not taken in such a manner. We further agree with the appellant that self-help and the replevin statutes are alternative methods for obtaining possession of collateral and that the initial election of a secured party to proceed by judicial process does not require that he pursue that remedy to a conclusion if possession can in the mean-

time be otherwise obtained. *Ellis* v. *Smithers*, 206 Ark. 247, 174 S.W. 2d 568.

The liability of the appellant here is not predicated upon its failure to proceed in the replevin action, but in availing itself of the alternative remedy provided by the commercial code, and thereafter failing to dispose of the collateral in the manner provided by that code.

The appellant seeks to excuse its failure to dispose of the collateral under Ark. Stat. Ann. § 85-9-505 (2) (Supp. 1979), which permits a secured party in possession to retain the collateral in satisfaction of the obligation under certain conditions. That section, however, requires that the secured party give written notice of such a proposal to the debtor unless he has waived that right in writing. If the secured party receives an objection from the debtor, or any other person entitled to receive that notification within twenty-one days after the notice has been sent, the secured party *must* dispose of the collateral under Ark. Stat. Ann. § 85-9-504. Only in the absence of a written objection pursuant to that notice may the secured party rightfully retain the collateral in satisfaction of the debtor's obligation.

Appellant contends that such notice was sent to the debtor and refers to a letter dated June 6, 1979, written by James Gallman to the then president of Seven Day Builders, Inc. This letter could not be considered a compliance with the written notice requirements for several reasons. First, it was not written by the secured party to the debtor but by an attorney who was no longer representing the bank. Secondly, it did not give notice that the appellant intended to retain the collateral in satisfaction of the obligation, but simply relayed information received by the attorney that a proposed settlement of the dispute had not been accepted by the appellant, and unless all of the obligations were paid in full the bank intended to take the equipment. Thirdly, it is to be noted that Ark. Stat. Ann. § 85-9-505 (2) applies only to a secured party in possession. At the time the letter was written, the appellee was still in possession of the equipment. Lastly, and of great significance, is the fact that within the twenty-one day period during which the appellee had

the right to object, the appellee filed its answer in the replevin action in which it not only objected to the retention of the collateral but to the taking itself. In that pleading they expressly counterclaim for redelivery and damages for the retention. There is no merit to appellant's contention that they were entitled to retain the collateral in satisfaction of the debt under the quoted section.

Ark. Stat. Ann. § 85-9-505 (Supp. 1979) expressly declares that when such notice has not been given or if objection to retention of the collateral as satisfaction of the debt is made, the secured party *must* dispose of the collateral pursuant to the provisions of Ark. Stat. Ann. § 85-9-504 (Supp. 1979). The appellant admittedly made no effort to comply with the provisions of the latter section.

Section 85-9-504 provides that after the default a secured party may proceed to sell, lease or otherwise dispose of the collateral, and specifies the application to be made of the proceeds of that disposition. Section 85-9-504 (2) provides that if the security interest secured an indebtedness, the secured party upon disposing of the collateral must account to the debtor for any surplus. The appellant did not comply with these requirements.

Ark. Stat. Ann. § 85-9-507 (1) (Supp. 1979) provides that if the repossessed security is not disposed of in accordance with the requirement of the code the debtor has the right to recover from the secured party any loss caused by the failure to comply. In our recent decision in *Robert Mayhew* v. *Doyle Loveless*, 1 Ark. App. 69, 613 S.W. 2d 118 (1981), we declared that the proper measure of the debtor's loss was the market value of the collateral less the balance due on the debt. We therefore hold that the trial court erred in entering judgment for the full amount of the market value without taking into consideration the balance due on the debt. The judgment should have been entered for the value of the equipment at the time of taking less the balance due on the purchase price, not by way of setoff, but as a proper application of the measure of damages.

We cannot agree that appellee's bankruptcy in any way

affected this cause of action. The record shows that although the bankruptcy court did enter a stay order against all proceedings against this appellee in the state courts by proper order, it subsequently relaxed the stay order in its entirety as to this specific case. When such a stay order is relaxed, full jurisdiction to proceed to a final conclusion is restored to the state courts.

Affirmed in part and reversed and remanded in part.

GLAZE and CORBIN, JJ., dissent.

TOM GLAZE, Judge, dissenting. This case is somewhat remarkable. In view of my research and the extensive research performed by the parties, I cannot find another case within or without our jurisdiction in which one person represented so many in a business transaction. The transaction involved multiple parties but factually is easy to follow. In 1975, James Gallman, an attorney, approached Hayden McIlroy, President of McIlroy Bank (Bank), to see if the Bank would purchase and lease construction equipment to Seven Day Builders (Builders). The equipment was to be purchased from Jeanway Industries (Jeanway). Mr. McIlroy agreed and Gallman prepared all the necessary documents. At the time of this transaction, Gallman was the attorney for Mr. McIlroy, the Bank, the Builders and Jeanway. He was also the President, majority stockholder and agent for Builders.[1] The Bank agreed to disburse $75,000 to finance the transaction, about $62,000 was paid Jeanway for the equipment, $10,000 was invested in a Certificate of Deposit in Builders' name with Gallman was trustee and approximately $2,500 went to Builders directly. Gallman drafted the lease so Builders would pay off the $75,000 in five years and he offered the Certificate of Deposit as collateral to secure the lease payments. Gallman personally guaranteed the payments, and he gave the Bank the Certificate of Deposit to help protect himself against personal liability if Builders defaulted on its payments. It is also significant to note that

[1]Gallman organized Builders and was its originating, sole stockholder. Before or at the time of the business transaction, a Mike Hedrick and International Properties had acquired five percent and forty-four percent respectively of the stock of Builders.

International Properties, Builders' forty-four percent minority shareholder, was involved in this original transaction to the extent that it was to loan Builders $25,000 working capital, and Gallman was to arrange all the necessary financing for Builders through the Bank. Don Couch, the President of International Properties, had discussed with Gallman the formation of Builders even before it was organized. Gallman had known and represented Couch in previous years when Couch had been in the banking business in Little Rock, Arkansas.

As mentioned above, Gallman was attorney for four of the participating parties to the business transaction, *viz.*, Hayden McIlroy, the Bank, Builders, and Jeanway. He also was an agent for Builders when the financing and business transaction was closed.

As an attorney, Gallman could conceivably represent multiple clients having differing interests.[2] In the instant case, however, given the nature of the creditor/debtor transaction in question and Gallman's relationship with each of the four participating parties, this transaction was fraught with the likelihood of litigation from its inception. Gallman admitted as much when he attempted to protect himself from personal liability on the Bank loan if Builders defaulted. More importantly, the record reflects that the Certificate of Deposit he pledged so as to limit his personal liability was purchased from the $75,000 loan proceeds, all of which became Builders' obligation to the Bank. Although Gallman testified that all parties were aware that he represented the Bank, Builders and Jeanway, there is nothing in the record which shows that he discussed the potential conflicts and pitfalls which could result from his sole handling of the transaction.

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[2]Our Supreme Court has adopted the Code of Professional Responsibility of the American Bar Association. (Adopted Per Curiam June 21, 1976; effective July 1, 1976.) The Code actually was in effect in Arkansas after Gallman undertook to represent the parties in this cause. Ethical considerations 5-14 through 5-16 of the Code are instructive concerning instances in which a lawyer is justified in representing two or more clients having differing interests.

Even if Gallman had scrupulously followed every ethical consideration in this matter, the greater issue and concern arises because he not only was the attorney for all the parties, but also he was the agent for Builders. The law is settled that the knowledge of an agent acquired in discharge of his principal duties for a corporation is ordinarily imputed to the principal. *Ritchie Grocer Company* v. *Aetna Casualty & Surety Company*, 426 F. 2d 499 (8th Cir. 1970). Thus, it cannot be argued seriously that Builders was ignorant of nor insulated from the details of the negotiations and transaction fashioned by Gallman and entered into with the Bank. In fact, Builders' other major shareholder, International Properties, through its President, Don Couch, was actively involved in this venture from its inception. In most jurisdictions where the problem has arisen, the courts have taken the view that a borrower who initiates a usurious transaction is estopped from setting up the defense of usury. See Annot. 16 A.L.R. 3d 510, 513 (1967), which cites the following cases: *Blanks* v. *American Southern Trust Company*, 177 Ark. 832, 9 S.W. 2d 310 (1928) and *Perry* v. *Shelby*, 196 Ark. 541, 118 S.W. 2d 849 (1938). See also, *Swaim* v. *Martin*, 158 Ark. 469, 251 S.W. 26 (1923) and *Rogus* v. *Continental Illinois National Bank and Trust Company of Chicago*, 4 Ill. App. 3d 557, 281 N.E. 2d 346 (1972). From the record, there is no doubt that Builders initiated the loan/lease transaction and Gallman, its agent and attorney, prepared the documents, negotiated the percentage of interest to be charged, determined the amortization period and calculated the payments to be paid the Bank. I can conceive of no set of facts more appropriate to apply the rule of estoppel. See *Moorehead* v. *Universal C.I.T. Credit Corporation*, 230 Ark. 896, 327 S.W. 2d 385 (1959). Appellee mentions in its brief, almost in passing, that estoppel was not raised nor argued below. However, substantial evidence supporting such a defense was received without objection and is binding on appellee on the merits of this controversy. *Moorehead* v. *Universal C.I.T. Credit Corporation, supra.*

For the foregoing reasons, I would reverse.

I am authorized to state that Judge Corbin joins in this dissenting opinion.

CAPITOL CITY MANOR, INC., d/b/a CUMBERLAND NURSING HOME *v.* James A. CULBERSON, Executor of the Estate of DAVID A. CULBERSON

CA 80-474 613 S.W. 2d 835

Court of Appeals of Arkansas
Opinion delivered April 8, 1981
[Rehearing denied May 6, 1981.]

Lessenberry & Carpenter, for appellant.

Hoofman & Bingham, for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, Capitol City Manor, Inc., brings this action from a default judgment entered against it in the Circuit Court of Pulaski County in the amount of $30,000 in favor of the appellee, James A. Culberson, Executor of the Estate of David A. Culberson. It urges that the trial court erred in not finding that appellant's failure to file an answer within the time prescribed was excused under Rule 55 (c), Rules of Civil Procedure, [Ark. Stat. Ann. vol. 3A (Repl. 1979)], and in refusing to hold that the answer of the co-defendant inured to its benefit.

The appellant, Capitol City Manor, Inc., operates a nursing home in the City of England under the name of Cumberland Nursing Home in which David A. Culberson, now deceased, had been a resident. The appellee, James A. Culberson, is the executor of the Estate of David A. Culberson. On January 24, 1980, the appellee filed suit in the Pulaski County Circuit Court for the wrongful death of David A. Culberson, against both Capitol City Manor, Inc. and Harold B. Betton, a medical doctor. Dr. Betton was a resident of Pulaski County. Summons was served on Dr. Betton, who filed a timely answer in the form of a general denial, reserving the right to amend his answer at a later date. The agent for service of the appellant, Capitol City Manor, Inc., was properly served but no answer was filed on behalf of the appellant. On April 4, 1980, upon testimony of the appellee and others, the trial court entered judgment against the defaulting appellant in the amount of $30,000. No judgment was rendered against Dr. Betton. On May 1, 1980, the appellant filed its motion to set aside that judgment asserting that its failure to answer should be excused because of unavoidable casualty and that co-defendant's general denial inured to its benefit.

At the hearing held on that motion appellant's president testified that he immediately delivered a copy of the complaint and summons both to his insurance agent and attorney, and thereafter relied upon them to take all necessary action. He testified further that he knew nothing more of the action until writs of garnishment had been issued and

served. It was stipulated that both the insurance agent and the attorney referred to, if present, would have denied either receiving the documents from appellant or ever discussing this cause of action with its officers.

Rule 55 (b), Rules of Civil Procedure, [Ark. Stat. Ann. vol. 3A (Repl. 1979)], provides:

> (b) The court may set aside a default judgment previously entered upon a showing of excusable neglect, unavoidable casualty or other just cause.

Our courts have consistently ruled that these circumstances do not constitute the excusable neglect, unavoidable casualty or other just cause which would authorize the setting aside of a judgment by default even if the papers had been turned over to the agent and attorney. *Robertson* v. *Barnett*, 257 Ark. 365, 516 S.W. 2d 592; *Moore* v. *Robertson*, 242 Ark. 413, 413 S.W. 2d 872.

We do, however, agree with appellant that it was not in fact in default because the answer of its co-defendant inured to its benefit, and the judgment should not have therefore been entered. In *Firestone Tire & Rubber Co.* v. *Little*, 269 Ark. 636, 599 S.W. 2d 756, this court held that while a default judgment should only be set aside for excusable neglect, unavoidable casualty or other just cause, it should not be entered at all, and if entered it should be set aside when the action is against several defendants jointly and the defense interposed by an answering defendant is not personal to himself but is common to himself and the non-answering defendant.

Appellee's complaint alleged that the appellant, Capitol City Manor, Inc., had agreed for valuable consideration to provide the deceased with proper nursing care and medical attention while he was a resident in the nursing home. It further alleged that while he was under the care of the appellant, its agents and servants failed to provide him with adequate nursing and medical attention. It further alleged that the appellant's agents and servants had failed to supervise the taking of medication prescribed by Dr. Betton or to

follow his instructions that the deceased be given liquid food, resulting in the deceased becoming dehydrated and causing his death. Allegations against Dr. Betton were that he had failed to exercise the degree of care and skill of other physicians, negligently failed to visit the deceased in the nursing home and insure that his instructions for the deceased were being carried out. It was alleged that these failures on the part of the named defendants jointly caused the death of the deceased, and prayed for judgment against both named defendants both jointly and severally. There was evidence before the court that although Dr. Betton was the deceased's personal physician, he was also paid a monthly fee to serve the appellant as its medical director.

The answer of Dr. Betton was a general denial of all material allegations of that complaint and put in issue each and every allegation thereof. In *Firestone*, this court on similar facts stated:

> As already pointed out, a general denial puts in issue the basic elements in every lawsuit, regardless of the differing allegations of fault as to each defendant. We conclude the general denials by Shelton and Smith placed in issue the vital elements of the plaintiff's lawsuit. Their answers included a denial the accident happened, alleged if it did happen it did not result in injury and damage to the plaintiff, denied negligence and denied res ipsa loquitur is applicable. The answers invoked defenses common to all defendants and we conclude the answers inure to the benefit of Firestone.

We hold that the general denial filed by Dr. Betton inured to the benefit of the non-answering appellant, and that the trial court erred in entering the default judgment against the appellant while there was still pending before it a general denial filed by the co-defendant placing in issue each and every allegation of the complaint against both defendants. The judgment against the appellant entered by default should have been set aside.

Reversed and remanded.

COOPER, J., dissents.

James F. BROWN *v.* Amanda Brown SMITH

CA 80-498 613 S.W. 2d 598

Court of Appeals of Arkansas
Opinion delivered April 8, 1981

Mitchell, Williams, Gill & Selig, by: *Joseph W. Gelzine*, for appellant.

Harrison & Hewett, by: *Ronald D. Harrison*, for appellee.

GEORGE K. CRACRAFT, Judge. In 1971 the appellant, James F. Brown, and appellee, Amanda Brown Smith, were granted a divorce in the Sebastian County Chancery Court. A property settlement agreement entered into between the parties prior thereto was approved by the court and incorporated in its decree. Their agreement provided that the appellant should pay to appellee for the support and maintenance of their daughter the sum of $125 per month and for the support and maintenance of their son the sum of $175 per month, said payments to continue "until said children obtain majority or marry, whichever occurs first." The agreement recited that the reason for the larger sum being awarded for the support of the minor son was due to the requirement that he receive special education beyond the requirements of an average child.

At the time these agreements were made in 1971 our law provided that all males under the age of twenty-one years were deemed to be minors. Ark. Stat. Ann. § 57-103 (Repl. 1973). In 1975 the legislature changed the law by providing that all persons upon reaching the age of eighteen years shall be considered to have reached the age of majority. Ark. Stat. Ann. § 57-103 (Supp. 1979). When the minor son reached his eighteenth birthday in December of 1979 appellant ceased making child support payments relying upon the latter act.

In February of 1980 the appellee filed her petition requesting that the court hold appellant in contempt for discontinuing the support payments for the minor child without prior court order, for arrearages accumulated from and after his eighteenth birthday, and for an increase in child support payments. After hearing evidence on the mat-

ter the chancellor entered his order directing that the appellant pay all installments of child support which had accrued since the date the child reached his eighteenth birthday, directed him to continue those support payments pending further order of the court and increased the child support payments to the sum of $50 per week. The chancellor in his findings found that the child "became of age at the age of eighteen under the present law, but the fact that a child becomes of age does not necessarily mean that support should be terminated." He found that the child was handicapped and that support should be continued even beyond the age of majority in the increased amount.

The appellant appeals from that order of the court asserting that the court erred in awarding the arrearage, and that there was not sufficient evidence to show that the child was handicapped or required further support from his parent. While we do not agree with the chancellor's conclusion that the obligation to pay support was terminated on the child's eighteenth birthday, we do find that he reached the correct result and affirm the order entered by him, *Morgan* v. *Downs*, 245 Ark. 328, 432 S.W. 2d 454.

The pivotal question presented by this appeal is whether a statutory reduction in the age at which a minor is deemed to reach his majority has the effect of establishing an earlier date for the termination of the obligation to support a child under a contract entered into before its effective date, and providing for the support to continue "until he reaches his majority." We are unable to find any cases in our courts dealing directly with the subject. Both parties have provided us with excellent briefs discussing many cases from sister states which have dealt with the question and the issue was the subject of an exhaustive annotation found in 75 ALR 3rd 228 (1977) at page 260.

Some of these courts have held that minority is a status rather than a vested right, there being no vested right in the personal privilege of minority and a child has no vested right in further child support. Such agreements have been construed to intend no greater liability for child support than that imposed by law. *Rice* v. *Rice*, 213 Kan. 800, 518 P.

2d 477 (1974); *Jungjohann* v. *Jungjohann*, 213 Kan. 329, 516 P. 2d 904 (1973). The majority rule, and we believe the better reasoned one, is best expressed in *Wilcox* v. *Wilcox*, 406 S.W. 2d 152 (Ky. 1966). There the parties had entered into a property settlement in which the father agreed to make child support payments until the child reached its majority or became self-supporting. Some nine years after that divorce was granted and property settlement approved, the legislature of the State of Kentucky passed an act reducing the age of majority from twenty-one to eighteen years of age. The husband, upon the child reaching its eighteenth birthday, filed a petition to be relieved of further payments under the contract and decree upon the child reaching its eighteenth birthday. The trial court found as a matter of law that the age of majority was reduced from twenty-one to eighteen years by the legislation and there was no obligation for support after the child's eighteenth birthday. There the appellate court in reversing the action of the trial court, stated:

> We cannot agree with the finding of the court that there was no obligation of support on the husband after the child's eighteenth birthday. At the time the parties entered in the contract, the age of majority was twenty-one and not eighteen. In construing a contract the intention of the parties governs. ... Furthermore, in construing a contract, we must seek out the intention of the parties and ascertain how they meant the agreement to operate at the time they entered into it. ... In *Whitaker* v. *Louisville Transit Co.*, Ky., 274 S.W. 2d 391, 394 (1954), this court stated: 'It is a familiar principle of constitutional law that constitutional and statutory provisions in effect at the time a contract is made become a part of the contract.' Therefore, since the age of majority was twenty-one when the parties entered into the contract, the father is not relieved of his obligation of support to the child until she reaches her twenty-first birthday or becomes self-supporting.

See also *Strum* v. *Strum*, 22 Ill. App. 3rd 147, 317 N.E. 2d 59 (4th Dist. 1974); *Waldron* v. *Waldron*, 13 Ill. App. 3rd 964, 301 N.E. 2d 167 (5th Dist. 1973); *Istnick* v.

Istnick, 37 Ohio Misc. 91, 307 N.E. 2d 922 (C. P. 1973); and *Baker* v. *Baker*, 80 Wash. 2d 736, 498 P. 2d 315 (1972).

The agreement now before the court provided that the appellant should pay child support for the support and maintenance of his son "until he reached his majority." At the time of the making of that agreement in January of 1971 the age of majority for the son was twenty-one years of age as set out in Ark. Stat. Ann. § 57-103 (Repl. 1973). In construing contracts we seek to determine the intent of the parties at the time the contract was made and in so seeking we place ourselves in the position of the parties to determine what they meant by the words they might have used. *Asimos* v. *T. L. Reynolds & Sons, Inc.*, 244 Ark. 1042, 429 S.W. 2d 103 (1968). At the time this agreement was entered into the word "majority" was, by statutory definition, the age of twenty-one years for males. We hold that the parties entered into that agreement with reference to that statutory age, and intended for child support to continue until their son reached the age of twenty-one years or married.

The child in question has not yet reached the age of twenty-one and therefore, although we do not agree with the chancellor's reason for ordering continued child support, we would affirm his action in doing so for the reasons herein stated. The appellant also urges as error the chancellor's order increasing the child support from $175 per month to $50 per week and in extending those obligations beyond the child's majority. Appellant concedes that chancery courts may either reduce or increase amounts of child support payments provided for by such agreements because of changed circumstances and order such payments to continue past the age of majority. *Collie* v. *Collie*, 242 Ark. 297, 413 S.W. 2d 42. *Elkins* v. *Elkins*, 262 Ark. 65, 553 S.W. 2d 31. He argues, however, that while the power exists there was insufficient evidence to warrant its exercise.

The court in its order recited that it had considered the defendant's present earnings, his circumstances and ability to pay support, and the son's need therefor. The chancellor, therefore, could properly consider that the appellant was no

longer required to support his married daughter, and that his present gross income exceeded $22,000 a year. He also considered the testimony of the appellee as to the increasing demands for child care for her son who was subject to disability and handicap and that appellant's earnings far exceeded those of appellee. The record reflects that the trial judge had the opportunity to observe the child and his assessment of his handicap would be much superior to ours from the written record. We do not reverse the chancellor unless his findings are clearly against the preponderance of the record. *Elkins* v. *Elkins, supra.* Such awards rest largely within the sound discretion of the trial court. We cannot find from the record that this discretion was abused or the findings of the trial judge are against the preponderance of the evidence.

Affirmed.

CORBIN, J., not participating.

GLAZE, J., concurs with this opinion.

HOME FEDERAL SAVINGS & LOAN ASSOCIATION *v.* Sandra J. BASS, Administratrix of the Estate of Johnny BASS, Deceased

CA 80-482 613 S.W. 2d 604

Court of Appeals of Arkansas
Opinion delivered April 8, 1981

Bradley & Coleman, by: *Douglas Bradley*, for appellant.

Arlon L. Woodruff, for appellee.

LAWSON CLONINGER, Judge. On June 27, 1977, appellee, Sandra J. Bass, administratrix of the estate of Johnny D. Bass, deceased, filed a complaint alleging that appellant, Home Federal Savings and Loan Association, negligently failed to procure credit life insurance requested by the decedent, Johnny D. Bass. On October 24, 1978, after the appellee herein rested, the trial court directed a verdict for appellant, which was appealed to this Court.

On August 15, 1979, this Court delivered an opinion which reversed and remanded the case, holding that the appellant, who is the appellee in the instant case, met the burden of proof necessary for a jury to decide whether appellee was negligent. *Bass, Administratrix* v. *Home Federal Savings & Loan Association*, 266 Ark. 770, 587 S.W. 2d 48 (Ark. App. 1979). The issues were subsequently presented to a jury, which on March 5, 1980, found in favor of appellee herein, Sandra Bass.

On this appeal, appellant relies upon three points for reversal: (1) The trial court should have directed a verdict for appellant after both parties rested; (2) The trial court admitted improper evidence which was prejudicial to appellant; (3) The trial court gave an erroneous instruction.

On August 18, 1976, Johnny Bass and Sandra Bass, husband and wife, obtained a home loan from appellant. A federal reserve disclosure statement which pointed out the amount of the loan, the interest rate, and the monthly payments for principal and interest, was presented to the Basses, and the statement form contained a space for the signature of the applicants if they desired to purchase credit life at a cost of $4.16 per month. Appellant's employee who prepared the papers and closed the loan had credit life insurance applications with Integon Insurance Company in her desk, but did not advise the Basses that it would be necessary to fill out an application, or to take any other steps to effectuate insurance. No application was made by the Basses and no credit life insurance was procured.

Johnny Bass went to the hospital in December, 1976, and in February, 1977, it was determined that he was terminally ill with a brain tumor. He died May 18, 1977.

Seven years prior to August, 1976, Johnny Bass at age seventeen had a leg amputated for the treatment of bone cancer, but he had not gone to a doctor for any treatment for at least three years prior to the discovery that he had a brain tumor. The medical doctor for Integon Insurance Company testified that an insurance application on behalf of Johnny Bass would not have been accepted by Integon, but

that an application would have been considered in August, 1979. The trial court admitted, over the objection of appellant, documents and testimony indicating that credit life insurance had been issued to Johnny Bass covering a bank loan, an automobile loan, and a refrigerator loan, in 1975 and 1976. This evidence was introduced, and limited by the trial court, on the issue of the insurability of Johnny Bass.

The trial court was correct in its denial of appellant's motion for a directed verdict at the end of all the testimony. On the previous appeal of this case, this Court held that the jury may have found that the Basses were led to believe credit life was being provided, and that the jury may also have found that there was a duty on the part of Home Federal to process an insurance application in the normal way. We found that Sandra Bass, as administratrix, had met the burden of proof necessary for the jury to decide whether Home Federal was negligent. The ruling of this Court on the previous appeal that the appellee here had made a *prima facie* case of negligence becomes the law of the case on this appeal, and appellant has been unable to present any evidence which would justify taking the issue from the jury. If there is any substantial evidence tending to establish an issue in favor of a party against whom the verdict is requested to be directed, it is error for the court to take the issue from the jury. *Page* v. *Boyd-Bilt, Inc.*, 246 Ark. 352, 438 S.W. 2d 307 (1969). In testing whether there is substantial evidence, the testimony and all reasonable inferences deducible therefrom must be viewed in the light most favorable to the party against whom the verdict is directed, and if fair-minded persons might reach different conclusions, it is error to direct a verdict. *Wheeless* v. *Eudora Bank*, 256 Ark. 644, 509 S.W. 2d 532 (1974). When the evidence in this case is viewed in the light most favorable to appellee, the question of appellant's negligence was a proper issue for the jury to determine.

The second and third points relied upon by appellant for reversal relate to the insurability of Johnny Bass at the time he made a request to appellant for credit life insurance, and these points bring into focus the divergent approaches made by appellant and appellee to the issues of the negli-

gence and liability of appellant. Appellant contends that in order to show that the alleged negligence of appellant was the proximate cause of the damages sustained by appellee, the appellee was required to show that the application of Johnny Bass, if processed, would have been approved by Integon Insurance Company. Appellee contends that the whole point of its case is that there were other insurance companies willing to insure Johnny Bass, and that Johnny Bass was denied an opportunity to look elsewhere for insurance because appellant negligently failed to take any steps to process his application and failed to notify Johnny Bass of this fact.

We believe the trial court correctly presented the appellee's theory of the case to the jury when it gave Instruction number 6, not objected to by appellant, as follows:

> You are further instructed that if the defendant, Home Federal, undertook to procure a policy of insurance for the plaintiffs for credit life, then the law imposed upon them the duty, in the exercise of reasonable care, to perform the obligation that they assumed. In this case, if you believe from a preponderance of the evidence that the defendant, Home Federal, contracted with the plaintiff Bass to provide him with credit life insurance and failed to exercise ordinary care or diligence in their effort to provide said insurance or failed to reasonably notify Bass of their inability to obtain such insurance your verdict will be for the plaintiff, Sandra Bass. If you do not so find, then your verdict will be for the defendant, Home Federal.

The trial court gave, over the objections of appellant, Instruction number 5 as follows:

> Sandra Bass, executrix of the estate of Johnny Bass, claims damages from the defendant, Home Federal Savings and Loan, and has the burden of proving each of four essential propositions:
>
> First: That Johnny Bass has sustained damages;
> Second: That Home Federal breached an obligation to

process and provide credit life for Johnny Bass, or that they were negligent in processing an application for and providing credit life;
Third: That Johnny Bass was insurable on August 18, 1976;
Fourth: That such breach of obligation or negligence was the proximate cause of the damages sustained by Johnny Bass.

Appellant urges that Instruction number 5 was erroneous, not because it was a wrong declaration of the law, but because there was no evidence in the record from which the jury could find substantial evidence of the elements stated; that although appellant may have been negligent, there was no causal connection between its negligence and appellee's damages. The jury found that there was a causal connection, and we find that there was substantial evidence upon which to base that finding. It cannot be said with certainty that Johnny Bass could have secured other insurance if he had been aware that he had none through appellant, but he was entitled to the opportunity to try. The instruction was erroneous in that the second portion improperly placed upon appellee the burden of proving that appellant was obligated to *provide* credit life for Johnny Bass. Appellant is in no position to complain, for the reason that the instruction is more favorable to appellant than it is entitled to demand. *Thompson, Trustee* v. *Magness*, 206 Ark. 1081, 178 S.W. 2d 493 (1944).

Appellant urges that the third portion of Instruction number 5 should have been extended to tell the jury that appellee had the burden of showing that Johnny Bass was insurable under the arrangements available to appellant through Integon Insurance Company. Appellant was not entitled to such an instruction, because it was never the contention of appellee that Johnny Bass was insurable by Integon. The third portion of Instruction number 5 is indefinite, because the term "insurable" was not defined in any part of the instructions to the jury. A person is insurable if he meets the criteria established by a particular insurance company, and each company has its own criteria defining insurability. As used in the context of Instruction number 5

"insurable" could be interpreted as meaning that appellee had the burden of proving Johnny Bass insurable by Integon Insurance Company, or it could mean that appellee had only to prove that Johnny Bass was insurable by any company. The jury found under the instruction that Johnny Bass was insurable, and appellant is not in a position to complain, having failed to offer an instruction defining insurability.

Evidence tending to show that Johnny Bass was insurable by companies other than Integon Insurance Company was relevant, and it was competent for that limited purpose. Uniform Evidence Rule 403, Ark. Stat. Ann. § 28-1001 (Repl. 1979), provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury. We do not find that appellant was unduly prejudiced by the admission of evidence regarding the insurability of Johnny Bass, or that the jury was misled by it.

The judgment is affirmed.

Trudy ROBINSON *v.* Charles L. DANIELS,
Director of Labor, and OLSTEN TEMPORARY HELP

E 80-192 613 S.W. 2d 608

Court of Appeals of Arkansas
Opinion delivered April 8, 1981

James R. Cromwell, for appellant.

Bruce H. Bokony, for appellees.

LAWSON CLONINGER, Judge. Claimant Trudy Robinson appeals from a decision by the Arkansas Board of Review which denied her unemployment benefits under the provisions of Section 5 (c) of the Arkansas Employment Security Law, Ark. Stat. Ann. § 81-1106(c) (Repl. 1976). The denial was based upon a determination that she failed without good cause to accept available, suitable work when offered by her employer.

We find that the decision of the Board of Review is not supported by substantial evidence, and we reverse.

On April 21, 1980, claimant began working as an Olsten Temporary Help employee on a part-time job as a keypunch operator at United Parcel Service. Her job was of indefinite duration, but she believed it might develop into permanent, part-time or full-time employment. On May 23, 1980, Olsten offered claimant two weeks of full-time employment at Arkansas Blue Cross-Blue Shield. The work was similar to that which she was doing at slightly lower hourly wages. The hours at the job offered at Blue Cross-Blue Shield were from 7:00 a.m. to 4:30 p.m., while her hours at United Parcel Service were from 10:30 p.m. to 3:30 a.m.

For a number of reasons claimant declined the offer of employment at Blue Cross-Blue Shield and chose to remain at United Parcel Service. She did not believe she could hold both jobs, and Olsten did not expect her to. She had worked

for Blue Cross-Blue Shield on a previous occasion, and if Olsten had known this the offer would not have been extended to her. Most importantly, however, she did not want to give up her part-time job, which she hoped would become permanent, for a full-time job of only two weeks duration.

As a result of claimant's decision not to accept the temporary full-time work at Blue Cross-Blue Shield, she was denied unemployment benefits.

In the case of *Wacaster* v. *Daniels*, 270 Ark. 190, 603 S.W. 2d 907 (Ark. App. 1980), this Court stated:

> The only condition that warrants a claimant from accepting offered employment is for good cause as expressed in the applicable statutory provision. While the term 'good cause' may be difficult to define, it seems plain that the term means a justifiable reason for not accepting the particular job offered. In other words, to constitute good cause, the reason for a refusal must not be arbitrary or capricious and the reasons must be connected with the work itself.

We do not find anything arbitrary or capricious in the decision of claimant to decline the offer made, and we find that it was justifiable under the circumstances. She testified that Olsten had told her that the job at United Parcel Service might become permanent part-time or even permanent full-time, and it was certain that the job at Blue Cross-Blue Shield, although full-time, would be for only two weeks. She could not perform both jobs, and she could be given no assurance that she would be able to return to her part-time job after two weeks. In brief, it was her judgment that it was a better course for her to stay with the temporary part-time job which she had reason to believe might become permanent and decline a full-time job of only two weeks' duration.

There is no substantial evidence in the record to indicate that claimant's judgment was arbitrary or capricious, or that it was not justifiable, and the decision of the Board of Review is reversed.

MAYFIELD, C.J., and COOPER, J., dissent.

Raymond WRATHER *v.* STATE of Arkansas

CA CR 80-78 613 S.W. 2d 601

Court of Appeals of Arkansas
Opinion delivered April 8, 1981

E. Alvin Schay, State Appellate Defender, by: *Jackson Jones*, Deputy Appellate Defender, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. In this appeal from a conviction for Theft of Property, a felony, the sole issue is whether the evidence is sufficient to support a conviction. The defendant-appellant, Raymond L. Wrather, was found guilty by the trial court, sitting without a jury, and sentenced to the Arkansas Department of Correction for a term of five years.

We find there is substantial evidence to support the finding of the trial court, and we affirm.

Appellant was charged with Theft of Property in violation of Ark. Stat. Ann. § 41-2203 (Repl. 1977), which provides:

> (1) A person commits theft of property if he:
> (a) knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of interest in, the property of another person, with the purpose of depriving the true owner thereof . . .

Viewing the testimony in the light most favorable to the state, as we must do, the evidence indicates that on September 5, 1978, appellant leased furniture valued at $1,120.-00 from Arkansas Furniture Rental, Inc., for a period of six months, at a monthly rental of $62.50. The furniture was not to be removed from the address given by appellant without the written permission of the lessor. The last payment by appellant was for the month of January, 1979, and in February, 1979, appellant moved, taking the furniture with him. When no further payments were made, the lessor called appellant's brother and place of employment in an effort to locate appellant, but was unsuccessful. When appellant failed to return the lessor's calls, a warrant was obtained for appellant's arrest in June of 1979. The lessor did not know where his furniture was, and he was not contacted by appellant or anyone on his behalf until after the warrant of arrest was issued.

An important aspect of this case is the credibility of the witnesses, and the trial judge had the right to accept such portions of testimony as he believed to be true and reject those he believed to be false. *Core* v. *State*, 265 Ark. 409, 578 S.W. 2d 581 (1979). The trial court may well have believed that appellant in the instant case made no effort to contact the lessor of the property, or that he made no effort to return the furniture.

The element of intent was established by circumstantial evidence at the trial, but the fact that evidence is circumstantial does not render it insubstantial. *Williams* v. *State*, 258 Ark. 207, 523 S.W. 2d 377 (1975). The Court in *Chaviers* v. *State*, 267 Ark. 6, 588 S.W. 2d 434 (1979) upheld a theft of property conviction which involved consideration of the clauses "exercises unauthorized control" and "purpose of depriving the owner thereof." In commenting on the element of intent, the Court stated:

> By the nature of things, one's intent or purposes being a state of mind, can seldom be positively known to others, so it ordinarily cannot be shown by direct evidence, but may be inferred from the facts and circumstances shown in evidence.

In this case, there was substantial evidence from which the trial court could infer the intent to deprive the owner of its property.

Appellant urges on this appeal that the appropriate statute for the offense alleged is Ark. Stat. Ann. § 41-2209 (Repl. 1977), which deals specifically with the theft of leased personal property. The point must be rejected, because there was no objection in the trial court to support it. Appellant may have deliberately chosen not to object in the trial court, but in any event, he cannot raise it for the first time on this appeal. *Wicks* v. *State*, 270 Ark. 781, 606 S.W. 2d 366 (1980).

Affirmed.

GLAZE and CORBIN, JJ., concur.

TOM GLAZE, Judge, concurring. I agree that the majority is legally correct in affirming the trial court's conviction judgment. I am just not sure we are "right" in the result. For instance, one problem that concerns me is the issue we are unable to consider on appeal because of appellant's failure to object and raise the issue below. On appeal and through different counsel, appellant argues that he was charged under the wrong statute, *viz.*, Ark. Stat. Ann. § 41-2203 (Repl. 1977) rather than the more specific provision of § 41-2209 (Repl. 1977), which covers the same subject matter. If appellant is correct, he would have been availed of certain important affirmative defenses not available to him under § 41-2203. For example, § 41-2209 provides that personal, ten day notice must be given the lessee of personal property, and if proper notice is not given, the lessee charged under § 41-2209 may raise the lack of notice as a defense. The State, of course, contends on appeal that our Supreme Court's holding in *Wicks* v. *State*, 270 Ark. 781, 606 S.W. 2d 366 (1980) prevents our review of this issue because it was not raised or argued at trial and does not fall within one of the four exceptions which permits review under limited circumstances noted in *Wicks*. Moreover, the State also contends that § 41-2209 does not apply to the facts at bar in any event because this provision is applicable only where a lessee without authorization holds property after the lease expires, not when a lessee merely is in default. If this is true, then a narrow distinction, indeed, prevents a defendant lessee from taking advantage of some rather meaningful affirmative defenses. Whether the State is correct in its contention that § 41-2209 is inapplicable here is of no moment since the State is correct that the holding in *Wicks* does not allow us to decide this issue even though a substantial right of appellant's is involved. On the contrary, review would have been possible if our Supreme Court had adopted the "plain error" rule long recognized and applied by our federal courts. This case serves as a prime example why the standard of review should be the same in both the federal and state courts.

One other concern I have regarding this case is the five year maximum sentence imposed by the special trial judge in light of the facts and circumstances described in the record before us. This court, however, is not at liberty to reduce a

sentence within statutory limits even though we might think it unduly harsh. *Abbott* v. *State*, 256 Ark. 558, 508 S.W. 2d 733, 736 (1974). The rule enunciated in *Abbott* which limits appellate review of sentences is based on sound reason and avoids permitting the reviewing court from exercising powers similar to the clemency powers vested in the executive branch of the government. Thus, any diminution of sentence at this point lies solely within the sound discretion of the trial judge, a fact that I would feel remiss in not at least mentioning.

Although the foregoing matters give me great concern, our appellate role is well defined and delineated. Therefore, I agree with the majority on the issues reached and decided, and for that reason conclude the trial court's judgment should be affirmed.

I am authorized to state that Judge Corbin joins in this concurring opinion.

Charles G. HENRICKS, Individually and as Administrator of the Estate of Donald M. HENRICKS, Deceased, Dorothy HENRICKS, Barbara HENRICKS and Charles HENRICKS *v.* Jasper S. BURTON, Jr.

CA 80-465 613 S.W. 2d 609

Court of Appeals of Arkansas
Opinion delivered April 8, 1981

Smith, Jernigan & Smith, by: *H. Vann Smith*, for appellants.

Brazil & Roberts, for appellee.

TOM GLAZE, Judge. The issue presented in this appeal is whether the trial court erred in granting a summary judgment to the appellee. The case was submitted to the trial judge on the pleadings and two opposing affidavits.

In our review of summary judgment decisions, the principles of law which we must follow are well known and long established. The appellee has the burden of demonstrating that there is no genuine issue of fact for trial when

filing his motion for summary judgment, and any evidence submitted in support of his motion must be viewed most favorably to the party who resisted the motion. *Dodrill* v. *Arkansas Democrat Company*, 265 Ark. 628, 590 S.W. 2d 840 (1979). Moreover, a summary judgment is to be granted only when there is no genuine issue as to any material fact and when, even though facts are in dispute, reasonable and fair-minded men could only draw one conclusion from them. *Saunders, Adm'x.* v. *National Old Line Insurance Company*, 266 Ark. 247, 538 S.W. 2d 58 (1979).

The facts at bar arise out of a vehicular accident in which appellant's son was a passenger and the appellee was the driver. Appellant's son was killed as a result of this accident and he subsequently filed this suit against appellee. Appellee raised the affirmative defense of the guest statute which requires appellant to show that the accident and resulting death of appellant's son was due to appellee's willful and wanton negligent conduct.

Therefore, whether appellee was entitled to the summary judgment granted by the lower court must depend on whether appellant has shown that factual issues exist which would lead reasonable and fair-minded men to decide that appellee's actions, at the time of the accident, were willful and wanton.

Under case law, we are instructed to look to the facts and circumstances of each individual case to determine whether a vehicle was operated in wanton or willful conduct in disregard of the rights of others. *Ellis* v. *Ferguson*, 238 Ark. 776, 385 S.W. 2d 154 (1964). The court in *Ellis* held this conduct is shown by a person, when, notwithstanding his conscious and timely knowledge of an approach to an unusual danger and of common probability of injury to others, he proceeds into the presence of danger, with indifference to consequences and with absence of all care.

We now review the facts before us in light of the foregoing procedural and substantive legal principles. By affidavit, the appellee simply denied that he was intoxicated or was reckless at the time of the accident. He stated that just

before the accident occurred at 12:45 A.M., he was in a left hand curve and driving thirty-five miles per hour when some dogs ran in front of his jeep. Appellee said that he swerved to the right and got into loose gravel which caused him to lose control of the jeep.

The appellant submitted to the court an affidavit by the investigating police officer. The officer had not seen the accident, and his opinion was obtained from his post-accident investigation. After relating the measurements he took and the tire marks and blood stains he observed, he stated that the appellee had entered the curve in an inattentive state, lost control of the vehicle, causing it to flip and roll over three times, which resulted in the death of appellant's son.

Although appellee may refute the officer's conclusion, he does not contradict the officer's findings. The officer stated that appellee's jeep left tire marks on both sides of the highway, flipped over three times and traveled some two hundred sixteen feet from the point his jeep first left the highway. It is not our role, on review, to try the issues but merely to determine if there are issues of fact. It is not difficult to conceive that reasonable and fair-minded men could arrive at more than one conclusion when deciding, on these facts, whether appellee was negligent, grossly negligent or willful and wanton in the operation of his jeep.

The appellee raises for the first time on appeal his contention that the investigating officer's affidavit should not be considered since the officer was not properly qualified as an expert. It is well settled that we will not consider an issue raised for the first time on appeal. *Dunkum* v. *Moore*, 265 Ark. 544, 580 S.W. 2d 183 (1979). If the appellee objected to or opposed the appellant's affidavit, he could have done so by deposition, answers to interrogatories, further affidavits or by an appropriate motion. See Rule 65, *Arkansas Rules of Civil Procedure*. Thus, from all the facts and circumstances presented us in the pleadings and affidavits, we conclude that genuine issues of fact do exist, and that the lower court erred in granting appellee's motion for summary judgment.

Reversed and remanded.

NATIONAL REJECTORS INDUSTRIES *v.*
Charles L. DANIELS, Director of Labor,
and Gerald POPLIN

E 80-282 613 S.W. 2d 611

Court of Appeals of Arkansas
Opinion delivered April 8, 1981

No briefs filed.

TOM GLAZE, Judge. The employer, National Rejectors Industries (NRI) brings this appeal from the Board of Review's decision that the claimant, Gerald Poplin, is entitled to unemployment benefits. The Board found that when Poplin was hired, he was told by NRI that he could live in the Nacogdoches, Texas, area; however, when he arrived at Houston, Texas, to start his job, Poplin's supervisor informed him that he must live in Houston proper. Shortly thereafter, Poplin quit his job, and the Board held NRI abrogated its agreement with Poplin, which was good cause for Poplin to quit.

The findings of the Board are not consistent with the

evidence. Nowhere in the record does it appear that NRI and Poplin agreed that he could live in the Nacogdoches area. Poplin testified that he was hired to work in Texas and Louisiana and live within fifty to sixty miles of Houston. He testified further that Nacogdoches is approximately seventy-five miles from Houston, and his wife's employer had a plant in Nacogdoches to which she could be transferred. Apparently, Poplin was unaware of the correct distance between Houston and Nacogdoches, and we take notice that the mileage between the city limits of these two cities is in excess of one hundred forty miles. This mileage is almost twice the mileage to which Poplin testified and is more than twice the fifty or sixty mile distance to which the parties agreed before Poplin was hired.

From the facts before us, including Poplin's own testimony, we must conclude that the Board's finding that NRI abrogated its work hire agreement with Poplin is clearly erroneous and not supported by substantial evidence. We, therefore, reverse the Board's decision and remand with directions to disallow benefits to the claimant.

Reversed and remanded.

Henry Lee ROGERS *v.* INTERNATIONAL PAPER CO.

CA 80-445 613 S.W. 2d 844

Court of Appeals of Arkansas
Opinion delivered April 15, 1981

Kaplan, Brewer & Bilheimer, P.A., by: *Silas H. Brewer, Jr.,* for appellant.

Bridges, Young, Matthews, Holmes & Drake, for appellee.

MELVIN MAYFIELD, Chief Judge. Henry Lee Rogers is appealing the decision of the Workers' Compensation Commission which found his employer, International Paper Company, not liable for the cost of medical treatment obtained by appellant after he changed physicians. The Commission based the decision upon a finding that appellant had failed to comply with Workers' Compensation Commission Rule 21(4). In its entirety, Rule 21 reads:

> The employer and/or insurance carrier has the right and duty in the first instance to provide prompt medical care to injured employees through physicians and hospitals of the respondents' choice. A claimant, subsequently, may obtain a change in treating physicians to a physician of the claimant's choice, the costs of such treatment to be borne by the employer or the employer's insurance carrier, provided (1) the claimant's healing period shall not have ended; (2) the claimant is not seeking to change physicians from one of his

> own choice, previously selected by the claimant; (3) the physician to whom claimant wishes to change is qualified in the particular field of medicine needed for claimant's particular difficulties; (4) the claimant files with the Commission a petition for a change in physicians, gives the name of the physician to whom he wishes to change and asserts that the physician to whom he wishes to change is competent to treat his particular ailment; (5) no unresolved issue exists over whether claimant is legally entitled to medical care at the expense of respondents.

The record shows that appellant sustained cervical spine injuries on February 15, 1978, while working for appellee and received medical treatment at the appellee's first aid station. That night at home appellant could not rest or sleep so he went to the emergency room of the Jefferson Hospital in Pine Bluff where he was treated by Dr. P. B. Simpson, Jr., the physician on call. The employer accepted compensability of appellant's injuries, began paying him temporary total disability benefits, and paid for all medical treatment furnished thereafter by Dr. Simpson.

In mid-August, 1978, Mr. Rogers informed appellee's safety representative that he wanted to be examined by another physician. The request was refused and appellant then contacted his attorney who referred appellant to Dr. William F. Blankenship. Dr. Blankenship first examined appellant on August 16, 1978, saw him at intervals thereafter, and released him for work on December 5, 1978. Appellee paid temporary total disability benefits while appellant was under Dr. Blankenship's care, but refused to pay Dr. Blankenship for his medical services because of appellant's failure to follow the procedure prescribed in Workers' Compensation Commission Rule 21 to change his treating physician.

It is undisputed that appellant did not seek permission of the commission prior to changing physicians. It is his contention, however, that he (1) substantially complied with the rule, and (2) that the rule conflicts with the controlling statutory provisions.

We do not think that there was a substantial compliance. Knowing that his employer would not approve, the appellant not only made the change in physicians before he filed a petition therefor, but has never filed such a petition with the Commission. The Commission held, and our Supreme Court has indicated, that when a claimant changes physicians in such a situation he acts at his own peril as far as payment for the physician's services are concerned. See *Caldwell* v. *Vestal*, 237 Ark. 142, 371 S.W. 2d 836 (1963); *Southwestern Bell Telephone Co.* v. *Brown*, 256 Ark. 54, 505 S.W. 2d 207 (1974); and *Mohawk Rubber Co.* v. *Buford*, 259 Ark. 614, 535 S.W. 2d 819 (1976).

The statutory authority for the change of physicians at employer's expense is found in Ark. Stat. Ann. § 81-1311 (Supp. 1979) which reads: "The Commission may order a change at the expense of the employer when, in its discretion, such change is deemed necessary or desirable." In *Southwestern Bell, supra*, the petition for a change of physicians was filed after the change had been made and the Commission ordered the employer to pay the new physician's bills both retroactively and in the future. In affirming the Commission, the Supreme Court said: "As to the validity of the retroactive feature of the Commission's order, the act unequivocally provides that it is within the discretion of the Commission to grant a petition for a change of physician."

In *Mohawk Rubber Co.*, 259 Ark. at 618, the court said:

> The Workmen's Compensation Commission is empowered to make such rules and regulations for the administration of the Workmen's Compensation Law as may be found necessary. Ark. Stat. Ann. § 81-1343(9). Any reasonable construction or interpretation given such rules is certainly entitled to great weight upon judicial review, even if not controlling. (Citations omitted.) Certainly if an administrative agency's interpretation of its own rule is not contrary to statute or irreconcilably contrary to the plain meaning of the regulation itself, it may be accepted by the courts.

Since there was no attempt to comply with Rule 21(4),

we find the Commission's in keeping with the plain meaning of the rule and clearly within the discretion allowed by statute. The decision is therefore affirmed.

Lindsey DAWSON *v.* Neal A. PICKEN & Linda L. PICKEN, Husband and Wife and HARRIS McHANEY REAL ESTATE, INC.

CA 80-478 613 S.W. 2d 846

Court of Appeals of Arkansas
Opinion delivered April 15, 1981

Kurt Butcher, for appellant.

Roy E. Stanley, for appellees, Picken.

Ronald L. Boyer, for appellee, Harris McHaney Real Estate, Inc.

JAMES H. COOPER, Judge. Appellee Harris McHaney Real Estate, filed a petition of interpleader on October 25, 1979, and deposited $2,500.00 earnest money with the Benton County Circuit Clerk. The $2,500.00 had been deposited with the real estate company by appellee Picken as earnest money under the terms of contract of purchase of certain real estate from appellant. Appellant answered the petition of interpleader, claiming the money under the terms of the contract. Appellees Picken answered the petition of interpleader alleging fraud committed by appellant and claiming the funds plus $10,000.00 in punitive damages.

The record reflects that on February 20, 1980, certain interrogatories were propounded to appellant who did not respond. On June 9, 1980, appellees Picken filed a motion to compel discovery. On June 10, 1980, the trial court entered an order which required that the interrogatories be answered before June 30, 1980, and provided that if appellant failed to do so he would be subject to the sanctions set forth in Rule 37 of the Arkansas Rules of Civil Procedure. The interrogatories apparently never were answered. The case was set for trial on July 8, 1980, and on that date neither appellant nor his attorney appeared. The Court entered a decree which found that July 8, 1980, was the date set for trial and further found that due to misrepresentation of facts made by appellant that appellees Picken were entitled to rescind their contract and receive a refund of the entire balance of the $2,500.00 earnest money. The decree reflects that the matter was submitted to the Court on the petition of interpleader, the answers filed, and the evidence adduced by the parties.

Appellant first asserts as error that there is no evidence in the transcript to support the judgment, and that the judgment was not rendered in the manner required by law. The answer of appellees Picken clearly raised the issue of

fraud. They alleged that the water problem in the basement was deliberately misrepresented to them to induce them to purchase the property. The answer filed by appellant did not controvert any allegations of fraud, and did not raise any defense to those allegations. The Picken answer alleged facts sufficient to authorize the entry of judgment in their favor, particularly when viewed along with the statement in the decree that there was evidence adduced from the parties. Based on the recitation in the decree and the allegations of fraud in the complaint (which were never controverted by appellant) the Court did not err in finding a sufficient basis to render judgment in favor of appellees Picken. We presume there was sufficient and competent evidence to support the findings of the trial court. *Phillips* v. *Arkansas Real Estate Commission*, 244 Ark. 577, 426 S.W. 2d 412 (1968).

Appellant also argues that the judgment entered was a default judgment and that therefore he was entitled to three days' notice prior to a hearing under the provisions of Rule 55 of the Arkansas Rules of Civil Procedure. No motion for default was filed in this case. On the regularly scheduled trial date, appellant and counsel failed to appear, and the Court entered judgment in favor of appellees Picken. This was not a situation where Rule 55 applied. The Court proceeded to enter judgment based on the complaint, answers, and "evidence adduced by the parties." The action was not based on the failure to appear or answer.

Next appellant argues that the decree of the Court did not state what the material misrepresentations of fact were which would entitle appellees Picken to rescind. The trial court is not required to list the facts which support its findings. The findings of the Court were based on the pleadings and evidence adduced, and the decree is not defective in this regard.

We are unable to say that the evidence was insufficient to support the judgment, and we cannot say that the findings by the Court are against the preponderance of the evidence or that they are clearly erroneous.

Appellees argue that the judgment was also properly entered because of the failure of appellant to respond to the Court's order to compel discovery. The Court clearly had the authority, under Rule 37 of the Arkansas Rules of Civil Procedure, to enter judgment against appellant on this basis, but the Court did not do so. Therefore we need not deal with this argument by appellees.

Affirmed.

Larry HUGHES, d/b/a CHOCTAW HOMES OF RUSSELLVILLE and MFA SECURITY SERVICE CO. *v.* Charles A. BROWN and Jewel M. BROWN

CA 80-491 613 S.W. 2d 848

Court of Appeals of Arkansas
Opinion delivered April 15, 1981

Young & Finley, for appellants.

Adams, Covington & Younes, for appellees.

DONALD L. CORBIN, Judge. Appellees Charles A. Brown and Jewel M. Brown purchased a mobile home from the appellant Larry Hughes d/b/a Choctaw Homes of Russellville on December 13, 1978, for $16,150.00. Appellant installed the mobile home at a location known as Rose Hill. Subsequently, appellees requested that appellant move the mobile home to another site and this was done. Appellees filed suit in the chancery court of Searcy County, Arkansas, alleging that the mobile home was so improperly installed as to cause great damage to the mobile home; that it was not level or tightened down properly so as to cause it to become damaged to the extent that it could not be repaired or lived in. They asked for rescission and their expenses and costs. MFA Security Service Company, which purchased the contract, was dismissed as a party to the suit. The trial court held that the contract be rescinded. The court ordered appellant to remove the mobile home from the property of appellees and provide them with a comparable mobile home properly installed or pay to appellees any and all sums which they had previously paid to appellant less the sum of $500.00.

Appellant contends on appeal that the decision was against the preponderance of the evidence and that the relief granted is not supported by the evidence.

This action was brought as one for rescission. We observe that this transaction is governed by the Uniform Commercial Code and that the specific section of the Code controlling the Brown's action in this case is Ark. Stat. Ann. § 85-2-608 (Add. 1961) which deals with revocation of acceptance. See *Frontier Mobile Home Sales, Inc.* v. *Trigleth*, 256 Ark. 101, 505 S.W. 2d 516 (1974). Although the Uniform Commercial Code, in most instances, does not use the term "rescission," it has been held, and the commentators agree, that rescission and revocation of acceptance amount to the same thing under the Uniform Commercial Code. See *Peckham* v. *Larson Chevrolet-Buick-Oldsmobile, Inc.*, 99 Idaho 675, 587 P. 2d 816 (1978), and cases cited therein. See also *Marine Mart, Inc.* v. *Pearce*, 252 Ark. 601, 480 S.W. 2d 133 (1972)[1]. We, therefore, view and treat the Brown's action for "rescission" as one for "revocation of acceptance" under Ark. Stat. Ann. § 85-2-608. The principal issue in this case is whether the Browns have sufficiently established the elements necessary for a revocation of acceptance under Ark. Stat. Ann. § 85-2-608 which provides:

> *Revocation of acceptance in whole or in part.* —
>
> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

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[1]In *Marine Mart* v. *Pearce*, 252 Ark. 601, 480 S.W. 2d 133 (1972), the Court affirmed a decision by the chancellor ordering a "rescission" of the sales contract while applying the Uniform Commercial Code.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

Appellant contends that they properly performed the contract and argues that the evidence supports appellant's version of the transaction. The trial judge made a specific finding that as a result of improper placement and installation, the mobile home practically fell apart. The interior paneling had bent, the floor covering became loose and the plumbing fixtures became inoperable and loose. Where, as here, there are sharp conflicts in the testimony which must be resolved, to a considerable extent, upon evaluation of the credibility of witnesses, we must defer to the judgment of the trial judge because of the superiority of his position in making that determination. *Weber* v. *Weber*, 256 Ark. 549, 508 S.W. 2d 725 (1974); *Marine Mart, Inc.* v. *Pearce, supra.*

The chancellor, in effect, found that the goods were non-conforming and under *de novo* review we find that the revocation of acceptance was given within a reasonable time. The appellees made repeated efforts to have appellant correct the defects in the mobile home caused by the improper placement and installation of the mobile home on the appellees' property. Approximately four months after the purchase of the mobile home, the appellees notified appellant that they no longer wanted the mobile home and were turning the matter over to their attorney. A reasonable time for revocation depends on the "nature, purposes, and circumstances of such action". Ark. Stat. Ann. § 85-1-204(2). *Frontier Mobile Home Sales, Inc.* v. *Trigleth, supra.*

It is well recognized that we review chancery cases *de novo* on appeal and affirm when it appears correct from the record as a whole even though the chancellor has based his decision upon the wrong reason. *Sweeney* v. *Sweeney*, 267 Ark. 595, 593 S.W. 2d 21 (1980). Since we find that the appellees effectively revoked their acceptance of the contract under the Code we affirm the order entered by the chancery court.

Affirmed.

GLAZE, J., concurs in the result but disagrees that the Uniform Commercial Code is applicable to the facts in this cause.

In the Matter of the Estate of Moses WRIGHT, Deceased, Mozella WATSON and Mae Ethel BRUNSON *v.* Leola VALES

CA 80-444 613 S.W. 2d 850

Court of Appeals of Arkansas
Opinion delivered April 15, 1981

Hale, Fogleman & Rogers, for appellants.

Shaver, Shaver & Smith, by: *J. L. Shaver*, for appellee.

TOM GLAZE, Judge. This appeal involves an action to determine heirship filed by appellants, Mozella Watson and Mae Ethel Brunson, in the administration of the estate of Moses Wright, who died on December 31, 1977. The appellants alleged that they were the children and heirs of the decedent. Lillian Wright, the decedent's widow, was the administratrix of the estate, and in her response to appellants' petition, she acknowledged that appellants were the illegitimate children of Moses Wright, and acknowledged further that the appellee, Leola Vales, was also the illegitimate child of the deceased. Vales, on the other hand, filed an answer denying that the appellants were the children of Moses Wright, and alleged that they had no interest in the estate. The probate court found Vales to be the sole heir at law of Moses Wright, subject to the dower rights of his widow, and it held further appellants were not the children of the decedent, finding, rather, that they were the lawful children of Precious and Ernest Davis. The appellants appeal only from that part of the lower court's decree which denies they are the children and heirs of Moses Wright.

The specific facts which give rise to this appeal are not in dispute. In 1945, the appellants' mother, Precious Black,

married Ernest Davis in a ceremonial wedding performed by a minister. There is no evidence indicating a marriage license was issued or recorded. Precious Davis testified that in January, 1946, she and Mr. Davis permanently separated. She further testified that she and Moses Wright began to have a relationship in 1947 which lasted until July, 1949. During this period, Precious gave birth to both appellants and stated at the hearing below that Moses Wright was their father. In reaching its decision, the trial court primarily relied on the well known legal presumption that a child born in wedlock is legitimate. In so holding, the court also rejected the testimony of the appellants' mother, Precious Davis, in her attempt to rebut the presumption of legitimacy by stating Mr. Davis had no access to her during the period in which the appellants were conceived. We believe the trial court was correct on both points.

The presumption of legitimacy of children born during the wedlock of two persons is well grounded in common law and Arkansas statutory law. See *Bankston* v. *Prime West Corporation*, 271 Ark. 727, 610 S.W. 2d 586 (Ark. App. 1981). We also held in *Bankston* that a parent's testimony is incompetent when it is employed to bastardize a child. The trial court in the instant case followed both of these legal principles when it found that the appellants were the natural children of Ernest Davis.

Appellants, however, argue there never was a legal marriage between Precious and Ernest Davis because there is no evidence that a marriage license was issue and recorded as required by Arkansas law. The Supreme Court, however, in *DePotty* v. *DePotty*, 226 Ark. 881, 295 S.W. 2d 330 (1956) held that our marriage license statutes are merely directory and not mandatory, and although Ark. Stat. Ann. § 55-201 (Repl. 1971) provides for the procurement of an Arkansas license by those contracting marriage, Arkansas has no statute providing a marriage is void when no license is obtained. In *DePotty*, the court found valid a marriage between a couple who, without an Arkansas license, had a ceremonial marriage performed by a duly qualified minister. In view of the clear holding in *DePotty*, we find no merit in appellants' argument that the earlier Supreme Court case

of *Thomas* v. *Thomas*, 150 Ark. 43, 233 S.W. 808 (1921) requires that a person must procure a license *and* be married by a minister.

Appellants also contend the legitimacy presumption rule should not apply to them because the only proof in the record shows that Precious and Ernest Davis were not living together or cohabiting as husband and wife since January, 1946, and the oldest appellant, Brunson, was born March 11, 1948, over two years after the Davis' separation. It is true that a number of family members and a friend testified that Moses Wright acknowledged and held himself out as the father of appellants, but this is not sufficient evidence to rebut the appellants' legitimacy status. Our courts have long held that the presumption of legitimacy rule can only be overcome by the clearest evidence that the husband was impotent or without access to his wife. *Thomas* v. *Barnett*, 228 Ark. 658, 310 S.W. 2d 248 (1958). In the case at bar, there was no evidence concerning Mr. Davis' impotency, and the only evidence of nonaccess was presented through the testimony of Precious Davis, the wife. As mentioned earlier, the trial judge ruled this testimony incompetent and, in doing so, relied on the Lord Mansfield rule which has been recognized and adopted by our Arkansas courts. *Thomas* v. *Barnett* and *Bankston* v. *Prime West Corporation, supra*. In summary, our courts, in following the Lord Mansfield rule, have held that neither a husband nor wife is competent to testify to the husband's nonaccess in affiliation proceedings where such testimony would tend to prove a child conceived after marriage to be illegitimate. Applying this rule to the facts before us, we conclude the trial judge correctly refused to consider the testimony of Precious Davis, and therefore, failed to rebut the appellants' legitimacy status.

The appellants take rather strong exception to the application of the presumption rule which causes the appellants in the instant case to be the legitimate children of Ernest Davis rather than the illegitimate children of Moses Wright. Although appellants recognize the rule is founded on moral law and protects the innocent child, they argue its application here merely deprives them of their right to inheritance in the decedent's estate. We believe appellants'

perspective in this regard is much too narrow and fails to recognize the sound principles of public policy which are served by the rules followed by our courts in deciding cases where legitimacy issues exist. For instance, what application of these rules would the appellants ask us to take if Ernest Davis had died and left a valuable estate? Under these circumstances, the rules appellants urge us to ignore here would serve to protect their interest in any estate left by Davis. If we looked to the whims of the parties or equities in each case before deciding to apply or not apply these rules in legitimacy cases, there would be little stability or predictability in our descent and distribution or paternity actions.

For the foregoing reasons, we affirm.

Affirmed.

CRACRAFT, J., not participating.

COOPER, J., dissents.

EMPLOYERS MUTUAL CASUALTY COMPANY *v.* PIGEON CREEK CORPORATION

CA 80-496 614 S.W. 2d 516

Court of Appeals of Arkansas
Opinion delivered April 15, 1981
[Rehearing denied May 20, 1981.]

Meadows & Elcan, by: *Frank C. Elcan, II*, for appellant.

David L. Osmon and *H. David Blair*, for appellee.

TOM GLAZE, Judge. This appeal involves a law suit filed by Pigeon Creek Corporation (Pigeon Creek) for a loss to a houseboat it owned. Pigeon Creek alleged that it was entitled to damages for the loss pursuant to the terms of a policy issued by Employers Mutual Casualty Company (Employers). Pigeon Creek was awarded judgment for $10,750.50 and Employers brings this appeal from that adverse ruling.

The relevant facts are not in dispute. The policy in question was first issued by Employers to George and Mary Goetz on their 1969 Stardust Cruiser houseboat. Munsey Insurance Agency (Munsey) was the agent which handled the policy issuance and the term of the policy was December 23, 1975, to December 23, 1976.

On April 20, 1976, Pigeon Creek, through its president

and principal shareholder, Kenneth Fagan, purchased the houseboat from the Goetzes. On the same date, Fagan requested Munsey to transfer the existing insurance policy into the name of Pigeon Creek. At this same time, Fagan discussed the possibility of renting the houseboat to others in the course of his business; however, Munsey advised Fagan that there was a private pleasure warranty contained in the policy, and the policy would be null and void if the boat was used commercially. There were no further discussions between Munsey and Fagan until January 12, 1977.

On November 30, 1976, and prior to the policy expiration date of December 23, 1976, Munsey billed Pigeon Creek for the policy period of December 23, 1976, to December 23, 1977. Another request for payment was mailed at the end of December, 1976.

When payment was not received by January 12, 1977, Munsey telephoned Fagan to find out why. Munsey testified that Fagan stated that the boat had been used commercially and the policy was no good. Upon hearing of the commercial use of the boat, Munsey agreed that the policy was no good and requested the return of the renewal certificate so that Employers could give Munsey credit on the charges. Fagan agreed to return the certificate. Also on January 12, 1977, Munsey called Employers and informed it of his conversation with Fagan.

On January 14, 1977, the houseboat sank in the cove where it was moored. The sinking was due to a heavy accumulation of snow on the boat, causing the boat to sink lower in the water than normal and allowing water to flood the hull through a drive transom at the rear of the boat. Fagan testified that sixteen inches of ice surrounded the boat from the date of loss until the ice broke around March 10, 1977. Fagan further testified that extremes of temperature were responsible for the ice on the lake and that he had not attempted to remove the boat for some fifty days because of the ice in the cove where the boat was moored. On the night of January 14, Fagan discovered that the boat had sunk, and the next day he called Munsey, who informed him that he had no coverage. On this same day, January 15, 1977, Fagan

mailed the renewal premium in the amount of $230 to Munsey, who promptly rejected and returned the payment to Fagan. After attempts to resolve the controversy between Employers, Munsey and Pigeon Creek failed, Pigeon Creek filed suit against Employers which led to this appeal.

Appellant raises six points on appeal. Our decision, however, turns on one issue, *viz.*, whether or not the insurance policy was in effect at the time of appellee's loss in view of the fact that the policy term had expired, and appellee had failed to pay the premium for its renewal. Although this issue was mentioned by the trial judge, it was not decided below. Evidence was introduced and fully developed without objection on the issue at trial and is also argued here. Therefore, this point for reversal is before us and is binding on the parties on the merits of this controversy. *Moorehead* v. *Universal C.I.T. Credit Corporation*, 230 Ark. 896, 327 S.W. 2d 385 (1959). The controlling law on this issue is found in the case of *Preferred Risk Insurance Company* v. *Central Surety & Insurance Corporation*, 191 F. Supp. 797 (W.D. Ark. 1961). See also, *Roberts* v. *Buske*, 12 Ill. App. 3d 630, 298 N.E. 2d 795 (1973) and *St. Paul Fire & Marine Insurance Company* v. *Bierwerth*, 285 Minn. 310, 175 N.W. 2d 136 (1969). In *Preferred*, the insured owned an automobile which was first insured on May 20, 1958, until November 20, 1958, by Central Surety & Insurance Corporation through its agent, Greening Insurance Agency. Prior to the expiration of the automobile policy on November 20, 1958, the Greening Agency had prepared and forwarded to the insured a new six month policy which would expire on May 20, 1959. The insured paid the premiums timely and the new policy was in effect for the full six month period. However, on May 8, 1959, and prior to the expiration of the second six month policy, the Greening Agency forwarded to the insured a third policy to cover her automobile from May 20, 1959, to November 20, 1959. A bill for the due premium payment was mailed to the insured on two occasions, May 18 and June 1, 1959. The insured never paid the premium and no cancellation notice and agreement were performed between the parties. On June 7, 1959, the insured was killed in an accident which involved her automobile. A law suit was filed against Central Surety & Insurance Corporation

wherein it was contended the renewal policy for the May 20, 1959, to November 20, 1959, term was in force and effect.

The court found that the insured had received the renewal policy; she did not pay the premium; she had purchased a new policy with the same coverage through another insurance company and its agent on May 20, 1959. The court held that the policy issued by Central was not in effect at the time of the accident and stated the rule of law that we believe is also controlling of the facts and issues at bar. The court said:

> Normally, in insurance cases the offer is made by application on the insured and acceptance is manifested by delivery of the policy by the insurer. *The unsolicited delivery of a renewal policy prior to the expiration of the original policy, as in this case, is not an acceptance, but an offer, and no contract of renewal is created unless acceptance by the insured is expressly made or necessarily inferred.* [Emphasis supplied.]

In the instant case, Pigeon Creek did not request Employers or Munsey to renew the yacht insurance policy. Munsey sent Pigeon Creek unsolicited both the renewal certificate and the statement for premiums. In fact, since the premiums had not been paid by Pigeon Creek by January 12, 1977, or about three weeks after the policy date had expired, Munsey called Pigeon Creek's president, Fagan, and asked why the premiums had not been paid. Fagan admitted this conversation with Munsey regarding the overdue premium payment, and also said that Munsey wanted to know when he was going to send in the payment. However, there is no evidence in the record that reflects that Fagan expressly accepted the renewal certificate when he discussed the matter with Munsey, nor is there evidence from which it can be inferred. Fagan did not mail the overdue payment on January 12, 13 or 14. He mailed the payment on January 15, the day after Fagan discovered the loss of the boat, and twenty-three days after the policy had expired. Considering the rule enunciated in *Preferred* as applied to the facts before us, we are of the clear opinion that Pigeon Creek did not accept the renewal certificate offered by Employers, and

therefore, there was no insurance policy in effect between Pigeon Creek and Employers on January 14, 1977.

Pigeon Creek relies on the case of *American Employers' Liability Insurance Company* v. *Fordyce*, 62 Ark. 562, 36 S.W. 1051 (1896) and contends that we should find the policy in effect because there was a legal presumption that a short credit had been extended to Pigeon Creek for the premium payment. The *Fordyce* case did not involve a policy renewal but rather a new policy and the initial premium, two legally different and distinguishable factual situations as was noted in *Preferred*. Even if initial and renewal policy issuances evoked the same legal principle, the presumption of short credit found by the court in *Fordyce* involved a new liability policy issuance and the liability which accrued under the policy was before the insurer demanded payment of the premium from the insured. As we have already discussed above, Munsey had made demand for payment in this cause in advance of the loss.

In accordance with the above, we reverse the judgment of the trial court with directions to enter judgment in favor of Employers.

Reversed and remanded.

MAYFIELD, C.J., and COOPER, J., dissent.

MELVIN MAYFIELD, Chief Judge, dissenting. The majority opinion has decided this case for itself, overlooking the fact that this is an appeal from a circuit court. On appeal, chancery cases are tried de novo and the appellate court may enter the decree which it finds should have been rendered by the chancellor. *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W. 2d 18 (1979). On appeal, circuit cases are not tried de novo and we review only the errors assigned and do not decide issues of fact. *Fidelity & Deposit Co.* v. *Fairfield*, 169 Ark. 997, 278 S.W. 658 (1925). *Houston* v. *Adams*, 239 Ark. 346, 389 S.W. 2d 872 (1965).

Contrary to the above rule, the majority opinion has

decided that no contract of insurance was entered into between the parties because it finds that delivery of the renewal policy was an offer which was not accepted. This factual finding is made despite the fact that the trial court specifically stated that this issue had not been raised by the attorneys and that no offer and acceptance questions would be addressed by the court.

After holding that a case appealed from circuit court should be reversed, the court in *St. Louis Southwestern Railway Co.* v. *Clemons*, 242 Ark. 707, 415 S.W. 2d 332 (1967), said:

> We come now to the question of whether this case should be dismissed or remanded. This court has long adhered to the rule so well reiterated in *Fidelity Mutual Life Insurance Co.* v. *Beck*, 84 Ark. 57, 104 S.W. 533 and 1102 (1907). The general rule is to remand common law cases for new trial. Only exceptional reasons justify a dismissal. One of the exceptions is an affirmative showing that there can be no recovery. *Pennington* v. *Underwood*, 56 Ark. 53, 19 S.W. 108 (1892). There it was said that when a trial record discloses "a simple failure of proof, justice would demand that we remand the cause and allow plaintiff an opportunity to supply the defect." To the same effect, see *Hinton* v. *Bryant*, 232 Ark. 688, 339 S.W. 2d 621 (1960).

This procedure should have been followed in this case. The result of what the majority has done is to take a circuit court case and decide for itself a fact which was not even presented to or decided by the circuit court. If this were an appeal from chancery court, this would be proper. It is not proper to do this in an appeal from a law court.

I believe the decision of the circuit court should have been affirmed but if the case is to be reversed for the reason stated in the majority opinion, it certainly should be remanded for a new trial.

JAMES R. COOPER, Judge, dissenting. The majority in this case has found that the insurance policy on the boat

owned by Pigeon Creek Corporation had expired December 23, 1976, and that there was no coverage by reason of the expiration as of the date of the loss on January 14, 1977. I cannot agree.

The facts are correctly stated in the majority opinion, and it is unquestioned that Mr. Fagan, President of Pigeon Creek Corporation, had not paid the premium for the renewal certificate prior to the date of the loss. The majority bases its holding on *Preferred Risk Insurance Company* v. *Central Surety & Insurance Corporation*, 191 F. Supp. 797 (W.D. Ark. 1961). The majority opinion quotes from that case and adopts as the law of this case that:

> . . . The unsolicited delivery of a renewal policy prior to the expiration of the original policy, as in this case, is not an acceptance, but an offer, and no contract of renewal is created unless acceptance by the insured is expressly made or necessarily inferred. . . .

In its opinion, the trial court specifically found as follows:

> *Expiration of policy — non-payment of premium:* A previous policy was in force covering the boat in question. Around the first of December a renewal certificate was issued by the defendant renewing the policy for one year. The premium was charged to the agent's account and the agent billed the plaintiff. It appears well settled law that it is not necessary that the premium be paid for coverage to take effect, unless prepayment of premium was expressly provided as a condition precedent before coverage took effect. Such was not the circumstance in the case at bar.
>
> It occurs to the Court that a renewal agreement is in one sense an entirely new contract. If this were the case, a proposition could be posed that, under these circumstances, there was merely an offer extended requiring an acceptance and that the offer was withdrawn. *Since this issue has not been raised by the attorneys and since the renewal has been viewed as one continuous con-*

> *tract,. the Court will not address any offer and acceptance questions.* [Emphasis supplied]

As is shown by this quotation, the Court found that the issue on which the majority bases its opinion was not raised at trial, nor was it considered by the trial court in reaching its decision. The Court specifically found that the parties viewed the "renewal as one continuous contract," and I am unable to see how we can do otherwise.

In any event, the *Preferred* case can be distinguished, since, in that case, the insured had purchased another policy on the same property with the same coverage, and in that case the premium had not been paid by the insurance agent. In this case, the trial court, sitting without a jury, was required to rule as to whether the credit had been extended to Pigeon Creek Corporation. The Court did rule that the premium for the renewal was charged to the account of the insurance agent, who then billed Pigeon Creek Corporation. This could be nothing other than a finding of short credit extended to the Corporation by the agent. I believe that the case of *American Employers' Liability Insurance Company* v. *Fordyce*, 62 Ark. 562, 36 S.W. 1051 (1896) correctly states the law in this case as follows:

> ... While the insurance company had the right to cancel the policy for the nonpayment of the premium, as per the contract between the parties, it had no power to make this cancellation relate back, and avoid the policy ab initio. ...
>
> ... Now, in the present case, while the premium had not in fact been paid, credit had been extended, and before any demand had been made for the payment of the premium, the liability accrued. The insurer also a short time thereafter cancelled the policy, thus electing not to insist upon the payment of the premium. ...

The only factual distinction here is that demand was made for the premium prior to the loss. The demand was made on January 12, 1977, and the loss occurred on January 14, 1977. No notice of cancellation was sent to the insured

prior to the loss, and was only sent some 7 days following the loss.

The majority seeks to distinguish *Fordyce* on the ground that it involved a new policy and an initial premium. If the law is that in a case of a new policy and an initial premium, a short credit would allow the policy to be in force, how can it make any sense not to allow a short credit on a continuing contract, a renewal annually of an insurance contract, to cause the policy to remain in force?

The agent for Employers, Mr. Munsey, obviously believed that the policy was in full force and effect when he telephoned Mr. Fagan to request payment of the premium. He testified as follows:

> Q. Would you relate for the Court what occurred in your conversation of January 12, 1977, with Mr. Fagan, please?
>
> A. We had sent him this statement for renewal of premium and we had not received our money. So, I called Mr. Fagan on January 12, and asked him why he hadn't paid his premium. He said, well, it's no good because I have been using the boat commercially. I said, that's absolutely correct, if you will return your certificate, *I want to get it cancelled*, so that it won't be charged against me, and he says, I will send it to you. That's the last I heard. I told him he didn't have any coverage. [Emphasis supplied] T. 183.

Plaintiff's exhibit number 5 is a letter from Mr. Munsey to Mr. Fagan dated January 17, 1977, stating that he (Munsey) was returning the check Fagan had sent for the premium. In that letter, Mr. Munsey indicated that following the conversation with Fagan on January 15, 1977 (in which Fagan notified him that the boat had sunk), he called the home office of Employers and they cancelled the policy as of the renewal date of December 23, 1977.

Defendant's exhibit number 7 is a cancellation certificate from Mutual Marine in New York, dated January 21,

1977, seven days following the loss. No notice was given prior to either notice of cancellation. Ten days notice prior to cancellation was required by the policy terms.

Mr. Fagan directly contradicted the testimony of Mr. Munsey as to the substance of the January 12, 1977 conversation. Fagan denied that he had told Munsey that the policy was no good. Fagan testified that he believed that he had coverage, except during the times the boat was being used commercially. He testified that this belief was founded on conversations he had with Munsey in April of 1976 when the policy was transferred to him. Munsey denied telling Fagan that the boat would be covered, even if used commercially, as long as the loss did not occur while it was being used commercially.

This case clearly involves the credibility of witnesses, and the question of whether there was substantial evidence to support the findings of the trial court. The majority has based its ruling on an issue which was not argued by the parties at trial, and which the trial court did not address. The Court, as previously noted, specifically found that the policy was renewed for one year, that the premium was charged to the agent's account, that prepayment of premium was not a condition precedent to coverage, and that the renewal was viewed as one continuous contract. I believe that there is substantial evidence to support these findings of the trial court, and, since there is substantial evidence, we should affirm. *Shuffield* v. *Hunter*, 268 Ark. 1083, 597 S.W. 2d 852 (Ark. App. 1980).

The majority has not reached any of the other points raised by appellant and I will not do so here. However, after reviewing the other arguments, the briefs, and the record, I can find no basis for reversal and I would affirm the trial court in all respects.

Earl Lee HARPER *v.* STATE of Arkansas

CA CR 80-72 614 S.W. 2d 237

Court of Appeals of Arkansas
Opinion delivered April 22, 1981

E. Alvin Schay, State Appellate Defender, by: *Deborah Sallings*, Deputy Defender; and *John Settle*, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Jack Dickerson*, Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Judge. The appellant, Earl Lee Harper, was charged with the crime of rape, in violation of Ark. Stat. Ann. § 41-1803 (Repl. 1977). Upon trial by jury, he was found guilty of a lesser included offense, sexual abuse in the first degree, as defined by Ark. Stat. Ann. § 41-1808 and § 41-1801 (Repl. 1977). The jury fixed his punishment at the maximum penalty of five years imprisonment and a fine of $10,000.

From the judgment imposing the penalty of the jury verdict, the appellant brings this appeal. The sole point relied upon is that the trial court erred in allowing appellant to be cross-examined with regard to conduct unrelated to his propensity for truthfulness.

Appellant was accused of "deviate sexual activity" with an eight-year-old girl. To be guilty of the lesser offense of sexual abuse in the first degree, as found by the jury, the appellant had to engage in an act of "sexual contact" with the girl. "Sexual contact" is defined by the statute as "any act of sexual gratification involving the touching of the sex organ or anus of a person, or the breast of a female."

The mother and father of the girl were divorced. The night before the alleged occurrence the appellant and the girl's mother had met at a club where there was drinking and dancing. They left the club together and appellant spent the rest of the night at the home where the mother and her daughter lived. The next day the three of them went to the home of a girlfriend of the mother and they returned to the mother's home about 9:30 p.m. The little girl went to bed, the mother started the laundry, and the appellant, who was watching television, decided he wanted an omelet. The mother did not have any eggs and appellant asked her to go to the store and get some. She agreed and was going to take her daughter with her, but appellant said to leave the girl in bed since the mother would be gone only a few minutes. The mother testified she returned from the store in not more than ten minutes and found her daughter crying. After talking to

the girl, the mother asked appellant to leave the house and he did.

At the trial, the child and the appellant gave different accounts of the events in that short interval while the mother was gone to the store. The child's testimony contained allegations which, if believed, were legally sufficient to convict appellant of sexual abuse in the first degree. The point which appellant raises in this appeal, however, relates to a series of questions about appellant's conduct earlier in the day.

Upon cross-examination of appellant, the prosecutor questioned him about "touching" the girl during the afternoon while they were visiting in the home of the mother's girlfriend. The court permitted the inquiry over the objection that the question was improper because there had been no prior evidence about such conduct. Thereupon, the following occurred:

> Q. That afternoon is it not true that you were sitting down in a chair, and Heliana was on a stool in front of you, and when you pulled her up you put your hand between her legs and held her that way for a few minutes?
>
> A. To the best of my recollection, I was sitting there watching television, Heliana was sitting on a stool in front of me, but I never touched her in any unnatural manner, no, sir.
>
> Q. Well, did you touch her?
>
> A. I don't recall.
>
> Q. You don't recall even having any hands on her at all?
>
> A. I may have put my hands on her shoulder, on her head, or something like that, because all the kids were sitting there in front of me right at my feet.
>
> Q. You don't recall pulling her up to you by putting

your hand down in the wrong place?

MR. SETTLE: Your Honor, I believe he has answered.

THE COURT: Yes, I permitted you to inquire.

There had been no prior evidence about such conduct that afternoon and the appellant contends this was an attempt to impeach credibility which was improper under Rule 608(b), Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979), which reads:

> (b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

In *Gustafson* v. *State*, 267 Ark. 278, 590 S.W. 2d 853 (1979), the court said that before adoption of the Uniform Rules of Evidence it was proper to ask on cross-examination whether a defendant was guilty of almost any kind of crime, but that Rule 608 (b) changed that by requiring, before acts of misconduct for impeachment purposes may be inquired into on cross-examination: (1) the questions must be asked in good faith, (2) the probative value of the conduct must outweigh any prejudicial effect, and (3) the misconduct must relate to truthfulness or untruthfulness. These conditions were again stated and followed in *Divanovich* v. *State*, 271 Ark. 104, 607 S.W. 2d 383 (1980).

Applying Rule 608 (b) and the law set out in the above cases to this case, we must agree that the questions asked appellant on cross-examination were improper. In the first place, *Gustafson* indicated that misconduct relating to

truthfulness would include forgery, perjury, bribery, false pretense, theft, and embezzlement, but said, "Obviously, some misconduct would not bear on truthfulness. For example, murder, manslaughter or assault do not *per se* relate to dishonesty." And in *Divanovich* the court said, "Questions regarding appellant's violent nature and destruction of property are wholly unrelated to his propensity for honesty and, therefore, improper." So, the questions about appellant "touching" the girl during the afternoon would not, under *Gustafson* and *Divanovich*, have any relation to his truthfulness or untruthfulness.

Another condition that must be met is that the probative value of the conduct must outweigh any prejudicial effect. Here, the appellant denied that he "touched" the girl as suggested by the prosecutor. Rule 608 (b) provides that "specific instances of the conduct of the witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." Thus the appellant's denial ended the inquiry since, as *Gustafson* says, "The State may not go beyond that answer, as it may in the case of a conviction, and prove the misconduct by extrinsic evidence." Under this situation, a New Mexico case cited in *Gustafson* held the questioning prejudicial because no evidence of probative value resulted and the *Gustafson* opinion says, "We arrive at the same conclusion."

The third condition to be met is that the questions must be asked in good faith. We hesitate to say that the questions about appellant's conduct during the afternoon were not asked in good faith in this case. The record is devoid, however, of any information upon which the questions were based. It would be helpful, in this regard, to both the trial court and the appellate court for the prosecutor, at least, to state (out of the jury's hearing) the information he has which causes him to want to ask such questions. After all, there is language in *Gustafson* which says "Prosecuting attorneys would be well advised to procure a ruling from the trial judge before asking such questions before a jury."

The State agrees that appellant's conduct during the

afternoon would be inadmissible to show only that he was a bad man who should be convicted, but it says that was not the purposes of the questioning. The conduct inquired about was admissible, the State contends, under Rule 404(b) of the Uniform Rules of Evidence, as proof of motive, intent, preparation, or plan. The distinction, however, is that in the cases cited by the State there was testimony, or tangible evidence, to show the conduct, but in the case at bar there is no such evidence. There is nothing here but questions asked by the prosecutor. Rule 404 (b) cannot apply without evidence. The same distinction exists with regard to the State's argument that intermingled acts are admissible to show the circumstances "surrounding the whole criminal episode." There is simply no evidence of an "act" in the afternoon — only questions asked on cross-examination. To the extent that *Alexander* v. *State*, 257 Ark. 343, 516 S.W. 2d 368 (1974), cited by the State, is in conflict with what we have said here we call attention to the fact that it was decided before the adoption of the Uniform Rules of Evidence and before the decisions of *Gustafson* and *Divanovich*.

We, therefore, hold that the prosecutor's cross-examination about appellant's conduct during the afternoon was improper. We cannot say these questions had no prejudicial effect. *McIntosh* v. *State*, 262 Ark. 7, 552 S.W. 2d 649 (1977). *Chapman & Pearson* v. *State*, 257 Ark. 415, 516 S.W. 2d 598 (1974).

Reversed and remanded.

Jesse RAY *v.* GEORGIA-PACIFIC CORPORATION

CA 80-470 614 S.W. 2d 676

Court of Appeals of Arkansas
Opinion delivered April 22, 1981
[Rehearing denied May 27, 1981.]

Dewey Moore, for appellant.

Griffin, Rainwater & Draper, and *Joe K. Bridgforth*, Resident Counsel, for appellee.

GEORGE K. CRACRAFT, Judge. Appellant brings this appeal from that part of a decision of the Workers' Compensation Commission which denied him an award for disability to the body as a whole, the right to present evidence of violation of safety regulations under Ark. Stat. Ann. § 81-1310 (d) and in not holding that the employer was liable for additional medical expenses.

The appellant, Jesse Ray, sustained a compensable injury in the course of his employment with the appellee, Georgia-Pacific Corporation, for which temporary total disability benefits were paid through July 31, 1977. He returned to work on August 1, 1977, and continued in that employment since that date. Dr. Hartmann in his report of November 4, 1977, reported that the appellant had received an injury to his right knee and rated him as having a ten percent permanent disability as a result of that injury. He found no permanent disability to the body as a whole.

On September 30, 1977, without the permission or knowledge of either the employer or the Workers' Compensation Commission he was seen by Dr. Lester, complaining

of a back injury. Dr. Lester rated his permanent partial disability to the right leg as between ten and fifteen percent and rated him five to ten percent disability to the body as a whole. The appellant made claim to the compensation commission for permanent partial disability ratings as to his right leg and to the body as a whole basing that claim upon the medical report of Dr. Lester, also claiming that the appellee should be responsible for the medical treatment rendered by Dr. Lester. The appellant further claimed the benefit of the fifteen percent penalty under the provisions of Ark. Stat. Ann. § 81-1310 (d) (Repl. 1979), which provides for such a penalty "where there is clear and convincing evidence that the injury was caused by violation of any Arkansas statute or regulation pertaining to the health or safety of employees." In answers to interrogatories propounded to him prior to the hearing the appellant stated that he was basing his claim upon Ark. Stat. Ann. § 81-108 (Repl. 1979), which in general requires an employer to furnish a safe place for its employees to work.

At a hearing before the Administrative Law Judge it was found that the claimant had received a permanent partial disability of twelve and one-half percent to his right knee and a five percent disability to the body as a whole as a result of the injuries. The Administrative Law Judge further held that the employer was not responsible for the medical bills incurred by appellant with Dr. Lester for his failure to comply with Rule 21. The Administrative Law Judge further refused to hear an offer of proof on the safety penalty holding that, as a matter of law, Ark. Stat. Ann. § 81-108 (Repl. 1979) was not such a safety statute or regulation as was contemplated by Ark. Stat. Ann. § 81-1310 (d) (Repl. 1979). On review the full commission affirmed all of the rulings of the Administrative Law Judge with the exception of his finding as to disability to the body as a whole.

The appellant first contends that the Workers' Compensation Commission erred in its finding that the appellant did not sustain any disability to the body as a whole. We cannot agree. While there was testimony in the report of Dr. Lester that found such a disability, there was also testimony in the report of Dr. Hartmann that none had been sustained.

This court must view the evidence in the light most favorable to the commission's decision and uphold that decision if supported by substantial evidence. *Warwick Electronics* v. *DeVazier*, 253 Ark. 1100, 490 S.W. 2d 792. Conflicting medical testimony presents an issue of fact for the commission to determine. *Mechanics Lumber Co.* v. *Roark*, 216 Ark. 242, 224 S.W. 2d 806.

Here Dr. Hartmann's report indicated that no disability to the body as a whole had been sustained, and that any abnormalities in his back shown by the x-rays were of long standing and not caused by the accident in question. This report is quite detailed and its substantiality is not open to question. It is to be noted that the commission also considered the testimony of appellant's fellow employees, that they had worked with him for the two or three year period subsequent to the accident and had observed no difficulty nor heard complaints about his back and that he had done the work in exactly the same way both before and after the accident. They testified that they noticed nothing about his condition which would indicate any disability.

The appellant next argues that the commission erred in ruling that the appellee was not liable for the cost of the treatment rendered by Dr. Lester. The record reflects that the appellant was afforded reasonable and necessary medical treatment by Dr. Hicks, who treated him until he returned to work. The appellant engaged the services of Dr. Lester on his own, without knowledge or permission of his employer. He did not petition the Workers' Compensation Commission for a change in physicians pursuant to Rule 21 of that commission which provides a method by which an injured worker may obtain a change in treating physicians at the cost of the employer. One of those requirements is that the claimant file with the commission a petition for such a change, giving the name of the physician to whom he wishes to change and asserts that the physician to whom he wishes to change is competent to treat his particular ailment. In the absence of consent or compliance with Rule 21 to effect such a change, there is no obligation on the part of the employer to pay for the additional medical care.

The ruling of the Workers' Compensation Commission denying this claim upon finding that he had not complied with Rule 21 is supported by substantial evidence and will not be disturbed on appeal.

Appellant next argues that the commission erred in its ruling that as a matter of law the proof of a violation of Ark. Stat. Ann. § 81-108 (Repl. 1979) would not warrant it in invoking the fifteen percent penalty and dismissed his claim. We find merit in this contention.

Ark. Stat. Ann. § 81-1310 (d) (Repl. 1979) provides the following:

> (d) *Violation of safety provisions.* Where clear and convincing evidence that an injury or death is caused in substantial part by the failure of an employer to comply with any Arkansas statute or official regulation pertaining to the health or safety of employees, compensation or death benefits provided by this Act shall be increased by fifteen percent . . . .

Ark. Stat. Ann. § 81-108 (a) (Repl. 1979) is as follows;

> (a) Every employer shall furnish employment which shall be safe for the employees therein and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such an employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees . . . .

Both the Administrative Law Judge and the Full Commission relied on the case of *Ryan* v. *NAPA*, 266 Ark. 802, 586 S.W. 2d 6 (Ark. App. 1979). The appellee argues that as the appellant cited no specific safety statute or official regulation of the State of Arkansas which was violated by appellee other than Ark. Stat. Ann. § 81-108, the claim could not be allowed inasmuch as that statute is not part of the Workmen's Compensation Act. We do not interpret that section as requiring that the violated statute or regulation be a part of

the Workmen's Compensation Act but rather that it applies to all such regulations, whatever area of public safety it may purport to cover. Nor do we construe *Ryan* as so holding. The court in *Ryan* did consider evidence of conduct alleged to have been in violation of Ark. Stat. Ann. § 81-108, but concluded that the evidence of violation of that statute was not substantial.

In *Harber et al* v. *Shows et al*, 262 Ark. 161, 553 S.W. 2d 282, the penalty provision was sought to be invoked on two grounds. First it was asserted that the injury resulted from violation of a federal regulation, and secondly, that it violated Ark. Stat. Ann. § 81-108. The commission imposed the penalty on a finding that there had been a violation of the federal regulation but did not pass on the question of whether there had been a violation of § 81-108. On appeal the court reversed upon a finding that the provisions of Ark. Stat. Ann. § 81-1310 (d) did not include federal regulations, but had reference only to Arkansas statutes or Arkansas regulations. In its direction for further action on remand of the case the court made it clear that evidence of a violation of Ark. Stat. Ann. § 81-108 was included in the penalty statute of the Workmen's Compensation Act in the following statement:

> The attorney for appellees also tried to proceed before the referee on the theory that the employer had failed to provide a safe place to work in violation of Ark. Stat. Ann. § 81-108 (Repl. 1960). After the hearing before the referee, the appellees tried to offer into evidence regulations of the Arkansas Labor Department which would have been relevant to this case. Neither the referee nor the Commission ruled on whether or not the appellees could proceed under Arkansas law, but instead based their decisions on violations of the federal regulations. This case will be remanded for a rehearing to determine whether or not the appellees may be entitled to compensation for violation of Arkansas regulations or law.

We hold that the proof by clear and convincing evidence that the injury or death of a worker is caused in substantial part by the failure of the employer to provide safe employ-

ment as required in Ark. Stat. Ann. § 108 (a), is within the purview of Ark. Stat. Ann. § 81-1310 (d) and that appellant should have been permitted to introduce evidence on that issue.

We do not know from the record what evidence appellant might have presented tending to show a violation of the safe employment statute. The Administrative Law Judge ruled as a matter of law that he could not present that evidence. At the hearing appellant attempted to make his offer of proof for the record, but was denied that right in the following language:

> I'm going to deny claimant's contention to make an offer of proof as to the safety violation. If the case is ultimately remanded to me we will have to hear it anyway. But I feel like that is the most expeditious way to handle it. I'll note your objections.

Ordinarily exclusion of evidence by a trial court will not be reviewed if an offer of proof of what the evidence would show is not in the record. However, it appears that the appellant was denied that right and not permitted to make a showing in the record of what he proposed to prove. In those circumstances, we conclude that he should be afforded that right and remand the case for further proceedings on that issue.

Affirmed in part and reversed and remanded in part.

Elton J. HABERMAN et ux *v.* Peter
VAN ZANDVOORD et ux

CA 80-467 614 S.W. 2d 242

Court of Appeals of Arkansas
Opinion delivered April 22, 1981

Charles E. Davis, for appellants.

Ralph C. Williams, for appellees.

JAMES R. COOPER, Judge. This is an appeal from a ruling by the Chancery Court of Benton County, Arkansas, which held that appellants were not in contempt of court and which modified a prior decree of that court regarding a permanent injunction.

This case originated with a suit by appellees against

appellants which resulted in an order of the Benton County Chancery Court requiring appellants to reduce the height of a spillway by one foot. The spillway and dam had been erected across a stream which caused water to back up onto appellees' lands. On September 6, 1979, a petition asking that appellants be cited for contempt was filed. It alleged that they had not only failed to reduce the height of the spillway, but that they had increased its height so as to cause the water to back up on appellees' land more than it was on July 9, 1979. On March 3, 1980, the chancellor entered a decree finding that appellants were not in contempt but he modified the original order and required that the spillway should be maintained so as to allow the water behind the dam to rise no closer than 83 inches to the top of the bridge curb on the east side of the bridge on the roadway between the land of the parties. The Court found that it intended by its order of July 9, 1979, that the water be maintained so the level of the water would be no higher than it was prior to the work performed by appellants on the dam on or about October 13, 1978. The Court then found that the 83 inch measurement would accomplish that result. From that decree comes this appeal.

The first issue we must decide is whether the Chancellor abused his discretion by ruling on an issue which was not before the court on the pleadings. Appellants had been cited for contempt for failure to comply with the earlier order. The Court, after testimony was adduced and evidence introduced, found that appellants had, in good faith, attempted to comply with the earlier order. The Court, after hearing all the testimony and viewing the exhibits, found that the earlier order did not do what the Court wanted done, and that a different measurement was necessary to insure the desired result. It appears that, upon proper notice, the Court could modify its previous order. *Carter* v. *Oslin*, 228 Ark. 629, 309 S.W. 2d 328 (1958).

The original complaint complained of water backing up on appellees' land as a result of appellants' dam. The Court found that in order to prevent the appellees from being deprived of the use of their land, the spillway would be lowered one foot. After the contempt hearing it was obvious

to the Chancellor that, even though appellants had tried to comply with the order, appellees were still being deprived of the use of part of their land due to the water backing up. The Chancellor modified the decree and in so doing changed the method of achieving the result he felt was equitable. He did not change the result, or the relief he intended, but only changed the manner by which the relief was to be achieved. His actions did not constitute an abuse of discretion.

The prayer for relief in the Petition for Citation for Contempt asks for, among other things, "all proper relief." The Arkansas Supreme Court has held that in equity cases:

> . . . the cause of action and relief granted are determined by the allegations of fact in the pleading, if there is a prayer for general relief, in the absence of surprise. *Henslee* v. *Kennedy*, 262 Ark. 198, 555 S.W. 2d 937 (1977).

In *Johnson* v. *Arledge*, 258 Ark. 608, 527 S.W. 2d 917 (1975), the Court held that:

> . . . Even though appellant did not specifically pray for judgment for arrearages, she was, in equity, under her prayer for general relief entitled to any relief in equity that would be justified upon proof of the facts alleged.

In this case, the petition for contempt alleged that the actions of appellants had caused more water to back up on to appellees' land than was present at the date of trial. This pleading of fact put appellants on notice that one of the issues before the Chancellor was the depth of the water and the degree to which it flooded appellees' land. There is no claim of surprise by appellants, and it appears to us that the question of the water level was fully litigated at the contempt hearing. We also note that either party is free to petition the Court for further modification if they so desire.

Secondly, appellants argue that the Court could not modify the prior decree after the expiration of ninety days from entry of the first decree, and, in support of this argument, cite Rule 60 (b) of the Arkansas Rules of Civil Proce-

dure. However, we do not believe that the rule prevents modification to carry out the intent of the original order. *Carter* v. *Oslin*, supra.

In that case, the Court said:

> . . . When the trial court on December 13, 1956, ordered appellee to restore the fence on the north side of the land it, in effect, if not in fact, issued a mandatory injunction against appellee. In such a situation we have repeatedly held that the Court does not lose control or jurisdiction with the lapse of the term of Court. . . . [Citing Cases].

In *Local Union No. 656 et al* v. *Thompson*, 221 Ark. 509, 254 S.W. 2d 62 (1953), the Court, in discussing appellants' fear that the injunction, if left to stand, would prevent picketing during another strike, stated:

> . . . Even so, the appellant's remedy is in the trial court and not here. An injunction, unlike most judgments, may be modified or vacated after the lapse of the term without regard to the statutes that ordinarily come into play when the term expires. *Stane* v. *Mettetal*, 213 Ark. 404, 210 S.W. 2d 804. . . .

We find that the Chancellor had the authority to modify or clarify his original order.

For their third point, appellants argue that the decree is against a preponderance of the evidence. We will not disturb the findings of the Chancellor unless we believe his findings to be against a preponderance of the evidence or clearly erroneous. Rule 52, Ark. Rules of Civil Procedure.

In this case the Chancellor heard several witnesses testify as to the water level and as to the methods they used to measure it. The Chancellor appears to have viewed the property, although the record is not clear on this point. From the record we are unable to say that the findings of the Court are against a preponderance of the evidence or that they are clearly erroneous.

Appellants argue that engineering studies are needed, and if that is true they are free to procure them and petition the Court for further modification of its order.

On the record we find no error.

Affirmed.

Marilyn SCOTT *v.* STATE of Arkansas

CA CR 80-95 614 S.W. 2d 239

Court of Appeals of Arkansas
Opinion delivered April 22, 1981

E. Alvin Schay, State Appellate Defender, by: *Jack R. Kearney*, Deputy Defender, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums*, Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. Appellant was convicted at a non-jury trial of tampering with physical evidence, Ark. Stat. Ann. § 41-2611 (Repl. 1977), and was sentenced to two years imprisonment. Appellant contends that the judgment rendered below should be dismissed because it is not supported by evidence of guilt of the crime charged, and that the trial court erred in denying her motion for dismissal of the charges below.

On December 14, 1979, Little Rock Police officers arrived at a Little Rock residence to investigate a shooting. Upon arrival they found Jerry Chandler, the brother-in-law of appellant, standing in the street with two bullet wounds. Mr. Chandler indicated that he had been shot twice by his wife, Carolyn Chandler, the half sister of appellant. Mr. Chandler was transported by ambulance to the hospital and following his removal from the scene the officers began their investigation. After questioning Mrs. Chandler and appellant, appellant advised the officers that she had thrown the gun with which Chandler was shot in the backyard. She testified that she had removed the gun and thrown it into the backyard as a result of requests by the victim. Although the officers searched for the weapon, it was never located. The record reflects that no criminal charges were ever filed as a result of the shooting. The testimony of the officers indicates

that appellant was uncooperative in assisting them in locating the weapon. Her testimony was to the contrary and indicated that she was nervous and really did not know where she had thrown the weapon.

Ark. Stat. Ann. § 41-2611 (Repl. 1977) provides as follows:

> (1) A person commits the offense of tampering with physical evidence if he alters, destroys, suppresses, removes or conceals any records, document or thing with the purpose of impairing its verity, legibility, or availability in any official proceeding or investigation.
>
> (2) Tampering with physical evidence is a class D felony if the actor impairs or obstructs the prosecution or defense of a felony. Otherwise, tampering with physical evidence is a class B misdemeanor.

The record indicates that appellant did remove the weapon. She testifies that she threw it into the backyard. The first question is whether or not she did so with the purpose of impairing its availability in an official proceeding or investigation. The police officers were clearly involved in an investigation when they sought the gun following the shooting of Jerry Chandler. The testimony of appellant was to the effect that she was simply attempting to stop further bloodshed by disposing of the weapon at the request of the victim. The testimony of the police officers indicates that she did not assist them in locating the weapon. Those facts are to be considered by the trial court in determining whether or not appellant had the requisite intent required under the statute.

The credibility of witnesses is determined by the Court as the trier of fact and we must affirm the judgment of the trial court if there is any substantial evidence to support the verdict. *Smith* v. *State*, 271 Ark. 671, 609 S.W. 2d 922 (1981). When we view the sufficiency of the evidence, it is reviewed in the light most favorable the State. *Norton* v. *State*, 271 Ark. 451, 609 S.W. 2d 1 (1980). Intent is a state of mind which must ordinarily be determined by inference from the circum-

stances rather than by direct evidence. *White* v. *State*, 271 Ark. 692, 610 S.W. 2d 266 (Ark. App. 1981).

We conclude that the trial court had sufficient evidence upon which to base a finding that appellant did remove or conceal the weapon with the purpose of impairing its availability in an investigation. We believe that the finding of guilt was supported by substantial evidence and that therefore the Court correctly denied appellant's motion for dismissal.

However, we must deal with the sentence imposed by the Court. The second portion of Ark. Stat. Ann. § 41-2611 (Repl. 1977) grades the offense based on its seriousness. Tampering is a class D felony where the actor impairs or obstructs the prosecution or defense of a felony. In all other cases it is a class B misdemeanor. At the time appellant threw the weapon into the backyard there had obviously been no felony charges filed since the incident had just occurred. It seems clear from the record that the unavailability of the weapon under the circumstances could have seriously impaired the investigation of the case. The shooting of Jerry Chandler could have constituted any number of felonies ranging from murder to battery.

The problem is in determining whether appellant actually impaired or obstructed the prosecution or defense of a felony. From the record we cannot determine that she did impair the prosecution of a felony. Therefore, the state failed to meet its burden of proof on the felony charge since it did not show that the appellant impaired or obstructed the prosecution or defense of a felony. The state only proved the lesser offense, which is a misdemeanor. There is no substantial evidence to support the felony conviction.

When the trial court imposes punishment for a higher degree of an offense than the evidence will support, the appellate court has the power to reduce the punishment to the maximum for the lesser offense, to the minimum for the lesser offense, to some intermediate term or to remand the case to the trial court for the assessment of the punishment or

for a new trial. *Collins* v. *State*, 261 Ark. 195, 548 S.W. 2d 106 (1977); *Dixon* v. *State*, 260 Ark. 857, 545 S.W. 2d 606 (1977).

Since there is no substantial evidence to support the felony conviction, the conviction must be reduced to misdemeanor tampering with evidence. This is a class B misdemeanor, punishable by imprisonment in the county jail for a term not to exceed ninety (90) days and/or a fine not to exceed $500.00. Ark. Stat. Ann. § 41-901 and 41-1101 (Repl. 1977). The judgment is so modified and the cause remanded to the Circuit Court for the entry of a judgment sentencing appellant within the limits allowed for class B misdemeanor.

Modified and remanded.

John S. ROBBINS et al *v.* Larry W. MARCHANT et ux

CA 80-461 616 S.W. 2d 736

Court of Appeals of Arkansas
Opinion delivered April 22, 1981
[Rehearing denied June 3, 1981.]

Wright, Lindsey & Jennings, for appellants.

Henry N. Means, III, for appellees.

TOM GLAZE, Judge. This action arose out of the sale of a house by Robbins and Associates (Robbins) to the appellees, Deborah and Larry Marchant (Marchants). Robbins had knowledge that the house was in a flood zone but failed to inform the Marchants of this fact. As a consequence no flood insurance was obtained by the Marchants at the time the parties closed the sale of the house on February 1, 1978. On September 13, 1978, the Marchants sustained damage to their house and its contents due to a flood. The Marchants filed suit for damages against Robbins and its president, John S. Robbins. John S. Robbins was also sued as the insurance agent from whom the Marchants purchased casualty insurance on the property in question. Appellant, Commercial National Mortgage Company (Commercial), and American Abstract & Title Company (American) were made parties to the law suit because they were participants in the sale of the property when the loan was closed. At the trial, the jury awarded the Marchants $26,000 in damages and apportioned the appellants' responsibility as follows: Robbins, 50%; John S. Robbins, 40%; and Commercial, 10%. The court dismissed American from the action, finding it should not be responsible for any of the damages incurred by the Marchants. Appellants' sole issue raised on appeal is that the trial court erred in failing to give an instruction limiting the Marchants' damages to the amount recoverable under a flood insurance policy if one had been obtained by the Marchants.

The appellants contend that the case of *Derby* v. *Blankenship*, 217 Ark. 272, 230 S.W. 2d 481 (1950) controls the issue raised here, and we agree. In *Derby*, a sawmill operator brought an action against a general insurance agent, based on the agent's failure to secure a policy of workmen's compensation insurance on the sawmill employees. The court approved the following instruction which we conclude is dispositive of the issue at bar:

> . . . where an insurance agent undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him

> the duty, in the exercise of reasonable care, to perform the obligation that he has assumed, and *within the amount of the proposed policy*, the agent may be held liable for any loss suffered by the applicant attributable to his failure to provide such insurance. [Emphasis added.]

Appellees argue that the decision in *Derby* is distinguishable from the facts before us because none of the appellants actually offered to procure flood insurance for the Marchants. Rather, the Marchants argue, the appellants' neglect lies merely in the circumstance that they had failed to inform the Marchants that the property they were purchasing was in a flood zone. In fact, an agent for Robbins had stated that the Marchants did not have to worry about flood insurance. Although appellees appear correct in their argument, it is difficult to understand why this factual distinction should permit the appellees greater damages.

The damages sought by the Marchants might conceivably be different if they had brought suit for rescission. However, the Marchants brought suit for damages, alleging the appellants negligently or intentionally failed to inform the Marchants of the flood zone and that flood insurance should have been purchased. If the appellants had met this duty and subsequently procured the insurance policy, the Marchants' loss of damages would have been subject to, and therefore, limited to the terms of the policy. We fail to see any reason (nor do the appellees offer one) why the rule of law announced in *Derby* should not be applied to the facts at bar. If we were to hold otherwise, we would effectively cause the appellants to be absolute insurers and liable for damages which would exceed the limits of the insurance policy they could have obtained if appellants had performed in a non-negligent manner.

For the foregoing reasons, we reverse and remand this cause with directions that the appellants are entitled to an instruction in accordance with the rule in *Derby* which limits the appellees' damages to the amount recoverable under a standard flood insurance policy.

Reversed and remanded.

Gerry SWAFFORD, Widower, et al, of Delores SWAFFORD, Deceased Employee *v.* TYSON FOODS, INC., Self-Insured Employer

CA 80-463 614 S.W. 2d 244

Court of Appeals of Arkansas
Opinion delivered April 22, 1981

Davis, Bracey & Heuer, P.A., by: *Sam T. Heuer*, for appellant.

Davis, Bassett, Cox & Wright, for appellee.

PER CURIAM. Amici Curiae briefs may be filed in the above styled appeal from the Workers' Compensation Commission within forty (40) days from the date of this order.

The appeal involves the question of whether Ark. Stat. Ann. § 81-1302(m) (Repl. 1976) creates an impermissible gender-based discrimination under the Fourteenth Amendment of the United States Constitution and/or Article II, Section 18 of the Constitution of the State of Arkansas.

The Arkansas Workers' Compensation Act, Ark. Stat. Ann. § 81-1302 provides:

> (1) "Widow" shall include only the decedent's legal wife, living with or dependent for support upon him at the time of his death.
>
> (2) "Widower" shall include only the decedent's legal husband who, at the time of her death, was living with and dependent upon her for support and was incapacitated to support himself.

The distinction between widow and widower carried forward into Ark. Stat. Ann. § 81-1315 (c) "... compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon him in the following percentage of the average weekly wage of the employee, and in the following order of preference:

> First. To the widow if there is no child, thirty-five per cent (35%), and such compensation shall be paid until her death or remarriage. Provided, however, the widow shall establish, in fact, some dependency upon the deceased employee before she will be entitled to benefits as provided herein.
>
> To the widower, if there is no child, thirty-five per cent (35%), and such compensation shall be paid during the continuance of his incapacity or until remarriage. Provided, however, the widower shall establish, in fact, some dependency upon the deceased employee before he will be entitled to benefits as provided herein.

If this Court concludes that § 81-1302 (m) is constitutionally invalid, it is faced with the further question whether the defect should be cured by extending the rights of widowers or eliminating them for widows.

Amici Curiae briefs may be filed without securing permission of the regular attorneys of the parties to this appeal and copies of such briefs will be served on those attorneys by the clerk.

Deborah Ann SANDERS (HALLOWELL) and
Frank HOLLEY *v.* Michael Ray SANDERS

CA 80-404 615 S.W. 2d 375

Court of Appeals of Arkansas
Opinion delivered April 29, 1981
[Rehearing denied June 3, 1981.]

Thorp Thomas, for appellants.

Mike Wilson, for appellee.

MELVIN MAYFIELD, Chief Judge. This is a child custody case. The child was born June 25, 1971. Her parents were divorced on January 30, 1975, by a Pulaski Chancery Court which granted custody of the child to the mother.

On September 11, 1975, the court granted the mother's petition to remove her daughter from Arkansas to California where the mother, who was planning to remarry, intended to live. The order also provided that the father would have custody for thirty days each year during the summer.

In the summer of 1979 the mother sent the child to Arkansas for the thirty-day visit with the father but instead of returning her at the end of the thirty days, the father filed a petition to change custody to himself and filed a motion for an extended period of visitation until his petition could be heard.

The mother filed a response to the petition and caused an order to issue directing the father to show cause why he should not be held in contempt for failing to return the child. On August 22, 1979, a hearing was held with both

parties and their attorneys present. The court denied the father's motion for an extended period of visitation, set the change of custody hearing for May 26, 1980, ordered the mother to post $1,000.00 bond to assure that she and the child would return to Arkansas for the hearing, and directed that Arkansas Social Services arrange for examination and evaluation of the home conditions of both parents and make a written report thereof to the court.

The hearing date was later changed from May 26, 1980, to May 12, 1980. Before the hearing the mother filed a motion for continuance and a motion asking that the cause be removed from the calendar and dismissed. These motions were denied and the hearing was held. Neither mother nor child were present but the mother's attorney was in attendance and participated at the hearing. Testimony was heard, reports from Social Services of both Arkansas and California were introduced, and depositions were read. At the conclusion of the hearing the court changed the custody to the father.

Three days later a petition was filed to forfeit the $1,000.00 bond which the court had previously ordered posted to assure the attendance of the mother and child at the hearing. This bond had been made and posted by the mother's father. He was notified of the hearing set on the petition but did not appear and the bond was forfeited.

The mother and her father have appealed. They urge four points for reversal: (1) the court should have granted a continuance; (2) the child was in California, custody jurisdiction was in the courts of that state, and Arkansas should not have changed it; (3) the evidence was not sufficient to change custody; and (4) the bond should not have been forfeited.

On the question of continuance, the appellants concede this is a matter within the sound discretion of the trial court. At the hearing on August 22, 1979, the court let the child return to California with her mother and tentatively set a hearing for May 26, 1980, on the father's petition. This was nine months later and the date was selected by the chancellor

after inquiring about the child's school schedule and after being told about the mother's work vacation. He really did not get much information about either at the time and specifically asked that a copy of the school schedule be submitted so he could have the information and firm up the matter on the docket. Subsequent to that, it appears that an interrogatory submitted to the mother about her daughter's school schedule was not fully answered and on December 19, 1979, the court entered an order directing that it be answered, but no further answer appears in the record.

On May 7, 1980, the mother filed a motion for continuance which was not granted. In her brief this appellant says she had been with the company for which she worked since July of 1979, and because she had not been there for one year it was impossible to take leave for the trial on May 12, 1980, and she argues that the case should have been reset within a month which would have allowed her to be present. She knew this, however, when the court tentatively set the case for May 26, 1980, and while the date was finally changed to May 12, she waited until May 7 to file a motion for continuance.

Considering the long period of time from August of 1979 to the hearing in May of 1980, and appellant's rather indifferent attitude toward the court's effort to fix the hearing date, we cannot say the trial court abused its discretion in refusing to grant a continuance. *McMorella* v. *Greer*, 211 Ark. 417, 200 S.W. 2d 974 (1947); *Crisco* v. *Murdock Acceptance Corp.*, 222 Ark. 127, 258 S.W. 2d 551 (1953).

In addition to the motion for continuance filed by the mother on May 7, 1980, she also filed, that same day, a motion which alleged that she had filed an action in California, asking that the Arkansas decree (giving her custody) be established as a California judgment and enforced by that state. The motion asked that the father's petition to change custody be removed from the docket of the Arkansas court and be dismissed pending further proceedings in the California court.

Both Arkansas and California have adopted the Uniform Child Custody Jurisdiction Act. Our act, Ark. Stat. Ann. § 34-2701 — 2725 (Cum. Supp. 1979), was approved February 9, 1979, and became effective July 20, 1979 (90 days after the legislature recessed on April 20, 1979).

> Section three of the act (34-2703) allows a state to exercise jurisdiction over a child if that state is the 'home state' of the child or it is in the best interest of the child. Jurisdiction is not granted solely on the physical presence of the child, except in cases of abandonment, emergency, or when there is no other state which can or or will assume jurisdiction. Conversely, physical presence of the child, although desirable, is not a prerequisite for jurisdiction.

Survey of Arkansas Law 1978-1979, 3 UALR L.J. 239-40 (1980).

Under section 34-2703 of the act, Arkansas undoubtedly had jurisdiction to modify the custody decree here involved. A closer question is presented as to whether the Arkansas court should have modified the decree. In a similar situation it appears that California stayed a custody proceeding pending a determination by a Wyoming court. See *Schlumpf* v. *Superior Court*, 79 Cal. App. 3d 892, 145 Cal. Rptr. 190 (1978).

In this case, however, there are several considerations which we think made it proper for the Arkansas court to have exercised its jurisdiction to change custody of the child.

In the first place, section 34-2706 of the act provides that a state shall not exercise jurisdiction if at the time of filing the petition a proceeding concerning the custody of the child is pending in the court of another state exercising jurisdiction substantially in conformity with the act. No such proceeding was pending in California at the time the petition to modify was filed in Arkansas by the father.

In the second place, section 34-2707 provides that a court may decline to exercise its jurisdiction if it finds that it

is an inconvenient forum to make a custody determination and a court of another state is a more appropriate forum. The section provides that in determining whether it is an inconvenient forum, the court may take into account whether substantial evidence concerning the child's present or future care, protection, training and personal relationships is more readily available in another state and if the exercise of jurisdiction would contravene any of the purposes stated in section 1 of the act. It does not appear that the evidence referred to in the section would be more readily available in California. As a matter of fact, the evidence available in California was presented by deposition in the Arkansas hearing along with extensive evidence available here.

Also, one of the purposes of the act set out in section 1 is to "deter abductions and other unilateral removals of children undertaken to obtain custody awards." In this case the father filed a petition in Arkansas to change custody to himself and filed a motion for an extended period of visitation until his custody petition could be heard. The mother, however, who was allowed to take the child back to California until that petition could be heard, did not return the child in keeping with the order of the court which allowed her to take the child to California. For Arkansas to defer to a custody determination by California under these circumstances would be to contravene the purposes of the act.

We cannot say that the court erred in exercising its jurisdiction to modify the custody decree which it had previously rendered.

The appellants also argue that the evidence was not sufficient to support the chancellor's change of custody. A long recitation of the evidence in this regard would serve no useful purpose. Suffice it to say, there was evidence concerning the child's physical condition, personal hygiene, and table manners. There was evidence from her school teachers in California and reports and evaluations of home conditions from Social Services of both Arkansas and California. And there was evidence that the father was able to offer the

girl a stable, secure, and loving home environment in a community where both her maternal and paternal grandparents reside as well as other relatives of both her mother and father. Although appellants suggest that the court changed custody to the father as punishment for the mother's failing to appear, the court specifically said that was not the basis upon which the change was made.

The primary consideration in awarding custody of children is the welfare and best interest of the children involved. *Digby* v. *Digby*, 263 Ark. 813, 567 S.W. 2d 290 (1980). And our court has held, "If the welfare of the child so requires, a decree may be modified without a change of circumstances." *Phelps* v. *Phelps*, 209 Ark. 44, 47, 189 S.W. 2d 617 (1945).

Even though we try chancery cases de novo, we do not reverse unless the chancellor's finding is clearly against the preponderance of the evidence. *Hackworth* v. *First National Bank*, 265 Ark. 668, 580 S.W. 2d 465 (1979); *Loftin* v. *Goza*, 244 Ark. 373, 425 S.W. 2d 291 (1968); Rule 52, Ark. Rules of Civil Procedure.

Finally, the appellants contend that the $1,000.00 bond posted by the mother's father, Frank E. Holley, should be held null and void because it provided for payment to be made to Pulaski County and not to the appellee, Michael R. Sanders.

It is true that the bond provides that Frank E. Holley as principal is "held and firmly bound to the County of Pulaski" but it also says "there is now pending a motion to change custody of the parties' minor child from the plaintiff to the defendant and principal is required to furnish a bond in the sum of $1,000.00 to secure the appearance of Deborah Ann Sanders Hallowell and Holley Sanders to personally appear in Chancery Court of Pulaski County, Arkansas, at the time and date to be set by this court for its adjudication on the custody matter." The bond concludes that if those persons do appear at the time and place set by the court, then the "obligation shall be null and void, otherwise it shall remain in full force and effect." In *Herring* v. *Morton*,

248 Ark. 718, 453 S.W. 2d 400 (1970), a bond was executed for the same purpose as the one here involved and was made payable to Hempstead County. The trial court had directed that the proceeds of the bond be paid to the appellee and on appeal it was urged that the proceeds should have been paid to Hempstead County, but the Supreme Court said:

> However, since the purpose of such bonds is to insure compliance with the orders of the court and to give some security to the parties litigant, it appears to us that perhaps a better procedure would be to require the proceeds of the forfeited bond to be paid into the registry of the court for the use and benefit of the parties litigant in enforcing the decree of the court in any jurisdiction where the minor child may be found. While this procedure may cause additional work on the part of the trial court and its clerks in policing withdrawals from the funds, it has the salutary effect of permitting the surety to protect himself to some extent by encouraging the principal to purge herself of the contempt and thus obtain a refund or partial refund of the amount of the bond. To this extent the order of the trial court should be modified.

The *Herring* case was cited in *Langley* v. *Denton*, 263 Ark. 904, 568 S.W. 2d 19 (1978) where the bond was also ordered paid into the registry of the court.

In our case the order of the court forfeiting the bond provides that "Frank E. Holley is ordered to pay unto Michael R. Sanders the sum of $1,000,00"; and that "Michael R. Sanders is given judgment against Frank E. Holley in the amount of $1,000.00." Under the authority of the *Herring* and *Langley* cases, we do not think this was the proper procedure to follow. The proceeds of the bond should have been ordered paid into the registry of the court for the use and benefit of the appellee in enforcing the decree of the court. If payment has not been made or is not forthcoming, judgment may be rendered and enforced in the name of the county with the proceeds to be paid into the registry of the court for the use and benefit of the appellee as herein provided.

The decree changing custody from the mother to the father and holding the mother in contempt of court for her failure to appear at the hearing is affirmed. The order of the court granting judgment in favor of the appellee against the principal on the bond is reversed and remanded to the trial court to be modified in keeping with this opinion.

GLAZE, J., not participating.

THE FIRST NATIONAL BANK OF PARIS
et al *v.* PEOPLES SECURITY BANK

CA 80-510 614 S.W. 2d 521

Court of Appeals of Arkansas
Opinion delivered April 29, 1981

C. Richard Lippard and *Wright, Lindsey & Jennings*, for appellants.

Hermann Ivester, for appellee.

GEORGE K. CRACRAFT, Judge. In March of 1979 the prospective incorporators of appellee, Peoples Security Bank, filed with the Arkansas State Banking Board their petition for a charter for a new bank to be located in the City of Paris in Logan County. Formal objections were filed by American State Bank at Charleston, and the appellants, Logan County Bank at Scranton, the First National Bank at Paris and Citizens Bank of Booneville. After a lengthy hearing the Board denied the petition, finding that there did not exist a public necessity and need for a new bank in Paris. The incorporators of Peoples Security Bank appealed that determination to the Circuit Court of Logan County. The circuit court reversed the determination of the Board, finding that there was not substantial evidence to support the finding of the Board and remanded the cause with directions that a charter be issued.

The appellant banks submit by this appeal that the trial court erred in its findings; that there was substantial evidence to support the finding of the Board and that the Board had not acted arbitrarily or abused its discretion in denying the application for a charter. We agree.

Ark. Stat. Ann. § 67-303.1 (Repl. 1980) which sets out

the prerequisite to charter approval by the Banking Board is, in pertinent part, as follows:

> If the Commissioner and the State Banking Board are satisfied that the persons named as stockholders have the confidence of the community, are financially able to discharge the obligation resting upon the stockholders under any provisions of this act, that the requisite capital has been in good faith subscribed, that a majority of the stockholders are residents of the state, that there exists a public necessity of the business of the community in which it is sought to establish the same, and that a consideration has been given to these factors:
>
> (1) The adequacy of the capital structure of the proposed bank, its future earning prospect, the general character of its management, the convenience and need of the community to be served and whether or not its proposed corporate powers are consistent with applicable state banking laws. . . . (A certificate of incorporation may issue.)

This section requires that all of the listed criteria be established to the satisfaction of the Board. Failure to thus establish any one or more of them prohibits the approval of the proposed charter. In its findings the Board affirmatively found that the stockholders had the confidence of the community and were financially able to discharge the obligations resting on stockholders; that the requisite capital had been subscribed in good faith and that a majority of the stockholders were residents of the state. As to the last of these required criteria the Board found:

> (16) There does not exist a public necessity in the community for the business of the applicant.

This section requires that the Board, in reaching its determination, consider specified factors:

(1) The adequacy of the capital structure of the proposed bank. In this instance the Board did find the capital structure to be adequate,

(2) The proposed bank's future earnings prospect. The Board found on conflicting evidence that while the applicant had projected that the proposed bank would be economically successful and make a profit in the second or third year, its projections were based on a total bank deposit growth which did not materialize; on an unrealistic estimated cost of funds (6%); and an unrealistic estimate as to the ratio of time to demand deposits. In Finding of Fact Fifteen, the Board found:

> Under current economic conditions the applicant's future earning prospects and its chances for a successful and sound operation are not good.

(3) The general character of its management. The Board specifically found that none of the proposed directors had any significant banking experience. The proposed chief executive officer was age twenty-seven and a half years, had been in the banking business since 1973 at four different locations. It did find, however, that the general character of the proposed bank management was acceptable.

(4) The convenience and needs of the community to be served. The Board specifically found that there were seven banking institutions operating in the twenty-five mile radius of the proposed site; that there was competition for deposits and loans within the service area from savings and loan associations and production credit associations, and that the applicant did not propose to provide or offer any service which was not presently being offered by existing institutions. It further found that the community's legitimate credit and banking needs were being adequately taken care of by existing institutions. The Board specifically found from conflicting evidence before it that the need, from a public standpoint, for the proposed institution had not been shown. There was also evidence from which the Board made specific findings that the area proposed to be served had an average population increase of about forty-nine families per year, that Logan County had less than one percent of the state's population and was experiencing slow economic growth both in industry and employment. The labor market area had an unemployment rate higher than that of the state

as a whole. It also found that the county in which the bank was proposed to be located had a lower income and an older population than the rest of the state. There was evidence that a similar application for a federal charter had been denied by the comptroller the year before.

In its opinion reversing the Board's decision, the trial court relied upon the fact that though economic growth was found by the Board to be slow, there was in fact some growth. It also commented on the finding of the Board that in order for a second bank to survive it would have to draw significant deposits from existing institutions and that the Logan County Bank would be "substantially harmed." The circuit court found that substantial harm to existing institutions was not a prescribed criteria under Ark. Stat. Ann. § 67-303.1 (Repl. 1980) and that he did not find substantial evidence to support that finding in any event. He based that finding on evidence as to deposit growth in existing banks and statistical data indicating that the appellant banks ranked very high on lists of most profitable banks of comparable size. While harm to existing banks may not be a statutory criterion, it is a factor which the Board may properly consider along with all other evidence before it in determining whether the requirements of the act have been established. The evidence regarding the ranking of these banks as to profits was fully presented to and considered by the Board. There was also evidence tending to show that the increase in deposits was affected by the inflation factor and, that in present economic conditions, deposit growth was not "the bottom line."

The decision of an administrative board will be upheld if supported by substantial evidence and not arbitrary, capricious or characterized as an abuse of discretion. *Independence Savings & Loan Assn.* v. *Citizens Federal Savings & Loan Assn.*, 265 Ark. 203, 577 S.W. 2d 390; *Citizens Bank* v. *Arkansas State Banking Board*, 271 Ark. 703, 610 S.W. 2d 257 (1981). The "substantial evidence" rule in this type case requires a review of the entire record and not merely a review of the evidence supporting the Board. *Citizens Bank* v. *Arkansas State Banking Board*, supra. In support of their position, as they did before the trial court, appellant banks

point out conflicting evidence which was more favorable to their position and argue the question of credibility and weight of that evidence.

On several occasions in recent years our court has reaffirmed its earlier declarations that the questions of credibility of witnesses and weight to be accorded evidence presented to the Board is a prerogative of the Board and not of the reviewing court, and that courts rely on their findings because they are better equipped by specialization, insight and experience in the matters referred to them. *Independence Savings & Loan Assn.* v. *Citizens Federal Savings & Loan Assn.,* supra; *Citizens Bank* v. *Arkansas State Banking Board*, supra.

The reviewing court may not displace the Board's choice between two fairly conflicting views even though the court might have made a different choice had the matter been before it *de novo*. The reviewing court may not set aside a Board's decision unless it cannot conscientiously find from a review of the entire record that the evidence supporting the decision is substantial. *Northwest Savings & Loan Assn.* v. *Fayetteville Savings & Loan Assn.*, 262 Ark. 840, 562 S.W. 2d 49.

When the entire record is reviewed and not merely that testimony supporting the Board's conclusion, we cannot say that the finding that there was no public necessity for a new bank in the City of Paris is unsupported by substantial evidence. The question of whether the Board's action was arbitrary or capricious is a narrow one and more restrictive than the substantial evidence test. It is only applicable where the Board's decision is not supported on any rational basis and made in disregard of the facts and circumstances. *Arkadelphia Federal Savings & Loan Assn.* v. *Midsouth Savings & Loan Assn.*, 265 Ark. 860, 581 S.W. 2d 345.

Reversed and remanded.

PORTER SEED CLEANING, INCORPORATED et al
v. Mitch SKINNER

CA 81-23 615 S.W. 2d 380

Court of Appeals of Arkansas
Opinion delivered April 29, 1981
[Rehearing denied June 3, 1981.]

Chester C. Lowe, Jr., for appellants.

Jesse B. Daggett, for appellee.

JAMES R. COOPER, Judge. This is an appeal from a determination by the Workers' Compensation Commission that at the time of decedent's death, his minor son was entitled to receive maximum dependency benefits. At the hearing before the Administrative Law Judge, it was stipulated that the decedent was an employee of the appellant and that his death arose out of and in the course of his employment.

It is not disputed that the decedent and his wife were separated at the time of death. The testimony indicated that decedent and claimant saw each other several times a week and that he did provide approximately $100.00 per month for his child. He also carried insurance on his son through his employer. The parties were never divorced nor was there ever a court order establishing support payments.

Several recent cases have dealt with a similar problem as is presented in this case. These cases followed the amendment to Ark. Stat. Ann. § 81-1315 (c) (Repl. 1976). That amendment changed the statute so that it provided that death benefits were payable to persons who were "wholly and actually" dependent upon the deceased employee. Prior to the amendment benefits were payable to persons wholly dependent. In *Chicago Mill and Lumber Company* v. *Smith*, 228 Ark. 876, 310 S.W. 2d 803 (1958), the Arkansas Supreme Court stated that:

> We believe the Legislature used the term 'wholly dependent' in the sense of applying to those ordinarily

> recognized in law as dependents and this would certainly include wife and children:

In the first case decided after the amendment, *Roach Manufacturing Co.* v. *Cole*, 265 Ark. 908, 582 S.W. 2d 268 (1979), the Court reaffirmed its decision in *Chicago Mill*, supra. The Court found that although the wife had made no efforts to secure support, nor had the husband paid any support during his eleven month absence, the child still had a reasonable expectation of support. The Court found that the child was actually dependent upon the father although he had contributed no support. In the *Roach* case the Arkansas Supreme Court determined that the Legislature intended, by inserting the phrase "and actually", to change the conclusive presumption of dependency established under prior case law and required some showing of actual dependency. Thus, following *Roach*, a child to whom a parent owed a duty of support, and who had a reasonable expectation of support was "wholly and actually" dependent upon that parent.

In *Doyle's Concrete Finishers* v. *Moppin*, 267 Ark. 874, 596 S.W. 2d 1 (Ark. App. 1979), the Arkansas Court of Appeals dealt with a similar situation. The father was obligated under a divorce decree to pay $108.00 per month in support though the actual amount paid exceeded that sum. The sole issue in the case was whether the minor child of a deceased worker, whose death was the result of a work-related injury, was entitled to the maximum benefits under the Workers' Compensation Act as a matter of law, or entitled only to the extent to which the minor child is actually dependent upon the deceased parent.

The Court discussed *Chicago Mill* and *Roach*, supra, and determined that dependency was a matter of fact rather than law, and therefore that the partial dependency provisions of the Act applied. The Court further pointed out that *Roach* did not solve the problem, for the holding there

> ... affirms the Commission's award of maximum benefits to a dependent minor who was receiving nothing from the deceased parent — it did so on a

> finding that there was substantial evidence to support the Commission's award of maximum benefits to the minor child, who was found to be 'wholly and actually' dependent upon the decedent.

The Court went on to agree that appellant's argument was logical, since *Roach* indicated that the partial dependency provisions must apply whenever a dependent was not totally supported by the deceased parent. The Court expressed concern that if that interpretation were adopted there would be a distinction drawn between children residing with both parents as opposed to those who were not.

The Court further stated that it could envision a situation where a minor child, regardless of his living situation, might have independent resources, and therefore might not be dependent upon the parents for purposes of the Workers' Compensation Act. The Court concluded that a minor child, receiving some support, was entitled to no less in benefits than a child (as in *Roach*) who was receiving nothing but who had a reasonable expectation of support. The award was affirmed on a finding of substantial evidence to support the determination by the Commission that Brad Moppin was actually dependent upon the decedent at the time of death.

The Arkansas Supreme Court granted certiorari to review the *Moppin* decision by the Court of Appeals. In *Doyle's Concrete Finishers* v. *Moppin*, 268 Ark. 167, 594 S.W. 2d 243 (1980), the Court determined that the question of dependency of a minor child was one of fact. The Court pointed out that, following the amendment of Ark. Stat. Ann. § 81-1315 (c), the purported dependent must be wholly and actually dependent on the decedent. The Supreme Court reviewed its holding in *Roach*, and stated that:

> . . . when the widow and the child, as here, are not living with the employee at the time of his death, 'there must be some showing of actual dependency' . . . .

The Court found that the child was "actually" dependent on the decedent because of the obligation to make

support payments (and his actual payment of it plus other sums) and because of the reasonable expectation of future support. The Court then stated:

> ... Certainly, if, as in *Roach*, the child who received no financial support was entitled to maximum benefits, it must be said that a child, as here, who receives some financial support, should be entitled to no less than the maximum benefits. ...

The Court then indicated that ordinarily it would remand the case to the Commission for a factual finding as to dependency but found that action unnecessary since under the facts, the Commission could have made only one finding, that the child was wholly and "actually" dependent upon the deceased. The opinion of the Court of Appeals was affirmed.

In the third case decided following the 1976 amendment, *Continental Insurance Company* v. *Richard*, 268 Ark. 671, 596 S.W. 2d 332 (Ark. App. 1980), the Court dealt with a situation where the decedent regularly contributed to the support of his mentally deficient child. The Court stated:

> ... Since he did this, the test of "wholly dependent" is met with the definition in the *Chicago Mill Company* case, supra, which was reaffirmed by the *Roach* case, supra. The test of "actual" dependency has been satisfied beyond the definition of the *Roach* case in that Frank Richard contributed to the support of his child and the child was "actually" dependent upon his father.

Under the holding in *Chicago Mill*, and *Roach*, supra, persons who are ordinarily recognized in law as dependents, including a wife and children, and to whom the employee owes a duty of support, are "wholly dependent" under our Workers' Compensation Law.

"Actually dependent", in light of the prior cases, does not require total dependency. All that is required is a showing of actual support or a reasonable expectation of

support. *Roach, Moppin*, and *RIchard*, supra. Since the Commission found actual support, no more is required in this case.

That determination of fact by the Commission carries the weight of a jury verdict. *Taylor* v. *Plastics Research and Development Corp.*, 245 Ark. 638, 433 S.W. 2d 830 (1968). That determination is supported by substantial evidence, and therefore we must affirm. *American Can Co.* v. *McConnell*, 266 Ark. 741, 587 S.W. 2d 583 (Ark. App. 1979).

Affirmed.

B. F. BOWMAN *v.* Tommy C. McFARLIN
and Peggy J. McFARLIN

CA 80-379 615 S.W. 2d 383

Court of Appeals of Arkansas
Opinion delivered April 29, 1981
[Rehearing denied June 3, 1981.]

Robert R. Cortinez, for appellant.

Dewey Moore, for appellees.

LAWSON CLONINGER, Judge. Appellant, B. F. Bowman, brings this appeal from a jury verdict for appellees, Tommy C. McFarlin and Peggy J. McFarlin, in the amount of $10,000 as damages for breach of contract. Appellant constructed a house for appellees on a lot owned by appellees, and in their complaint appellees alleged damages as a result of defects in construction, unauthorized changes in the agreement, and items not properly installed.

For reversal appellant urges that the trial court committed error by (1) permitting appellee Tommy C. McFarlin to testify as to the value of his services in correcting the

alleged defects, (2) by permitting the testimony of expert witness Ellis Wade Ashe because the witness did not examine the property and his testimony was not in the hypothetical, and (3) by permitting expert witness James A. Bennett to testify when the witness had no reasonable and fair basis for making valuation.

We find that the trial court was correct in its rulings, and we affirm.

Appellees alleged in their complaint that appellant had breached their written contract in the following ways:

(1) The contract provided for the construction of a freestanding garage in the back of the house connected by a breezeway, but the defendant constructed a carport alongside the house with no breezeway.

(2) The contract provided for the construction of three rows of piers underneath the house for support, but the defendant constructed two rows.

(3) The contract provided for the installation of dual heating and air conditioning units but defendant only installed one unit.

(4) The contract provided for a front porch to be ten feet deep, but the defendant constructed the porch six feet deep.

(5) The contract provided for no landscaping, but the defendant pushed down forty trees that were supposed to have been left standing and removed the topsoil on the front of the lot.

(6) The contract provided for a construction cost of $33,000 but the plaintiffs have paid $2,141.40 in addition to the contract price for items that should have been covered by the contract price.

(7) The contract provided for many other items that were not installed or were installed improperly.

Appellee Tommy McFarlin has been an exchange repair technician for a telephone company for twenty-one years, has been an owner of several houses, and had one of his previous houses built. He was permitted to testify that he logged daily the time he and his son worked on the property to correct defects that he alleged were caused by appellant's breach; that he worked a total of 174.5 hours, which he felt was worth $7.50 per hour, and his son worked 39.5 hours, which he felt was worth $3.00 per hour, for a total of $1,427.25. He testified in detail that he and his son cleared debris, tried to level floors, installed insulation, installed drains, and placed temporary supports under the house. Appellant on this appeal objects to Mr. McFarlin's testimony on the grounds that he was not qualified as an expert in the areas in which he was working and that he had no knowledge as to the value of the fees customarily charged. In the trial court, however, appellant objected only to the introduction of a sheet listing the work Mr. McFarlin and his son performed, showing the number of hours worked, and the wage alleged as fair, on the basis that it was of no value to the jury and irrelevant. The trial court properly placed the responsibility on the appellees for establishing to the jury's satisfaction that the work done by the McFarlins was chargeable to the appellant.

We cannot say that there was error in the admission of the testimony of Mr. McFarlin. He was a homeowner, and as the Arkansas Supreme Court said in the case of *Farmers Equipment Company* v. *Miller*, 252 Ark. 1092, 482 S.W. 2d 805 (1972), we are unable to say that the trial court abused its discretion in admitting this testimony. The determination of whether a nonexpert witness has sufficient knowledge of the matter in question or has sufficient opportunity for observation to be qualified to state an opinion lies largely within the sound judicial discretion of the trial judge, and is not reviewable on appeal unless so clearly erroneous as to manifest abuse of discretion. *Gibson* v. *Heiman*, 261 Ark. 236, 547 S.W. 2d 111 (1977). We find no manifest abuse of discretion.

Witness Ashe is in the landscaping and tree business, and he was permitted, as an expert, to give his opinion as to

the replacement cost of the trees allegedly destroyed by appellant. He did not examine the site and his values were determined on the basis of Mr. McFarlin's testimony in the case and upon information given him by Mr. McFarlin prior to this court appearance. Mr. Ashe was told by Mr. McFarlin that forty oak, pine and dogwood trees were destroyed, and that the oaks and pines measured between four inches and twelve inches in diameter. Mr. Ashe set his values on the basis of replacement trees four inches or less in diameter. Appellant urges that the proper measure of damages is the difference in the value of the land with and without the trees and in support of his view he cites a number of Arkansas cases. *Kyle* v. *Zellner*, 215 Ark. 349, 220 S.W. 2d 806 (1949); *St. Louis I.M.&S. Railway Company* v. *Ayers*, 67 Ark. 371, 55 S.W. 159 (1900); *Causey* v. *Wolfe*, 135 Ark. 9, 204 S.W. 977 (1918). The cases cited by appellant all deal with growing timber, and we are aware of no Arkansas case dealing with the proper measure of the damages for destruction of trees valued for their beauty and use as shade trees.

When a building contractor breaches his contract, two measures of damages are commonly used. The first measure, the "cost" rule, is the cost of repairing it where the work is defective. The second measure, the "value" rule, is the difference between the value as it is and the value promised. The choice between the two measures will depend on circumstances. The "cost" rule is generally preferred, if it is economically feasible in the circumstances, because it gives the landowner a money equivalent of what he bargained for by giving him the cost of getting the work properly done. Dobbs, *Law of Remedies* (1973), p. 897. The underlying purpose in awarding damages for breach of contract is to place the injured party in as good position as he would have been had the contract been performed. *Rebsamen Companies, Inc.* v. *Arkansas State Hospital Employees Federal Credit Union*, 258 Ark. 160, 522 S.W. 2d 845 (1975). In *Carter* v. *Quick*, 263 Ark. 202, 563 S.W. 2d 461 (1978), the Arkansas Supreme Court noted with approval the doctrine set out in 5 *Corbin on Contracts* (1964), § 1089, that the cost of curing defects should be the measure whether the breach of the contract is large or small and that it should be applied in every case, except where the actual curing of the defects

would cause unreasonable economic waste. The Court further noted that this view is consistent with the result in the case of *J. E. Hollingsworth and Company* v. *Leachville Special School District*, 157 Ark. 430, 249 S.W. 24 (1923).

We hold in the instant case that the cost or replacement rule was properly applied by the trial court, for the reason that the appellees cannot place a sale value on their trees and that they are entitled to replacement. They testified that they bought the specific lot upon which the house was built because they wanted a wooded setting, and they can be made whole only by replacement of the trees.

The trial court properly allowed witness Ashe to give his opinion on the basis of information he obtained before the trial and information he gained from the testimony of other witnesses during the trial. Questions calling for the opinion of an expert witness are not necessarily subject to objection because they are not in the hypothetical. Rule 703, Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979), provides that the facts or data in the particular case upon which an expert bases his opinion or inference may be those perceived by or made known to him at or before the hearing. *Campbell* v. *State*, 265 Ark. 77, 576 S.W. 2d 938 (1979).

Witness James A. Bennett was qualified as an expert in appraising and inspecting residential houses. He was also the owner of a construction company which had been inactive for two years, and appellees had requested that he make a bid on a portion of the repair work involving the landscaping and construction of a third pier to support the house. He was permitted to testify as to his appraisal of expenses of repairs, and his estimate of the cost of repairs totaled $19,330. Mr. Bennett was not an engineer, and the trial court sustained objections to questions which called for expertise in the engineering field.

We find that there was a reasonable basis for the testimony of Mr. Bennett. He had inspected the property on three occasions, and although he relied on the appellees' version of the contract provisions, the jury was given the

ultimate responsibility of deciding the issue of damages. As an expert witness he based his opinion as to damages on the plans and special conditions submitted to him on defects and variances, which he observed on three separate inspections. Rule 703, Uniform Rules of Evidence, *supra*.

Affirmed.

John SMITH *v.* STATE of Arkansas

CA CR 80-92 614 S.W. 2d 527

Court of Appeals of Arkansas
Opinion delivered April 29, 1981

Warren H. Webster, for appellant.

Steve Clark, Atty. Gen., by: *Arnold M. Jochums*, Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant John Smith prosecutes this appeal from a jury verdict of guilty of Interference With a Law Enforcement Officer, and a subsequent sentence of two years in the Arkansas Department of Corrections.

The issues on appeal are whether the trial court was in error when it (1) refused to grant appellant's Motion to Suppress all evidence secured after an alleged illegal entry into appellant's residence by the police, and (2) denied what appellant designates as a Motion to Dismiss because of an alleged illegal arrest.

We hold that there was no error committed by the trial court and we affirm.

When the evidence is viewed in the light most favorable to the appellee, the State of Arkansas, which we are required to do on appeal, we find that appellant was on parole from the Arkansas Department of Corrections and was under the supervision of the parole officer assigned to the Little Rock area. Appellant's parole was subject to revocation if he left the Little Rock area without the permission of his parole officer, and appellant had resided at his mother's home in Dumas for two weeks without permission. Upon learning that appellant was in Dumas, Bud Dunson, the parole officer assigned to the Dumas area, checked with appellant's parole officer in Little Rock and determined that appellant

was not authorized to be in Dumas. Mr. Dunson enlisted the assistance of Dumas city police officers and went to the residence of appellant's mother. Appellant urges that the police entered his residence without authority or permission, but the trial court found upon conflicting testimony that the police were invited into the residence. Mr. Dunson testified that he issued a warrant for appellant's arrest, but that he had left it at the Dumas Police Department before he arrived at appellant's residence. The Dumas police chief testified that he only sent his officers to back up the parole officer. When the parole officer and the police attempted to take appellant into custody, there was resistance, and appellant does not question the sufficiency of the evidence concerning the offense he is charged with; his contention is that all testimony of what occurred after the alleged illegal entry should be suppressed.

Ark. Stat. Ann. § 43-2810 (Repl. 1977) provides as follows:

> Return of parole violator. At any time during release on parole the Parole Board may issue a warrant for the arrest of the released prisoner for violation of any conditions of release ... Any parole or probation officer may arrest such prisoner without a warrant, or may deputize any officer with power of arrest to do so by giving him a written statement setting forth that the prisoner has in the judgment of the probation or parole officer violated the conditions of his release...

The taking of a parole violator without a warrant was approved by the Arkansas Supreme Court in the case of *Giles* v. *State*, 261 Ark. 413, 549 S.W. 2d 479 (1977), *cert. denied* 434 U.S. 894 (1977). In that case, the defendant, on parole for another offense, was arrested by his parole officer and a policeman without a warrant at midnight in a private dwelling. The Court stated:

> Arrest by a parole officer without a warrant in a private dwelling is clearly permissible under Ark. Stat. Ann. § 43-2810 (Supp. 1975) and the validity of the statute is not questioned. There seems to be no impro-

priety in a parole officer's recruiting the assistance of a city policeman, or any other officer authorized to make arrest, to assist him in performing his duty to make an arrest.

In the instant case appellant concedes that he was on parole for a previous felony, and that he did not have permission to be in Dumas. The parole officer had the authority to take appellant into custody, and it was proper for him to enlist the support of the Dumas city policemen. The trial court found that there was a valid arrest, and that finding is supported by the evidence.

The constitutional validity of the arrest is questioned by appellant, and he relies principally on the ruling in *Payton v. New York*, 445 U.S. 573 (1980), which was a successful challenge to the constitutionality of a New York statute authorizing police officers to enter a private residence without a warrant if necessary to make a routine felony arrest. *Payton*, however, is not applicable to the retaking of a parole violator. Ark. Stat. Ann. § 43-2808 (Repl. 1977) provides that "Every prisoner while on parole shall remain in the legal custody of the institution from which he was released." As a parolee the appellant was in the constructive custody of the Department of Corrections and subject to summary arrest for violation of the terms or conditions of his parole.

Prior to trial, appellant filed a Motion to Dismiss the charges against him because he was the victim of an illegal arrest. We are unaware of any Arkansas statute providing for a Motion to Dismiss by a defendant, but the thrust of his motion was that any charge against him based upon what happened at his residence was the result of an illegal entry and arrest and should be dismissed. The allegations made by appellant in his Motion to Suppress and his Motion to Dismiss are basically the same and we have treated those allegations together.

Affirmed.

Jimmy Douglas SLAVENS *v.* STATE of Arkansas

CA CR 81-15 614 S.W. 2d 529

Court of Appeals of Arkansas
Opinion delivered April 29, 1981

Sam Sexton, Jr., for appellant.

Steve Clark, Atty. Gen., by: *Leslie Powell*, Asst. Atty. Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant, Jimmy Douglas Slavens, appeals from the verdict of a Washington County jury finding him guilty of manslaughter and fixing his punishment at a term of two years in the Department of Correction and a fine of $10,000.

On the evening of April 14, 1979, the victim, Douglas Elkins, accompanied by a friend, Rex Simmons, visited the Am Vets Club in Fayetteville, Arkansas. At about 2:00 a.m. on April 15, 1979, he was seated at a table with Donald Clark, Marge Clark, Terri Slavens and Rocky Slavens, brother of the defendant. Elkins engaged in an altercation with Donald Clark which ended with Clark partially on top of Elkins. Rex Simmons, Elkins' friend, engaged in a brawl with club officials and a Fayetteville police officer. Following Simmons' removal from the club, Elkins was dragged from the club, apparently unconscious. He was loaded into the same police car that Simmons was in. The evidence indicates that the Am Vets Club was quite dark at the time of the altercation. At approximately 2:53 a.m. on April 15, 1979, at the police station, Roger Logue, a Fayetteville police officer, opened the rear door of the police vehicle to remove Elkins. He observed that Elkins' head was on the floorboard and his feet were up in the rear window of the car. A brief examination indicated to Logue that Elkins was dead and his body was removed from the car and either placed or dropped on the sidewalk. An autopsy by the State Medical Examiner disclosed that Elkins had consumed a considerable amount of alcohol and had died of a broken neck. These facts were undisputed. The events occurring from the time Elkins sat at the table with the Clarks until the discovery of his death are in considerable dispute.

Appellant raises seven points for reversal on appeal. We shall consider each in the order raised by appellant.

I.

Appellant's first point for reversal is that there is no substantial evidence to support the verdict of the jury in that the medical proof as to the cause of death is inconsistent with any conduct shown to have been chargeable to appellant.

Appellant argues that the evidence in this case is not only insubstantial, but that it is totally absent in three important areas:

> (1) The undisputed cause of death is inconsistent with any conduct chargeable to appellant.
>
> (2) The injuries sustained by the deceased are not consistent with any conduct chargeable to appellant.
>
> (3) Even had the State supplied proof that appellant caused the death of the deceased, there is no evidence that appellant's conduct was reckless.

The State Medical Examiner testified that the victim sustained two mortal wounds: a blow to the right side of the head and a broken neck. The broken neck, which caused instantaneous death according to the State Medical Examiner, had been preceded by a blow to the head. The victim had a laceration on the chin which the Medical Examiner explained could have been caused by a blunt object. He believed this was the blow that broke the neck of the victim as it would have caused the head to twist to the side and cause the fracture of the neck to occur.

There was testimony by seven witnesses that the appellant repeatedly swung a blunt object. Two witnesses testified that appellant was swinging at the victim. In considering the testimony on the question of sufficiency of the evidence, we will view the evidence in the light most favorable to the State, considering only that testimony that lends support to the jury verdict and disregarding any conflicting testimony which could have been rejected by the jury on the basis of credibility. *Chaviers* v. *State*, 267 Ark. 6, 588 S.W. 2d 434 (1979). Clearly viewed in the light most favorable to the State, there was substantial evidence to sustain the jury's verdict.

Appellant raises the question of whether his conduct was reckless. Ark. Stat. Ann. § 41-203(3) (Repl. 1977) defines "recklessly" as follows:

> A person acts recklessly with respect to attendant circumstances or a result of his conduct when he con-

> sciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Appellant admitted that he struck two other persons with a mace can in the affray instant to the killing. Viewed in a light most favorable to the State, *Chaviers* v. *State, supra*, there was substantial evidence for a jury to conclude that appellant acted recklessly.

II.

Appellant's second point for reversal is that the court erred in admitting evidence concerning a separate offense of assault committed by appellant as that offense had no connection with the death of Elkins and such evidence served only to inflame the jury against appellant.

Appellant worked as a doorman at the Am Vets Club. Among other duties, he sometimes assisted in the removal of persons engaged in misconduct in the club. Sometime prior to the events which resulted in the death of Douglas Elkins, appellant was involved in an incident which required removal of two patrons of the club. There was a fight and appellant either kicked or struck one of the patrons or both. The evidence of the State's witnesses indicated that appellant commited a vicious assault upon a helpless patron.

Prior to the commencement of the trial, appellant learned that the majority of the State's witnesses had been called to testify about this prior assault and a motion *in limine* was timely filed to exclude such testimony because it dealt with a separate and uncharged offense. A hearing was held on this motion and it was overruled for the stated reason that the court could not forecast what the witnesses were actually going to say.

The State produced at the trial a total of fifteen witnesses including investigative police officers and the State

Medical Examiner. Of the fifteen witnesses, twelve were in the AmVets Club at the time of the incidents involved here. Of the twelve, eight began their testimony by detailing, or attempting to detail, appellant's assault against the other patrons who had no connections with Elkins or the incident in which Elkins was killed. At trial, appellant continuously objected to the testimony concerning the prior fight.

This point involves the application of Ark. Stat. Ann. § 28-1001, Uniform Rules of Evidence, Rule 404(b) (Repl. 1979), which provides:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *Price* v. *State*, 267 Ark. 1172, 599 S.W. 2d 394 (1980), the Arkansas Court of Appeals stated the following test for the application of Rule 404(b).

> [T]he rule should be interpreted to exclude evidence of other offenses when its only purpose is to show the accused's character or some general propensity he might have to commit the particular sort of crime in question. It should not be interpreted to exclude evidence of other offenses when that evidence is probative of the accused's participation in the particular crime charged. If it is probative of his participation the only remaining question should be whether it is so prejudicial that it should be excluded because the prejudice brought about by exposition of other offenses is not sufficiently balanced by the probative value of the evidence on the facts sought to be proved.

The Court in *Price* v. *State, supra*, then went on to state:

> First, an issue must be raised as to which the "other offenses" evidence relates. Second, the proffered evi-

> dence must be clear and convincing and third, the probative value of the evidence must outweigh its unwarranted prejudicial effect.

The Arkansas Supreme Court affirmed *Price* v. *State* at 268 Ark. 535, 597 S.W. 2d 598 (1980).

In *McCoy* v. *State*, 270 Ark. 145, 603 S.W. 2d 418 (1980), the Supreme Court again dealt with the application of Rule 404(b). The Court stated that it is well-settled that evidence of other crimes by the accused, not charged in the indictment or information and not a part of the same transaction, is not admissible at the trial of the accused. *Moser* v. *State*, 266 Ark. 200, 583 S.W. 2d 15 (1979); *Alford* v. *State*, 223 Ark. 330, 266 S.W. 2d 804 (1954). Even if the events comprising the objectionable testimony were considered to be a part of the same transaction or proof of knowledge, opportunity, etc.; there are instances where evidence of other offenses should not be admitted, particularly where its prejudicial impacts substantially outweigh its probative value. *United States* v. *Moody*, 530 F. 2d 809 (8th Cir. 1976).

In *Moser* v. *State, supra*, the Arkansas Supreme Court stated that the general rule is that evidence of other crimes by the accused, not charged in the indictment or information and not a part of the same transaction, are not admissible at the trial of the accused. *U.S.* v. *Moody, supra*.

While appellant contends that the evidence of the other assault was admitted only to show that the defendant was a bad man, the State contends that the evidence of prior acts in this case is clearly relevant to prove intent. The State argues that appellant's actions immediately prior to the fatal fight were relevant to establish a state of mind and intent in that fight. The Court in *Moser* v. *State, supra*, quoting from *Alford* v. *State, supra*, stated, as to intent:

> What has happened is that the emphasis has shifted from evidence relevant to prove intent to evidence offered for the purpose of proving intent, by showing that the defendant is a bad man. If this transfer

of emphasis is permitted, the exclusionary rule has lost its meaning.

There is no showing of any connection between the first fight at the front of the club near the bar and the later incident involving Elkins at the back of the club. There is no claim that Elkins was involved in the fight in the front of the club or that he was even acquainted with the person involved there. As stated by the Court in *Moser* v. *State, supra*, "to allow evidence of other unrelated misconduct or crimes tends to allow the jury to be persuaded that if the accused is not guilty of the offense charged he ought to be convicted on account of the other activities". The only purpose served by this evidence is to show that the appellant is a bad man, the very type of evidence which this court has said must be excluded. We hold the trial court committed reversible error in admitting this testimony, and we reverse and remand this cause for retrial.

III.

Appellant argues, as his third point for reversal, that he did not receive a fair trial as guaranteed by the Constitution of the United States and the Constitution of the State of Arkansas in that the trial tactics employed by the State made it impossible for the defense to be affirmatively presented. Appellant cites the cases of *Napue* v. *Illinois*, 360 U.S. 264 (1959) and *Alcorta* v. *Texas*, 355 U.S. 28 (1957) for the rule that the State cannot, for example, obtain a conviction when it has in its possession evidence which shows the defendant to be innocent. Appellant then enunciates seven tactics which he contends denied him a fair trial. However, as the State correctly points out, appellant's contentions simply do not rise to the level of the constitutional challenge for denial of a fair trial as found in *Napue* v. *Illinois, supra*, and *Alcorta* v. *Texas, supra*. Those cases involved the use of false evidence and the evidence in this case is not false, nor even alleged to be.

Appellant contended that certain testimony was exculpatory and inconsistent with his guilt which was clearly a

question for the jury, not a denial of a fair trial. We find no error here.

IV.

Appellant's fourth point for reversal is that the trial court erred in its refusal to instruct the jury as to the limited purpose of prior inconsistent statements. The statement alleged by appellant to constitute error involved the witness Wayne Rieff. The State sought to introduce a prior statement made by this witness. The questioning went as follows:

> Q. Wayne, do you remember talking to Mr. Ziser back on November 13th?
>
> A. Yes.
>
> Q. Do you deny that you told him that Mr. Slavens was hitting Doug Elkins in the head and shoulders with a blackjack?
>
> A. Well, I don't know what I said to him.
>
> Q. O.K. Will you deny you made this statement?
>
> A. No.

At this point, counsel for the appellant objected and asked the court to instruct the jury regarding the limited effect to be given to the prior statement. The court, in making its ruling, stated that this questioning was necessary to lay a proper foundation as to whether or not there was an inconsistent statement. The prosecutor was then permitted to elicit details of the prior inconsistent statement and the court did not, then, or at any other time, instruct or advise the jury as to the limited purpose for which prior inconsistent statements may be used.

AMCI 202 reads as follows:

> Evidence that witness previously made a state-

> ment which is inconsistent with his testimony at the trial, may be considered by you for the purpose of judging the credibility of the witness but may not be considered by you as evidence of the truth of the matter set forth in that statement.

The notes on use of this instruction state that this instruction should be given at the time the prior inconsistent statement is admitted into evidence, if requested by the defendant. The notes also state that this instruction should not be used when the prior inconsistent statement was given under oath and subject to the penalty of perjury at a prior trial, hearing, or other proceeding, because such statements are not hearsay and may be admitted to prove the truth of the contents of the statement.

Appellant cites the case of *Rowe* v. *State*, 271 Ark. 20, 607 S.W. 2d 657 (1980) in support of his position. In *Rowe* v. *State, supra*, appellant complained that the trial judge refused his request for an instruction taken from AMCI 202 relating to limitation of the jury's consideration of prior inconsistent statements. The Court noted that the request was made after both parties had rested rather than at the time the statement was introduced. The State objected because the instruction was not given at the proper time. The Arkansas Supreme Court pointed out that the note on use accompanying the model instruction said it should be given if requested by counsel at the time the prior inconsistent statement is made. In the instant case, as appellant points out, the request for the instruction on the prior inconsistent statement was made at the time at which the statement was to be offered.

The State argues that should the court consider that a prior inconsistent statement was entered into evidence, then a limiting instruction was not proper as the prior statement was given under oath and was independently admissible. Ark. Stat. Ann. § 28-1001, Uniform Rules of Evidence, Rule 801(d)(1)(i) provides:

> (d) Statements Which are Not Hearsay. A statement is not hearsay if:

> (1) Prior statement by a witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and, if offered in a criminal proceeding, was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, ...

There are no Arkansas Supreme Court decisions interpreting Rule 801(d)(1)(i) as it applies to criminal proceedings.

In the instant case the witness Wayne Rieff gave the statement *under oath* to Deputy Prosecuting Attorney Andrew Ziser at the Washington County Courthouse Annex on November 13, 1979.

Under Ark. Stat. Ann. § 41-2602 (Repl. 1977) "[a] person commits perjury if in any official proceeding, he makes a false material statement, knowing it to be false, under an oath required or authorized by law." "Official proceeding" is defined by Ark. Stat. Ann. § 41-2601 (4) (Repl. 1977) to be "a certain proceeding heard before any . . . official authorized to hear evidence under oath . . . ."

Ark. Stat. Ann. § 43-801 (Repl. 1977), provides:

> The prosecuting attorneys and their deputies shall have authority to issue subpoenas in all criminal matters they are investigating; and shall have authority to administer oaths for the purpose of taking the testimony of witnesses subpoenaed before them; such oath when administered by the prosecuting attorney or his deputy shall have the same effect as if administered by the foreman of the grand jury.

Under the identical federal rule, a statement given to the grand jury clearly comes under the "other proceedings" classification. *United States* v. *Mosley*, 555 F. 2d 191 (8th Cir. 1977). It would appear that all the criteria of Rule 801 (d)(1)(i) had been met and the prior inconsistent statement made by witness Rieff was admissible for its substantive content and a limiting instruction was not required.

V.

Appellant's fifth point for reversal is that the trial court erred by giving, over the objection of the defendant, an instruction on circumstantial evidence. We disagree. While the State did rely on some direct evidence, the State also relied on circumstantial evidence. i.e., the victim received two mortal wounds which were consistent with blows from a blunt object. As the State relied on circumstantial evidence, it was proper for the trial court to give the circumstantial evidence instruction.

VI.

Appellant's sixth point for reversal is that the trial court erred in commenting upon the evidence.

During the course of the examination of Rex Simmons, the Prosecutor undertook to impeach Simmons as to the description of clothing worn by Don Clark on the night of the offense. In the course of overruling an objection, the court stated:

> I will settle this for you right quick. The only thing he is able to ask him is what is inconsistent with previous testimony. The part about the red shirt was an inconsistent statement. I will overrule your objection.

We agree with the appellant that the court's statement did come close to a comment on the evidence; but, on retrial, it is a statement that is not likely to recur.

VII.

Appellant's final point is that the court erred in instructing the jury, over the defendant's objections, on the offense of manslaughter.

Appellant contends that the statutes that authorize the giving of an instruction on lesser included offenses are in conflict with and violate the Constitution of the State of Arkansas. Appellant argues that since he was charged with

second degree murder, an offense which requires the State to prove that appellant intentionally caused the death of the deceased, that a charge of manslaughter, on the other hand, was improper because it permits a conviction where the reckless conduct of the accused may have caused the death. Appellant did not challenge that manslaughter is a lesser included offense of second degree murder. In *Chaney* v. *State*, 256 Ark. 198, 506 S.W. 2d 134 (1974), the Court held that the trial court may instruct on a lesser included offense over the objection of the defendant. Ark. Stat. Ann. § 41-105(2) provides:

> (2) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
>
> . . . . .
>
> (c) it differs from the offense charged only in the respect that . . . a lesser kind of culpable mental state suffices to establish its commission.

In finding appellant guilty of manslaughter, the jury obviously found from all the evidence that appellant had "struck or beat the victim in this case with some type of club or blackjack" as was alleged in the bill of particulars, but had done so with a lesser degree of culpable mental state: "recklessly."

Appellant was informed of the nature of the accusation against him in compliance with Article 2, Section 10 of the Constitution of Arkansas.

Reversed and remanded.

CLONINGER and COOPER, JJ., concur.

JAMES R. COOPER, Judge, concurring. I agree with the result in this case and with the reasoning of the majority on all points with the exception of Point II. I disagree with the majority opinion on this point in that it apparently holds that since there was no showing of a connection between the two fights the evidence could never have been admitted. I believe the rule is correctly stated in *Price* v. *State*, 267 Ark.

1172, 599 S.W. 2d 394 (1980), where the Court indicated that where evidence of other offenses was probative of the accused's participation in the crime charged it should not be excluded unless it is so prejudicial that its prejudicial effect outweighs its probative value. In this case the testimony was highly contradictory as to the time frame between the two fights. What occurred during the first fight certainly, in my opinion, had probative value as to the offense charged against appellant here.

However, I concur in the result reached because it is my opinion that the prejudicial effect of the testimony regarding the first fight outweighed its probative value and it should have been excluded on that basis.

I am authorized to state that Judge Cloninger joins in this concurring opinion.

CITY OF FAYETTEVILLE *v.* Charles L. DANIELS, Director of Labor, and Larry PALMER

E 80-204 614 S.W. 2d 680

Court of Appeals of Arkansas
Opinion delivered April 29, 1981

James N. McCord, City Atty., for appellant.

Bruce H. Bokony, for appellees.

TOM GLAZE, Judge. The claimant, Larry Palmer, was employed by the City of Fayetteville as Airport Manager in 1975. His responsibilities included maintenance, public and personnel relations, and accounting for airport parking revenues. The employer charged the claimant with negligence in the maintenance of the airport terminal building and grounds, an inability to maintain working relationships with others, a mismanagement of parking revenues, and repeated unavailability on the job. He was terminated in March, 1980, and filed for unemployment benefits on April 15, 1980.

The Employment Security Agency found that the claimant was discharged for reasons other than misconduct and awarded benefits. The City appealed the Agency determination and the Appeal Tribunal found that the claimant was discharged for misconduct consisting of mismanagement of parking funds and a disregard of the standard of behavior which the employer had a right to expect. The Board of Review reversed the decision of the Appeal Tribunal with a finding that, while certain evidence was in conflict, the preponderating weight of credible evidence

showed that the employer's dissatisfaction with claimant's work performance arose from causes other than misconduct in connection with the work.

We have previously noted our limited scope of appellate review when credibility of witnesses and the weight accorded their testimony are at issue. *Willis Johnson Company* v. *Daniels*, 269 Ark. 795, 601 S.W. 2d 890 (Ark. App. 1980). In line with our holding in *Willis Johnson*, we will not substitute our findings of fact for those of the Board of Review.

The appellant argues that in the instant case, the Appeal Referee, not the Board of Review, had the advantage of being in a position to observe the witnesses and consider their demeanor. The Referee's findings, however, are of no import in our review of this cause. In *Harris* v. *Daniels*, 263 Ark. 897, 567 S.W. 2d 954 (1978), our Supreme Court found it appropriate that rules governing judicial review in workers' compensation cases be applied to cases arising under the Employment Security Act. As in workers' compensation, we hold that no weight is to be attached to the findings of the Referee. Our only concern on appeal is whether there is substantial evidence to support the findings of the Board of Review. *Allied Telephone Company* v. *Rhodes*, 248 Ark. 677, 454 S.W. 2d 93 (1970); *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W. 2d 360 (1979).

The evidence in the record before us supports the Board of Review's find that the claimant was discharged for reasons other than misconduct in connection with the work. The employer contended that the claimant was negligent in maintaining the grounds. Claimant, however, was responsible for maintaining over five hundred acres of land, the airport terminal building, other buildings on the grounds and supervising and coordinating construction of the new terminal. He repeatedly informed the City that his staff of three persons was inadequate, and after his termination, the staff was immediately increased.

The record reflects that some friction existed between some other City departments and the claimant's department.

However, the employer failed to show that this friction was due to a conscious or deliberate disregard of the employer by the claimant. A failure by municipal managers to communicate and cooperate is not misconduct unless it is in conscious disregard for the interest of the employer.

The employer charged the claimant with mismanagement of parking revenues. The evidence was undisputed that some of the equipment was antiquated and the claimant on several occasions had requested replacements. The employer neither presented any evidence that the claimant was responsible for nor that he was even aware of a decrease in parking revenues. The City employer offered only the bare assertion that air enplanements increased over a two year period, while revenues decreased. This assertion is clearly insufficient to support the employer's charge that the claimant mismanaged the parking revenues and was guilty of misconduct.

The employer's final basis for discharge was claimant's repeated unavailability. While the testimony was in conflict, there was substantial evidence that the claimant was away from his office most often in connection with his duties as airport manager. In addition, he was on call twenty-four hours a day, seven days a week, and since he was not eligible for overtime pay, claimant sometimes adjusted his working hours to accommodate the situation.

We cannot say, in light of the record before us, that there was no substantial evidence to support the findings of the Board of Review, and we affirm its decision.

Affirmed.

Frank REYNOLDS *v.* Charles L. DANIELS, Director of Labor, and PINE BLUFF CITY BUS COMPANY

E 80-230 614 S.W. 2d 525

Court of Appeals of Arkansas
Opinion delivered April 29, 1981

Thad M. Guyer, Thomas J. Ginger, and *Julius D. Kearney*, for appellant.

Herrn Northcutt, for appellees.

TOM GLAZE, Judge. This case involves an appeal from a denial of unemployment compensation benefits to the claimant based on his misconduct under Ark. Stat. Ann. § 81-1106(b)(1) (Repl. 1976). The claimant was discharged by his supervisor as the result of an argument over wages and in which the claimant used the words "God damn it" and called his supervisor "a low down dirty son-of-a-bitch." Claimant argues on appeal that, as a matter of law, the use of profanity under the circumstances of this case, does not amount to misconduct. He also contends that the denial of benefits for the use of profane language is unconstitutional under the First Amendment of the United States Constitution as an undue burden on claimant's rights of free speech and expression.

Our court has defined misconduct in unemployment compensation cases to be an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of the standard of behavior which the employer has a right to expect of his employees. *Stagecoach Motel* v. *Krause*, 267 Ark. 1093, 593 S.W. 2d 495 (Ark. App. 1980), and *Parker* v. *Ramada Inn*, 264 Ark. 472, 572 S.W. 2d 409 (1978). We find no case in Arkansas which specifically addresses the issue of whether the use of profanity by an employee is misconduct as that term has been defined in the *Stagecoach* and *Parker* cases. This question has been considered by courts in other jurisdictions, and those courts have generally denied benefits where the employee directed vulgar or offensive language towards an employer or supervisor. *Olsgard* v. *Industrial Commission*, 548 P. 2d 910 (Colo. 1976); *Hayward* v. *Employment Security Commission*, 283 A. 2d 485 (Del. 1971); *Custom Meat Packing Company* v. *Martin*, 85 Idaho 374, 379 P. 2d 664 (1963); *Jackson* v. *Brown*, 136 So. 2d 329 (La. App. 1961); *Fetherson* v. *Unemployment Compensation Board of Review*, 196 Pa. Super. 498, 174 A. 2d 880 (1961); *Hob* v. *Levine*,

331 N.Y.S. 2d 247, 39 App. Div. 2d 620 (1972). See, Anno. 92 A.L.R. 3d 106 (1979).

In the facts at bar, the Board of Review found the evidence was sufficient to show claimant's discharge was caused by his willful disregard of standards of behavior that an employer has a right to expect, and we agree. The profanity employed by the claimant was both unprovoked and directed at his immediate supervisor in front and within the hearing of other employees. Moreover, there is no evidence in the record that the claimant attempted to resolve the wage dispute by discussing the matter privately with his supervisor or employer. We hold the facts in this cause are sufficient as a matter of law to come within the statutory definition of misconduct, and we believe the Board of Review was correct in its denial of benefits to claimant on this issue.

The second issue raised and argued by the claimant is that his profane criticism of his supervisor is protected by the First Amendment to the United States Constitution. We do not agree. Our decision is premised on the United States Supreme Court decision in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942). In *Chaplinsky*, the court recognized certain instances in which the right to free speech does not apply and the relevant part of the court's ruling which is particularly applicable to the instant case states:

> [I]t is well understood that *the right to free speech is not absolute* at all times and under all circumstances. *There are certain well-defined and narrowly limited classes of speech*, the prevention and punishment of *which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words* — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. [Emphasis supplied.]

The claimant argues that the effect of the *Chaplinsky* decision has diminished in view of the later Supreme Court holdings wherein the court greatly redefined what value is in the free speech and expression context. In sum, claimant contends that in light of these more recent decisions, what might be labelled mere profanity and vulgarity by contemporary societal standards now merit protection under the First Amendment. For this point, he relies on the cases of *Cohen* v. *California*, 403 U.S. 15, 26 (1971); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); and *Lewis* v. *New Orleans*, 415 U.S. 130 (1974). Claimant's reliance on these cases is misplaced. The *Cohen* court specifically distinguished the *Chaplinsky* case, finding that Cohen had displayed a four-letter word critical of the draft system whereas the facts in *Chaplinsky* involved abusive epithets inherently likely to provoke violent reaction and directed to a person. Another vital distinction found in *Cohen* and not here is in *Cohen* the profane expression was made relative to a public issue, i.e., against the draft. There is a fundamental initial proposition that a major purpose of the First Amendment is to protect the free discussion of governmental affairs. *Cohen* v. *California, supra*, and *Bala* v. *Commonwealth of Pennsylvania Unemployment Compensation Board of Review*, 42 Pa. Cmwlth. 487, 400 A. 2d 1359 (1979). Here, although claimant argues otherwise, the Board of Review found that the supervisor's refusal to pay the claimant a day's wages evoked claimant's anger and profanity. Thus, the ensuing discharge of claimant resulted from a personal, private dispute, not one emanating from a public issue or from the criticism of a governmental matter or function.

The other foregoing cases cited by the claimant involve penal enactments which the Supreme Court held unconstitutional under the First Amendment because the language used in the enactments was overbroad and did not limit their application to "fighting words." In the case at bar, claimant is not challenging the constitutionality of the Arkansas Employment Security Law, or the statutory provision under which claimant was discharged, *viz.,* Ark. Stat. Ann. § 81-1106(b)(1)(Repl. 1976). We are firm in our opinion that the rationale and holding in *Chaplinsky* is instructive and applicable to the facts before us. We, therefore, conclude that

the profanity expressed by claimant to his supervisor does not raise any constitutional issue. The terms used by claimant were both insulting and fighting words designed to provoke. The supervisor's decision to discharge the claimant because of the profanity was predictable and reasonable. Under the facts and circumstances of this cause, the claimant's conduct is in no way afforded the protection of the First Amendment and the free speech rights which it is intended to embrace.

Affirmed.

Mary Clay O'LEARY *v.* COMMERCIAL NATIONAL BANK OF LITTLE ROCK, ARKANSAS

CA 80-449 614 S.W. 2d 682

Court of Appeals of Arkansas
Opinion delivered May 6, 1981

Gannaway & Darrow, for appellant.

House, Holmes & Jewell, for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal by Mary Clay O'Leary from a decision of the Pulaski Chancery Court dismissing her motion to set aside a decree which permitted foreclosure against her homestead.

The record shows that in July of 1979 the appellee-bank brought a foreclosure action against the appellant, her husband, and his parents. Appellant's husband and father-in-law (now deceased) owned and operated O'Leary Oil Company, a partnership. O'Leary Oil Company borrowed some large sums of money from appellee and one of the documents securing that obligation was a mortgage on fourteen acres of land where appellant lived with her husband and their children. This mortgage bore the appellant's purported signature but she contends she did not sign it.

When suit was filed, the appellant's husband and his mother contacted an attorney (according to the attorney) and on August 6, 1979, he filed a general denial for all the O'Learys although appellant was not personally served

until September 7, 1979. On that day (she testified on the motion hearing) she called the attorney, told him she had not signed the mortgage, and he told her it would be taken care of and not to worry. When her husband came home she told him about being served and he also said not to worry about it.

She also testified that she did not talk to the attorney again and her husband kept telling her everything was going to be all right, but on February 8, 1980, she found out differently because on that day the sheriff showed up with a writ of execution and she found out that judgment had been entered and the mortgage foreclosed.

According to the attorney, he understood from the first that financing was going to be obtained by the O'Leary Oil Company to settle with the bank. When the appellant called him, he was put "in a spot," but he had been assured that settlement would be made. In October, when Mr. O'Leary, Sr., died, the bank's attorney told him they were not interested in putting a widow out in the street. So, in December, a consent decree was worked out based upon the assumption there would be a settlement; however, no settlement was made, the decree was entered, and on Feburary 12 he learned that appellant's home had been sold under the decree.[1]

At the hearing on the motion to set aside the consent decree the appellant's testimony was certainly sufficient to show she had a meritorious defense to the foreclosure suit under our decisions of *Walthall* v. *McArthur*, 185 Ark. 437, 48 S.W. 2d 227 (1932); *Hall* v. *Mitchell*, 175 Ark. 641, 1 S.W. 2d 59 (1927); and *Security Bank of Harrison* v. *Paul*, 268 Ark. 548, 594 S.W. 2d 259 (Ark. App. 1980). However, this defense was not presented to the trial court and we affirm that court's refusal to set aside its decree to allow the defense to be presented.

There are, as appellant points out, many decisions holding that a court has the inherent power to set aside a judgment during the term at which it was rendered. *Ashley* v. *Hyde*, 6 Ark. 92, 42 Am. Dec. 685 (1845); *The Security Bank of Branson, Missouri* v. *Speer*, 203 Ark. 562, 157 S.W. 2d 775

[1]This is not the same attorney who filed the motion to set aside the decree and who now represents the appellant in this appeal.

(1942); *Robbins* v. *Guy*, 244 Ark. 590, 426 S.W. 2d 393 (1968);*Massengale* v.*Johnson*, 269 Ark. 269, 599 S.W. 2d 743 (1980).

And since appellant's motion to set aside the consent decree was filed and heard within ninety (90) days of the filing of the decree, it might have been set aside within that ninety (90) day period just as it might have during the term under the law prior to January 1, 1970. Rule 60, Ark. Rules of Civil Procedure.

But our cases have also carved out some restrictions on this power, mainly in the area of default judgments, judicial sales, and jury verdicts. *Missouri Pacific Railroad Co.* v. *Orsburn*, 252 Ark. 872, 481 S.W. 2d 356 (1972). As to judicial sales, in the case of *Robbins, supra*, the trial court had set aside a judicial sale because of inadequacy of price but the Supreme Court reversed. The reason for reversal is well expressed in the following quotation from a case in the concurring opinion:

> Courts have adopted as a wise public policy, the rule that confidence in the stability of judicial sales should be maintained, so that competitive bidding may be encouraged by the assurance that, in the absence of fraud or misconduct, the highest bidder will be accepted as the purchaser of the property offered for sale.

In *Fleming* v. *Southland Life Insurance Co.*, 263 Ark. 272, 564 S.W. 2d 216 (1978), the chancellor refused to let the mortgage debtors pay the judgment and redeem their land where there had been a foreclosure sale but the sale had not been confirmed. The action of the chancellor was affirmed and the opinion states that the court "has the responsibility to protect the integrity of judicial sales to the end that bidders can have confidence that the legitimate high bid will be respected by the court."

In the instant case the record shows that at the time of the hearing on the motion to set aside the decree of foreclosure, the mortgaged property had already been advertised and sold and that the bank was the successful bidder and had

a commissioner's deed to the property. The cases cited above show that a court's power to set aside a judgment during the term at which it was rendered is restricted, as far as judicial sales are concerned, by the public policy of enforcing the stability of those sales.

The appellant's situation is not improved by her attorney's failure to present the defense that she had not signed the mortgage on her homestead. To the contrary, many cases hold that a party is bound by the acts and omissions of his attorney. *Alger* v. *Beasley*, 180 Ark. 46, 20 S.W. 2d 317 (1929); *Merchants' and Planters' Bank and Trust Co.* v. *Ussery*, 183 Ark. 838, 38 S.W. 2d 1087 (1931); *Dengler* v. *Dengler*, 196 Ark. 913, 120 S.W. 2d 340 (1938); *Beth* v. *Harris, Executor*, 208 Ark. 903, 188 S.W. 2d 119 (1945); *Moore, Adm'x* v. *Robertson*, 242 Ark. 413, 413 S.W. 2d 872 (1967).

The appellant attaches significance to the language in *Ussery* and *Beth* that one is bound by the acts and omissions of his attorney *where no fraud or unfairness if made to appear*. This language in *Ussery* is followed by the statement "she must be bound by his negligence or failure which was not occasioned by any misleading conduct on the part of the opposing party or misleading statement made by any officer of the court." We must conclude, therefore, that the fraud and unfairness referred to must be something other than the acts or omissions of one's own attorney.

Applying the policy of the law with regard to setting aside judgments where judicial sales have occurred and the policy of the law that holds one bound by the acts or omissions of his own attorney, we must affirm the chancellor's decision.

GLAZE, J., not participating.

Helen E. White PAYNE *v.* James WHITE, Jr.

CA 80-439 614 S.W. 2d 684

Court of Appeals of Arkansas
Opinion delivered May 6, 1981

Richard D. O'Brien, for appellant.

Sharpe & Morledge, for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, Helen White Payne, brings this appeal from an order of the St. Francis County Chancery Court adjudging her in contempt for willful noncompliance with its order, imposing upon her a fine of $1500, allowing appellee an attorney's fee in the proceedings of $1500 and directing that she reimburse appellee for his attorney's fee paid in California as a result of her noncompliance. Appellant urges on this appeal that the court abused its discretion in holding her in contempt, that the fees for the attorneys were excessive and unauthorized by law. We do not agree.

The action was originally brought by the appellant in the St. Francis County Chancery Court praying for a divorce, property settlement and custody of the minor child of the parties. The appellee, James White, Jr., filed an answer and cross-complaint in which he claimed that he was entitled to a divorce and also prayed that he be awarded custody of their minor child.

Thereafter the matter was set down for trial by the court on the 5th day of September, 1979. The appellant did not appear and the court proceeded to hear testimony and granted a divorce to the appellee, in which decree appellee was granted "sole and exclusive custody of Amy Louise White, minor child of the parties." No right of visitation was granted to the appellant. On September 13, 1979, the

appellant filed a motion to modify the decree stating that at the time of the trial she was without funds with which to make the trip from California where she then was, to attend the trial. Also she claimed that at the time of the trial the child was not within the jurisdiction of the court but with her in California.

On the 20th day of September, 1979, a hearing was heard on that motion at which the appellant appeared with the child. After a hearing thereon the court refused to modify the order with respect to the custody of the child but did allow visitation with appellant for one week during the Christmas season and three weeks during summer vacations, authorizing such visitations to take place either in the State of Arkansas or in the State of California.

During the course of this hearing the appellee voiced an objection to out of state visitation by the appellant, believing that once the child was removed from the state appellant would not return her. The court order contained the following admonition:

> In making this award of visitation beyond the jurisdiction of this court, the court is mindful of defendant's fear that the plaintiff would refuse to return the child to the jurisdiction of this court at the end of the visitation term, and specifically cautions the plaintiff that failure to return the child at the end of visitation will be a specific violation of the custody orders of this court, to be dealt with accordingly.

During the Fall of 1979 negotiations were had between the appellant and appellee with regard to the visitation during the Christmas season. On December 26, 1979, the appellee, pursuant to the order of the court and agreement made with appellant through her attorney, delivered the minor child to appellant at the Memphis Airport for a one week visitation in the State of California upon the specific agreement of the parties and order of the court that the child be returned to appellee at the San Diego Airport on January 2, 1980, at a time agreed upon.

The day before the child was taken to the Memphis Airport the appellee spoke with the appellant by telephone at a number furnished him by appellant as her residence telephone. Two days later he learned that the number she had furnished him had been disconnected and the address she had given him was not her true address. On December 28, 1979, two days after receiving custody of the child, the appellant filed an action in the Superior Court of San Diego County seeking custody of the minor child and obtained an ex parte order for custody. The appellant on that same day by telephone notified appellee's mother that the child would not be returned on January 2nd, that there was no need to come to California to pick up the child in accordance with their prior agreement.

On the prudent advice of his counsel appellee sent his present wife to San Diego on January 2nd as agreed. She had appellant paged and remained in the terminal for some period past the appointed hour. Appellant did not bring the child to the airport that day and so admitted in court. Appellee's wife remained in the State of California and the appellee, after conferring with his local counsel, and engaging counsel in California, joined her in San Diego where they remained for more than one week. On January 7th, 1980, the California court conducted a hearing and after hearing the evidence and examining the certified record of the Arkansas proceedings, found that it had no jurisdiction of the matter and that the courts of the State of Arkansas had at all times complete jurisdiction over the issue of the custody of the minor child. The California court directed that the child be returned to the appellee and that all proceedings with reference to her custody would remain in the court in Arkansas. That order also contained a finding that appellant had acted on advice of counsel and that she had no intention to violate the Arkansas decree, and expressed a desire that she not be penalized for taking the action that she took in the courts in California.

The appellee testified that he had incurred expenses in preserving his rights in the California court in excess of $6,600 for airline tickets for him and his witnesses, housing, shelter and attorney's fee. He further testified and introduced

into evidence a statement from his California attorney in the amount of $3,906.28, of which amount he had paid the sum of $2,000. There was also testimony that at the time this occurred the appellee was forced to take time off from work for over ten days, as a result of which he lost his job and remained unemployed for a period of about two weeks thereafter.

Upon this return to the State of Arkansas the appellee immediately filed a petition for modification of the decree so as to preclude further visitation by appellant or in the alternative that any visitation be restricted to that which might be exercised in his presence. He prayed that he have judgment against the plaintiff for all his expenditures, that she be held in contempt and that he be awarded his attorney's fee in these proceedings. The appellant filed her answer and counterplea in which she prayed that the petition of appellee be dismissed and that she be awarded the custody of the minor child based on change in circumstances.

After a hearing in which evidence was heard and appellant appeared, the trial court in written findings found her to be in willful noncompliance with the orders of the court. The court then further found that if the appellant "purge herself of the contempt, as hereinafter set forth," further visitation might be permitted but only then upon the posting of a substantial bond guaranteeing the performance of her obligation to return the child. A condition of her purge was that she be required to reimburse the appellee the sum of $2,000 actually paid by him to the attorneys in California. The court did not require her to reimburse any of the other undisputed expenses. The trial court further found that she should be responsible for, and directed her to pay, the expenses of the appellee's Arkansas attorney in the amount of $1500. The court further imposed upon her a fine of $1500.

The appellant argues that the court abused its discretion in holding her in contempt because it was required to give full faith and credit to the expression of desire in the California court's decree, that the Arkansas court not hold her in contempt. We find no merit to this contention. The

expression of the California court's sympathy for her is certainly not binding upon this court and is not such an order as is contemplated by the full faith and credit clause. The expression referred to was nothing more than a suggestion by the California court as to action it felt should be taken by the chancellor in Arkansas. It could be nothing more, as a court in one state cannot adjudicate what a court in another state should do with regard to enforcement of its own orders or the manner in which it should do so. *Nehring* v. *Taylor*, 266 Ark. 253, 583 S.W. 2d 56.

Nor do we find the fine of $1500 to be excessive when the circumstances are considered. In his findings the trial court recited that in the earlier proceedings he had found her to be unfit because of her manner of living and conduct in general, and particularly her conduct and attitude toward the child. Notwithstanding that, she had by scheme undertaken to circumvent the order of the court by removing the child and secreting her outside the jurisdiction of the court. The court commented that although she might have relied on advice of counsel, it could not permit erroneous advice of counsel to shield her from a direct, willful and contumacious violation of the order of the court of which she was well aware. In its findings the court also noted that this type of conduct was receiving national attention and that courts had a duty to deal with such conduct harshly not only as punishment for the violation of the act, but as deterrent to others. The trial judge, according to the record, had conducted all of the proceedings in this matter and was well aware of and acquainted with the background and all attending circumstances. His discretion in this matter should not be disturbed unless it has been clearly abused. When the amount of this fine is compared with the enormity of her contempt and the economic loss to the appellee for which he as not reimbursed, we cannot say the fine imposed by the court was excessive.

The appellant next asserts that the court erred in granting appellee a $1500 fee for his Arkansas attorney because it was clearly excessive. The trial court had presided over all of these proceedings and was in a far better position to assess the value and amount of these services than this court would

be. In making that award the court considered the negotiations of counsel leading up to the Christmas visitation, and the contact with California attorneys during those proceedings as well as the conduct of the proceedings had before it. We do not find it to be excessive.

Appellant further argues that the award of an attorney's fee was not allowable under Ark. Stat. Ann. § 34-1210 (Repl. 1979) inasmuch as this was not a proceeding for the enforcement of payment of "alimony, maintenance and support during pendency of an action for divorce." Section 34-1210 is as follows:

> During the pendency of an action for divorce for alimony, the court may allow to the wife or to the husband maintenance and a reasonable fee for her or his attorneys, and enforce the payment of the same by orders and executions and proceedings as in cases of contempt, and the court may allow either party additional attorney's fees for the enforcement of payment of alimony, maintenance and support provided in a decree.

While that statute would appear to be limited to actions to enforce payment of alimony, maintenance and support, the court's power to award attorney's fees in proceedings such as this is not limited to the statutory authority. The Supreme Court has consistently held that regardless of the effect of that statute, it is within the inherent power and jurisdiction of a court of equity to allow attorney's fees in matters not specifically covered by that statute, including contempt proceedings. *Finkbeiner* v. *Finkbeiner*, 226 Ark. 165, 288 S.W. 2d 586; *Feazell* v. *Feazell*, 225 Ark. 611, 284 S.W. 2d 117; *Gusewelle* v. *Gusewelle*, 229 Ark. 191, 313 S.W. 2d 838. In *Feazell* it was held that the allowance of fees under this inherent power was one that was vested within the sound discretion of the trial court. Under the circumstances of this case we cannot say that the trial court abused that discretion.

The appellant finally argues that the order directing the appellant to pay the sum of $2,000 to be applied on the fees paid the California attorney was excessive, unauthorized,

and one which ought to have been applied for in the California courts.

We cannot say that the award was excessive. The evidence discloses that the attorney had submitted a bill in excess of $3,900, of which amount the sum of $2,000 had been paid by the appellee at the time the services were rendered. The court here did not award the full fee but only that part which had already been paid. The award was made under the inherent power of the court to allow attorney's fees in proceedings such as those now before the court. Nor do we see merit in appellant's contention that the fees for services in the California court should have been assessed in that court. The fact that the services of the attorney were performed in California does not alter the fact that these services were essential to the successful prosecution of the action pending in the St. Francis County Chancery Court. If those services had not been skillfully performed the Arkansas court would have been powerless in its effort to enforce its decrees. This fee was incurred in direct connection with and as a part of this proceeding.

We find additional authority for the action of the trial court upon this issue in *Walker* v. *Fuller*, 29 Ark. 448, at 468, where the court recognized very strongly the principle that, in certain cases, process for contempt can be used to effect civil remedies, the result of which are to make the innocent party whole from the consequences of contemptuous conduct.

We affirm.

MAYFIELD, C.J., CLONINGER, J., and CORBIN, J., dissent.

DONALD L. CORBIN, Judge, dissenting. I must respectfully dissent to the award of a $2,000.00 attorney fee for reimbursement of appellee's California attorney. The chancellor did indirectly what he couldn't do directly — order damages paid under the guise of attorney fees.

Appellee relied upon Ark. Stat. Ann. § 34-1210 (Supp. 1979) to support his position that the reimbursement of his

$2,000.00 attorney fee was proper. This statute provides:

> During the pendency of an action for divorce or alimony, the court may allow to the wife or to the husband maintenance and a reasonable fee for her or his attorneys, and enforce the payment of the same by orders and executions and proceedings as in cases of contempt, and the court may allow either party additional attorney's fees for the enforcement of payment of alimony, maintenance and support provided for in the decree.

This statute has been stretched tighter than any rubber band to provide attorney fees in an action for modification of custody as in *Finkbeiner* v. *Finkbeiner*, 226 Ark. 165, 288 S.W. 2d 586 (1956); in a contempt proceeding for enforcement of support as in *Feazell* v. *Feazell*, 225 Ark. 611, 284 S.W. 2d 117 (1955) and in an annulment proceeding as in *Lee* v. *Lee*, 191 Ark. 163, 83 S.W. 2d 840 (1935). This is in spite of the fact that the statute provides only that attorney fees may be allowed "during the pendency" of an action for divorce or alimony and for the enforcement of payment of alimony, maintenance and support as provided for in the decree.

In *Farm Bureau Mutual Insurance Co.* v. *Kizziar*, 1 Ark. App. 84, 613 S.W. 2d 401 (1981), this Court adopted the guidelines promulgated under the Code of Professional Responsibility of the American Bar Association which were adopted by the Arkansas Supreme Court. The factors to be used as guidelines in determining reasonableness of an attorney's fee are to include the time and labor required, the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the lawyer or lawyers performing the services; and whether the fee is fixed or contingent.

In the instant case, the appellant relied upon the advice of her California counsel to seek relief. The California court was the proper body to entertain a request for attorney fees incurred in an action before it, and the request for reimbursement of attorney fees should have been made at that time before the California court. The California court gave full faith and credit to the Arkansas decree and expressed a desire that the Arkansas court not hold appellant in contempt. The appellant relied upon our system of jurisprudence to pursue her course of action. She was unsuccessful and immediately turned the child over to the appellee upon the conclusion of the California action.

This is clearly an abuse of discretion and it is an example of our courts engaging in the legislative process. The term "costs" or "expenses" as used (even in a statute) is not understood ordinarily to include attorney's fees. *Lewallen* v. *Bethune,* 267 Ark. 976, 593 S.W. 2d 64 (1980); 20 Am Jur. 2d *Costs*, § 72, p. 59. The right to recover attorney fees from one's opponent in litigation as a part of the cost thereof does not exist at common law. *Lewallen* v. *Bethune, supra*; 20 Am. Jur. 2d *Costs*, § 72. Such an item of expense is not allowable in the absence of a statute or rule of the court, or some agreement expressly authorizing the taxing of attorney fees in addition to the ordinary costs. *Lewallen* v. *Bethune*, *supra*.

In *C.R.T., Inc.* v. *Brown*, 269 Ark. 114, 602 S.W. 2d 409 (1980) the Court said:

> Since this was a civil contempt proceeding we find it entirely appropriate that the chancellor awarded attorneys' fees and costs. The award of attorney's fees in civil contempt action has been approved by the United States Supreme Court. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 87 S. Ct. 1404; 18 L. Ed. 2d 475 (1967).

In that case, the attorney fees were based on the number of hours appellee's attorneys said they worked.

The facts in the instant case are distinguishable from

those in *C.R.T., Inc.* v. *Brown, supra.* In that case the attorneys were Arkansas attorneys regularly practicing before the bar of the Court and they testified as to the amount of work that they did in behalf of their clients. In the instant case, the California attorney was never present before the Arkansas court and there was only a mere invoice showing that the appellee had paid a $2,000.00 fee. No evidence was taken as to the number of hours, skill, or any of the other guidelines adopted by our Supreme Court to determine the reasonableness of the California attorney fee.

MAYFIELD, C.J., and CLONINGER, J., join in this dissent.

David C. SCOTT et al *v.* Louretha Jewel HILL

CA 80-518 614 S.W. 2d 690

Court of Appeals of Arkansas
Opinion delivered May 6, 1981

Halloway & Haddock, by: *James W. Haddock*, for appellants.

Drew & Mazzanti, by: *William H. Drew*, for appellee.

GEORGE K. CRACRAFT, Judge. The appellants appeal from an order of the Chancery Court of Chicot County quieting and confirming the appellee's title to a ten acre tract of land legally described in that decree. On their appeal appellants contend that they are the owners of the legal title as the heirs of George Demsey, deceased, and that the chancellor erred in finding that the appellee, Louretha Jewel Hill, had acquired that title by adverse possession. We do not agree.

George Demsey died testate in Chicot County in 1968, survived by his widow, Eva Demsey, two children of a former marriage and several nieces and nephews. No children were born to his marriage to Eva. In his will George Demsey made no mention of his wife Eva but devised all of his estate including the lands in question which had been his homestead, to his two children and the nieces and nephews. His widow, Eva Demsey, was appointed personal representative and filed an election to take against the will, and in that

same petition made application for statutory allowances. In that petition the widow made claim to the title to the entire ten acres stating the erroneous conclusion that she "owns one-half interest absolutely as the widow of George Demsey, deceased, under the laws of descent and distribution of the State of Arkansas and hereby claim the other one-half interest therein by reason of statutory allowances in the sum of $1000 and $500 by reason of sustenance." Sometime later the devisees of George Demsey, deceased, filed a petition stating that the personal representative had not performed any of her duties except to file a petition for statutory allowances, "with the evident purpose of taking and converting the entire estate of George Demsey for her own use and benefit to the exclusion of the petitioners who are the next of kin and devisees under the last will of the said George Demsey." This petition requested that she be ordered to file a full and complete inventory and appraisal of all of the assets belonging to the estate. No further action appears to have been taken in said estate until some fifteen years later when in 1977 a personal representative in succession was appointed and the estate finally closed. While it is clear to the court that Eva had only a right, as surviving widow, to the possession of the ten acres as her homestead and dower for life, the record contains evidence that under her erroneous claim of absolute ownership, she remained on the property without interference until her death in 1970.

Eva died testate in 1970 and by her will specifically devised the property in question to appellee, Louretha Jewell Hill, and her sister, Christine Hill, as tenants in common. Christine Hill conveyed her interest to appellee, who immediately entered into possession of the property under color of title. The property was enclosed and there was a dwelling located on it which George and Eva Demsey had maintained as their homestead during their lifetimes. Appelee farmed the property herself for several years and grazed cattle thereon. Subsequently, she placed a tenant in possession who resided in the house and farmed and ran cattle on the tract. The chancellor found that during the period from 1970 to 1979, appellee, Louretha Jewel Hill, was in open, notorious, hostile, continuous possession of these lands under color of title and claim of right, free of interfer-

ence by anyone. It is clear from our law that uninterrupted possession for more than seven years under the conditions which the trial court found to exist, vest title in that possessor. *Thompson* v. *Morris*, 218 Ark. 542, 237 S.W. 2d 473.

The record shows that the appellee did not know of any of the appellants and was not aware of their existence until immediately before this action was commenced. Only one of the appellants testified at the hearing but indicated that all other claimants resided outside of the State of Arkansas and there was no indication that any of them had been in the state or on the property at any time during this nine year period of appellee's possession. Appellants testified that they had been given no actual notice of appellee's possession or claim. The record does not indicate that any of them ever visited the premises during the nine year period of appellee's adverse possession. Actual notice is not necessary. One claiming lands adversely under color of title need not give affirmative notice to another residing at a distant place or state, that he is claiming to own the land where, as here, he has no knowledge of the existence, whereabouts or claim of interest of appellants in the lands. *Miller* v. *Chicago Mill & Lumber Co.*, 140 Ark. 639, 215 S.W. 2d 900. While a true owner must have knowledge of notice that possession of another is hostile, this may consist of either actual knowledge or constructive notice, arising from the openness and notoriety of the possession. Constructive notice is that which as would reasonably indicate to the owner if he visits the premises and is a man of ordinary prudence that claim of ownership adverse to his is being asserted. *Terral* v. *Brooks*, 194 Ark. 311, 108 S.W. 2d 489.

The appellants argue that the title of the appellee is dependent upon that of Eva through whom they claim and that she, being possessed by virtue of dower and homestead rights for her life, could not hold adversely to the remainderman. We agree with the chancellor in his finding that the possession of Eva is not essential to appellee's claim.

The cases holding that the statute of limitations does not run in favor of a grantee of a life tenant are based on the premise that until the death of the life tenant there is no right

of entry in the remainderman. *Huestess* v. *Oswalt*, 253 Ark. 730, 488 S.W. 2d 707. However, upon termination of the prior estate that right immediately arises and unless the right of reentry is exercised by the remainderman within the statutory period, his title may be extinguished by adverse possession. The trial court found that the possession of appellee for the nine year period after Eva's death was of that nature by which title by adverse possession may be vested. The court will not reverse the order or findings of the chancellor unless it finds those findings to be clearly against the preponderance of the evidence.

Finally the appellants contend that there was an action against Eva for possession of the property pending in the Probate Court and that the statute of limitations was tolled as to both the life tenant and those claiming under her. While we agree with the parties that the pendency of an action to obtain possession by a legal owner would toll the statute of limitations, we cannot agree that the rule has any application to the facts here. There was no pending action for possession. While it is doubtful that the probate court had jurisdiction to entertain such an action, what the appellants refer to as a "pending action" was merely a petition for an order to require Eva to file an inventory in the estate of her deceased husband. It was not such a petition as would toll the statute of limitations for the recovery of real estate.

We affirm.

ARKANSAS STATE HIGHWAY COMMISSION *v.* OAKDALE DEVELOPMENT CORPORATION

CA 80-507 614 S.W. 2d 693

Court of Appeals of Arkansas
Opinion delivered May 6, 1981

Thomas B. Keys and *Philip N. Gowen*, for appellant.

Lightle, Beebe, Raney & Bell, by: *A. Watson Bell*, for appellee.

LAWSON CLONINGER, Judge. On September 13, 1973, appellant, Arkansas Highway Commission, condemned 0.24 acres of a tract of 31.5 acres owned by appellee, Oakdale Development Corporation, located in the southwest city limits of Judsonia. The property had been platted for residential subdivision development in 1967, and about half of the property had been developed at the time of condemna-

tion. The half in which the condemned property was located was undeveloped.

This is an appeal from a jury verdict for appellee in the amount of $4,000 as compensation for the taking. The sole issue on appeal is whether the trial court erred in permitting testimony of developed lot sales in the subdivision to support the opinion of witnesses as to the value of lots in the undeveloped area. We find no reversible error and we affirm.

This Court must review the testimony in the light most favorable to the appellee, and indulge all reasonable inferences in favor of the judgment. *Arkansas State Highway Commission* v. *Duff*, 246 Ark. 922, 440 S.W. 2d 563 (1969).

Gerald Joyner, a witness for appellee, is an engineer, a registered surveyor, and one of the developers of appellee corporation. As an expert witness and as a landowner, Mr. Joyner testified that practically all of one lot and a portion of two other lots were taken, and that two additional lots were damaged. In his opinion, at the time of the taking the fair market value of each lot was $3,200, for a total valuation of $16,000; that the fair market value of the property after the taking was $6,400, for a total damage to the landowner of $9,600. One lot was ascribed damage to its full value and the four other lots were described as being damaged 50%. He arrived at the value of $3,200 ascribed to each lot by taking the sale price of a lot in the developed area of the subdivision, $4,000, and deducting the expense of developing each lot, $800. Since the taking, ten single family homes and one building with five units in it have been built in the subdivision.

Wayne Hartsfield, a bank appraiser and a witness for appellee, knew of specific sales of comparable developed lots in the area for $4,000. He gave his opinion that the five lots taken or damaged had a before-taking value of $15,000, and an after-taking value of $7,500.

Henry Williams, an appraiser employed by appellant, stated that in his opinion the property taken had a fair

market value of $1,500 per acre, and that it was not desirable for residential building.

Testimony regarding the desirability of the lots in the undeveloped area of the subdivision for residential development, as compared to the lots in the developed area, was in conflict, but that was a question of fact to be considered by the jury.

Appellant argues that as a matter of law the trial court should have ruled that the sales relied on by appellee's witnesses were not comparable, and relies upon the case of *Arkansas State Highway Commission* v. *Welter*, 247 Ark. 23, 444 S.W. 2d 65 (1969), in which the Court said:

> We agree with the Highway Commission that the trial court should have struck the testimony of all the landowners' witnesses relative to valuation because there is a total absence of any reasonable or factual basis in the record for a comparison of the value of the lots in the paper subdivision with the sales price of fully developed lots in North Hill Subdivision where all utilities, streets, curbs and gutters were in place.

We disagree that the holding in *Welter* is applicable in this case, because the circumstances are different. In *Welter* there was a subdivision on paper, but there had been no effort to develop any part of it. The witnesses for Welter went to another subdivision for comparable sales, and in the words of the Court, there was "a total absence of any reasonable or factual basis in the record for comparison . . ." In the case before the Court the appellee's subdivision had been platted six years prior to the condemnation, and development of the subdivision had proceeded steadily, though perhaps at a slow pace. There was a reasonable basis for comparison of the value of lots in the developed area of the subdivision and the lots taken or damaged, and an allowance was made for the cost of development.

The question of similarity or dissimilarity of the lots sold and the lots condemned was basically a question for the trial judge. *Baker* v. *City of Little Rock*, 247 Ark. 518, 446

S.W. 2d 253 (1969). No general rule can be laid down regarding the degree of similarity that must exist to make such evidence admissible. It must necessarily vary with the circumstances of each particular case. Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court which will not be interfered with unless abused. *Arkansas State Highway Commission* v. *N.W.A. Realty Corporation*, 262 Ark. 440, 557 S.W. 2d 620 (1977).

We are in no position to say that the trial court in the instant case abused its discretion in admitting the testimony.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION
v. Marvin A. PEARROW et ux

CA 80-497 614 S.W. 2d 695

Court of Appeals of Arkansas
Opinion delivered May 6, 1981

Thomas B. Keys and *Philip N. Gowen*, for appellant.

Charles O. Pearrow and *Comer Boyett*, for appellees.

TOM GLAZE, Judge. This is an appeal from a judgment in the amount of $12,000 entered in the White County Circuit Court pursuant to a jury verdict returned in an eminent domain proceeding. On September 6, 1974, the appellant condemned 0.16 acre of 2.8 acres owned by the appellees. The appellees' house is located on the property but not on the 0.16 acre taken by appellant. The appellant argues one point for reversal, contending that the trial court erred in admitting into evidence testimony on behalf of appellees which intermingled commercial and residential values in arriving at damages as the result of the taking.

Our task on appeal is to determine the correct legal measure of damages applicable to the condemnation of

appellees' 0.16 acre and then to decide whether the evidence introduced at trial supported the damages awarded to appellees. Towards this end, we will review the case authorities which set forth the legal standards we must consider and follow in deciding the case at bar. First, it is settled law that the measure of the owner's compensation for condemned land is its market value at the time of the taking for all purposes, comprehending the land's availability for any use to which it is plainly adapted, as well as the most valuable purpose for which it can be used and will bring most in the market. *Fort Smith & Van Buren District* v. *Scott*, 103 Ark. 405, 147 S.W. 440 (1912). The general rule on the measure of damages as enunciated in *Scott* is one for consideration and general application to the facts in this cause. However, the facts before us also reflect that the appellees' residence is located on the subject property although it is not on the part of the land taken by the appellant. Thus, we must turn to another settled legal principle which is operable when the land taken has an improvement on it. This principle was relied upon by our Supreme Court in *Arkansas State Highway Commission* v. *Griffin*, 241 Ark. 1033, 411 S.W. 2d 495 (1967), quoting from its holding in *Arkansas State Highway Commission* v. *Richards*, 229 Ark. 783, 318 S.W. 2d 605 (1958), wherein it stated:

> *"The proper measure is the market value of the land with the buildings upon it, and the owner therefore receives nothing for the buildings unless they increase the market value of the land. Accordingly, evidence of the structural value of the buildings is not admissible as an independent test of value.* When, however, it is shown that the character of the buildings is well adapted to the location, [and] the structural cost of the buildings, after making proper deductions for depreciation by wear and tear, is a reasonable test of the amount by which the buildings enhance the market value of the property. As in other cases of determining market value, not only the character and condition of the building, but also the uses to which it might be put, are matters for consideration." [Emphasis supplied.]

Finally, appellant asks us, we believe correctly, to

review another legal measure that it argues should be considered and applied to the facts at bar when awarding damages. In this connection, appellant raises one issue on appeal, contending the trial court committed error by allowing the introduction of testimony concerning damages which intermingled commercial and residential values. Appellant relies in part on the case of *Arkansas State Highway Commission* v. *Toffelmire*, 247 Ark. 74, 444 S.W. 2d 241 (1969), wherein the Supreme Court stated:

> Clearly, in a commercial use evaluation, the value of the improvements, both before and after the taking, should have been based on commercial worth. Our case of *Arkansas State Highway Commission* v. *Griffin*, 241 Ark. 1033, 411 S.W. 2d 495 (1967), sets out the rule. There we said "a verdict rendered by a jury which was partially based on testimony relating to commercial value of the land, and partially based on testimony relating to the land's value for residential purposes, would not be proper . . ."

Now that we have a firm understanding of the applicable rules or legal measures which control the determination of the amount of damages to which appellees may be entitled, we must then review the evidence and testimony to decide if it is consistent with these recognized legal principles. In doing so, our task proves more difficult because the expert testimony is not as clear as we would prefer. To illustrate, we consider first the testimony of John Roddy, a real estate broker and witness for the appellees. Roddy testified that the highest and best use of the appellees' property before the taking was for commercial purposes. He stated that before the taking the land had a market value of $6,400 per acre. After the taking, Roddy related that appellees' land no longer had commercial value, that the land's highest and best purpose was for farming use and assigned an after value of about $600 per acre. Apparently, Roddy was of the opinion that the appellant's taking of the 0.16 acre destroyed any commercial use which appellees' property may have had before the taking.

It is at this point that we believe Roddy's evaluation and

testimony becomes confusing and departs from the correct measures of damages which are controlling of this case. Roddy assigned a value to the appellees' dwelling of $31,040 before the taking. Yet, on cross-examination, he admitted that the dwelling did not contribute to the commercial use of appellees' property. He stated that the appellees' house was actually in the way for commercial development, that it would have a salvage value of about $3,000 or that it would have to be sold and moved off the property to make way for any commercial development. This portion of Roddy's testimony is in direct conflict with the rule we noted earlier in *Arkansas State Highway Commission* v. *Griffin, supra*, *i.e.*, the owner receives no compensation for buildings unless they increase the market value of the land. Although the effect of Roddy's testimony was that the house did not enhance the value of the property for commercial purposes, he erroneously proceeded to assign a separate structural value to the appellees' residence which is not admissible as an independent test of the market value of the subject property. Whether, as appellant suggests, Roddy used the residential value of appellees' dwelling to arrive at his before taking evaluation is not clear from his testimony, and although a fair inference may justify the conclusion that Roddy incorrectly mixed residential and commercial values, it is of no moment. We have already duly noted the portion of Roddy's testimony which we conclude is erroneous and contrary to the correct measure of damages as is required in *Griffin*, and it is on this basis that we reverse and remand this cause for a new trial.

Since this case is remanded and a new trial is in the offing, we feel that it is necessary to refer in brief to certain testimony in the record given by the two expert witnesses called by the appellant. Both witnesses testified that one of the comparable sales on which they relied involved a 2.25 acre commercial tract located about one and one-half blocks from the appellees' property and on the opposite side of the highway. These same witnesses stated that the highest and best use for appellees' property before the taking was for residential purposes. Although these witnesses, late in their testimony, indicated that this 2.25 acre commercial tract was not comparable to appellees' property, the witnesses had

already testified otherwise. This type of testimony is contrary to law and can only prove confusing to a jury. We also note that this intermingling of commercial and residential values is the same wrong which appellant assigns as error in this appeal.

Reversed and remanded.

MAYFIELD, C.J., dissents.

MELVIN MAYFIELD, Chief Judge, dissenting. When the Highway Commission takes a portion of a person's land, the measure of compensation is the difference between the market value of the whole tract before the taking and the market value of the remainder after the taking. *Arkansas Highway Commission* v. *Bryant*, 233 Ark. 841, 349 S.W. 2d 349 (1961).

The abstract of testimony in the brief of the Arkansas Highway Commission in the instant case contains the following:

> Q. With these comparables in mind, what price, then did you assess to the subject property?
>
> A. Due to research of these comparables, and market study, market surveys made at the time for myself as investor in real estate there, I placed a value of $48,360.00. (R. 91)
>
> . . . .
>
> Q. What value did you place on the property now after the taking?
>
> A. $5,640.00.
>
> . . . .
>
> Q. Then you assess that property has been damaged how much?

A. Well, according to those figures, $42,720.00 is the difference. (R. 93)

In this case the Highway Commission took a portion of appellees' property. The verdict of the jury was $12,000.00. Under the law and evidence set out above, unless something else is involved, this case should not be reversed and remanded for a new trial. I cannot determine from the abstract of testimony whether there is anything else involved. Under Rule 9 of the Rules of Supreme Court and Court of Appeals, it is incumbent upon the appellant to abstract the testimony and it is not the duty of the court to search the record for evidence not abstracted.

Therefore, I would affirm the judgment.

William L. OWENS and Others, Being the Owners of All Lots in Block 6, 7, 8, and Lots 1-10 of Block 5, Western Oaks Place, a Subdivision in the City of Springdale, Arkansas *v.* Glen E. CAMFIELD and Sally CAMFIELD, Husband and Wife

CA 80-517 614 S.W. 2d 698

Court of Appeals of Arkansas
Opinion delivered May 6, 1981

Davis & Bracey, by: *Charles E. Davis*, for appellants.

Lisle & Watkins, by: *Barry J. Watkins*, for appellees.

TOM GLAZE, Judge. This appeal is from a chancery court decision which excepted two lots owned by appellees from a covenant restriction which limited the use of the lots for residential purposes only. The appellants own lots in the same subdivision in which appellees' two lots are located and appellants affirmatively plead at the trial below that the appellees were not entitled to have the convenant restriction cancelled. Appellants contend on appeal that the Chancellor erred in: (1) imposing the wrong legal standard for determining when a restrictive convenant should be removed, and (2) that the Chancellor's decision to remove the restrictive convenant was against the preponderance of the evidence even if the evidence presented was considered in view of the correct legal standard.

For purposes of this opinion, we consider both issues raised by appellants at the same time. Appellants cite the case of *Storthz* v. *Midland Hills Land Company*, 192 Ark. 273, 90 S.W. 2d 772 (1936), which sets forth the correct rule of law to follow when determining when a restrictive covenant should be cancelled. The court in *Storthz* held:

> ... the weight of authority is to the effect that equity will and should entertain a bill which has the purpose of cancelling a restrictive convenant in a deed as a cloud upon title wherein it is alleged that the conditions surrounding the property have so changed as [1] *to utterly destroy its value for the purpose for which the restriction was promulgated to prevent*, and [2] *that this change of conditions is due to no fault on the part of the petitioner* and [3] *will work no irreparable injury to others.* [Emphasis and numbers supplied.]

Appellants argue that the Chancellor failed to apply the first part of the rule in *Storthz* and direct our attention to the Chancellor's finding in the trial court's decree which states:

> That conditions on Highway 68 in Springdale, Arkansas, have *materially changed so that the purpose of the covenants is no longer served* insofar as the covenants restrict Lots 1 and 2 of Block 8 to residential use only. [Emphasis supplied.]

It is obvious that the decree does not reflect the identical language contained in *Storthz*. The trial court, in reaching its decision, may have been more exacting if it had specifically found that "the conditions surrounding the property had so changed as to utterly destroy its value for the purposes for which the restriction was promulgated to prevent." However, the court's failure to do so is certainly no reason in itself to reverse, especially when we review this case *de novo* and have the opportunity to determine whether the evidence supports the Chancellor's decision in view of the legal standard in *Storthz*. It is well established that we review chancery cases *de novo* on appeal, and we do not reverse the Chancellor's findings of fact unless contrary to the prepond-

erance of the evidence. *Garot* v. *Hopkins & Coates*, 266 Ark. 243, 583 S.W. 2d 54 (1979).

The record before us reflects that the two lots owned by appellees are bordered on three sides by commercial activity. The lots are bounded on the south by U.S. Highway 68. The convenant restriction which limited these two lots to residential use only was filed in 1960. In 1964, all the property bordered on the north side of Highway 68, including appellees' two lots, were zoned for commercial use. At the time and subsequent to the rezoning, the appellees' home was located on one of the lots and the other lot was and remains vacant. Both appellants and appellees agree that the evidence tends to show that appellees' property is located within a commercial "sprawl" area which has developed along Highway 68. Even though appellees' lots are located in an admitted commercial sprawl, appellants argue that this case is indistinguishable from the case of *Robertson* v. *Berry*, 248 Ark. 267, 451 S.W. 2d 184 (1970), wherein the Supreme Court upheld a residential use only covenant which covered property located in close proximity of a commercial area in Little Rock. Although the facts here may be similar in some respects to those found in *Robertson*, the case before us is clearly distinguishable. In *Robertson*, the court specifically found the evidence showed the restricted property's value for residential purposes had not been destroyed. Even the expert witnesses called by Robertson, who was seeking cancellation of the restrictive covenant, admitted that the subject property continued to have some value for residential purposes. Here, there was evidence that appellees' lots had no residential value. Tom Reed, a real estate appraiser, testified that there is no market for residential property along Highway 68 and stated he could not set a residential value for appellees' property. One of the appellants, Howard Gay, gave credence to Reed's opinion when Gay testified that he would only buy appellees' property as an investment so he could "make some money on it later down the line when the restrictive covenant runs out."

The fact that appellees' property is zoned commercial is of paramount consideration, and this important factor was not found in *Robertson*. While the general rule is that

restrictive convenants are not abrogated, destroyed or impaired when property is rezoned, the rezoning is a circumstance tending to show that at least in the judgment of the municipality the character of the neighborhood within the zoned area was changing or had changed from residential to business uses for purposes of determining whether the restrictive convenant should no longer be enforced because of changed conditions. *Hirsch* v. *Hancock*, 173 Cal. App. 2d 745, 343 P. 2d 959 (1959); *Staninger* v. *Jacksonville Expressway Authority*, 182 So. 2d 483 (Fla. App. 1966); to this effect see also 20 Am. Jur. 2d, *Covenants Conditions and Restrictions*, § 277.

Of course, Reed's previously mentioned testimony indicates appellees' property has no residential value since it is zoned commercial and is located within a commercial strip along Highway 68. The sole fact that appellees' property was rezoned has effectively caused them to lose, for all practical purposes, the use of one of the two lots in question. Lot 1 was vacant when the commercial rezoning occurred in 1964. The net effect of the rezoning is that appellees cannot build a house on Lot 1 since it is zoned commercial, and if the restrictive convenants are enforced, appellees cannot use the lot for commercial purposes. The appellees' plight is significant, *viz.*, they appear to own a piece of property on which they have no right to build an improvement or structure of any type.

We conclude from our review of the record that there is substantial evidence to show that the conditions surrounding the property of appellees have so changed as to destroy its value for residential purposes. Therefore, we affirm the decision of the trial court.

Affirmed.

Ray CAMP and Marcia CAMP *v.* Lino
LIBERATORE, Jr. and Marguerite A. LIBERATORE

CA 80-484 615 S.W. 2d 401

Court of Appeals of Arkansas
Opinion delivered May 13, 1981

George Pike, Jr., for appellants.

John M. Belew, for appellees.

GEORGE K. CRACRAFT, Judge. This appeal arises from a dispute over the location of the boundary line between adjoining landowners. The appellants Camp claim under a chain of title conveying the "North Half of the Southwest Quarter, Section Twenty-eight, Township Eleven North, Range Seven West, lying east of the county road." Appellees Liberatore claim through a chain which describes their lands as the South Half of that quarter section bounded also by the road. That part of this quarter section lying west of the road is not involved in this dispute.

The appellants claim that their ownership extends to the true section line as surveyed by them in 1979. Appellees, while conceding the accuracy of that survey, contended that an old fence line lying north of that line as surveyed had been established as the boundary line between their respective properties by mutual agreement and acquiescence of their predecessors in title for a period of twenty-three years. Between 1972 and 1979 the appellee undertook to reconstruct the old fence by erecting a new one which he testified was located one foot south of the remnants of the old fence. The chancellor found from the evidence that the old fence line referred to by appellees was a mutually agreed boundary and entered a decree which established it as a division line between the two properties. That line was located in the decree as being one foot north of the existing fence. The appellants appeal from that decree.

Prior to 1948 the entire quarter section was owned by A. M. Gillespie who caused the quarter corners, reestablished by a Geological Commission survey, to be permanently marked by stone monuments. These markers were set at the east and west corners of the line dividing the north and south halves of the quarter section, but no markers were placed in the timbered area between the two. In 1948 Virgil Allgood acquired title from Gillespie to the tract now owned by the appellees and immediately undertook to erect a fence intending to place it on the boundary line with Gillespie. He started his fence at the stone monument marking his northeast corner and worked westwardly along a line of blazes and other markings which he thought to be the section line to an intersection with the county road. The fence was strung partly on post and partly by utilizing standing timber. A subsequent survey made by the appellants in 1979 shows that he did not in fact follow the true line but that the fence he erected angled northwesterly some nineteen hundred feet. At the point of its intersection with the county road the fence was approximately one hundred eighty feet north of the section line. The fence had fallen into disrepair by 1972 when appellees acquired their title to the north half. Between 1972 and 1979 appellee completed reconstructing the fence along a line which he testified was one foot south of the visible remnants of the old fence line.

The appellants contend that the chancellor erred in finding that the fence was an agreed boundary line or one established by acquiescence referring to the Virgil Allgood fence as a "meandering, zig-zag, rag-tag fence" and Virgil's original intent and purpose to use it to contain his cattle. While there was evidence that the fence was not of such a nature, appellants contend that such a fence and purpose could furnish no basis for a boundary line by agreement or acquiescence. In support of this position they rely upon *Hoskins* v. *Cook*, 239 Ark. 285, 388 S.W. 2d 914; *Warren* v. *Collier*, 262 Ark. 656, 559 S.W. 2d 927; *Fish* v. *Bush*, 253 Ark. 27, 484 S.W. 2d 525, and other similar cases. Appellants argue that these cases hold that meandering fences of convenience cannot furnish the basis for the establishment of a boundary by acquiescence. We do not construe these cases as declaring the rule to be as appellants contend. They hold no

more than that the erection and maintenance of a fence at or near the boundary line between adjoining landowners is not enough, *in and of itself*, to establish a boundary line by agreement and acquiescence. What they do hold is that the basic question in each case is what was the intention of the parties with respect to that fence. This distinction was pointed out by Justice George Rose Smith in *Fish* v. *Bush*, supra, as follows:

> 'The basic question is one of intention: Did the adjoining landowners mean to recognize the fence as the boundary? The controlling distinction is clearly stated by Justice Bohlinger in *Carney* v. *Barnes*, 235 Ark. 887, 363 S.W. 2d 417 (1962): 'The case hinges on whether or not the old fence and the fence row was an agreed line between the two pieces of property. While the construction and maintenance of a division fence, when mutually regarded as a boundary, may constitute recognition and acquiescence mere existence of a fence between adjoining landowners is not of itself sufficient. There must, therefore, be a mutual recognition of the fence as the dividing line.'

The location, nature or type of construction of the fence is not controlling, but may in some instances be a factor to consider in making the ultimate determination as to whether the requisite intent exists. Where that mutual intention and acceptance is indicated by other facts presented in a particular case, the fence line, whatever be its condition or location, becomes merely the visible means by which the agreed line is located. It is the agreement and acquiescence, not the fence itself, that controls. The intention of the parties and the significance that they attach to the fence rather than its location or condition, is what is to be considered.

The chancellor found on evidence presented to him that there had been sufficient mutual agreement and recognition of this fence line to constitute a dividing line between the respective owners; that the new fence erected by appellees followed the old fence line accurately and was on appellees' property at all times one foot south of the old line. We do not reverse the findings of a trial judge unless we find that they

are clearly against a preponderance of the evidence. As preponderance turns heavily on credibility, we defer to the superior position of the chancellor in this respect. *Hackworth* v. *First National Bank of Crossett*, 265 Ark. 668, 580 S.W. 2d 465.

The chancellor heard the testimony of nine witnesses and with the exception of appellants and appellees, all of them were familiar with the history of the fence, and had at one time been the owner of one of the two tracts involved. They were all familiar with the stone markers that marked the east and west ends of the true section line. None of them, however, knew where that line lay on the ground in the timber between these two points. The Allgood brothers, respective predecessors in title to the parties, testified that they had agreed that Virgil's fence was to be accepted as their boundary line and continued to recognize it as such. Gerald Brown, Cecil Allgood's grantee and immediate predecessor in title to appellants, testified that he too recognized that fence as a boundary between himself and his neighbor, even though he knew that the line had never been surveyed. Pierce, a predecessor in title to the appellees, testified that he had always during his period of ownership accepted and recognized the fence as the line. The appellee testified that when he first discussed the reerection of the old fence with Brown, Brown admitted that the fence line was the boundary and that he was told to go ahead and build the fence but "not go past the fence line." There was also testimony from Pierce and others that Brown had recognized it while they were adjoining landowners. From this, and other testimony in the record, we cannot say that the finding of the chancellor was clearly against a preponderance of the evidence.

The appellants further argued that there could be no boundary line established by acquiescence or agreement because the corners were marked, a fact known to all parties, and about which there was never any dispute. While it was shown that the location of the corners was known to all, it was further shown that no one knew where the line between those markers lay on the ground in the timbered area between them. It is not necessary that a prior dispute exists about the location of a boundary or division line in order to

establish such boundary by acquiescence or agreement. *Gregory* v. *Jones*, 212 Ark. 443, 206 S.W. 2d 18; *Vaughn* v. *Chandler*, 237 Ark. 214, 372 S.W. 2d 213. Where there is doubt or uncertainty as to the true location of the boundary line the parties may by parol fix a line which, at least when followed by possession with reference to it, may be conclusive upon the parties. *Malone* v. *Mobbs*, 102 Ark. 542, 146 S.W. 143.

The appellants finally argued that the court erred in establishing the old fence line as the boundary because it had become so deteriorated over the years that it could not be accurately located at the time appellees reconstructed the fence. There was sufficient evidence before the court from which it could, and did find, that the remnants of the old fence line were sufficiently visible to enable appellees to accurately locate them on the ground; that appellees erected the fence at all times one foot south of that old fence line; and hence that the boundary line established by acquiescence and agreement was a line located one foot north of the existing fence. We cannot say that those findings are clearly against a preponderance of the evidence.

We affirm.

MAYFIELD, C.J., and CORBIN, J., dissent.

MELVIN MAYFIELD, Chief Judge, dissenting. I respectfully dissent from the majority decision in this case for the following reasons.

In the first place, both parties had the property here involved surveyed in 1979 and stipulated during the trial that the true boundary line is accurately reflected on the appellees' survey and that this surveyed line should prevail unless the court found an old fence line to be the boundary.

Both the north half and the south half of the quarter section involved were owned by the same man in 1948. That year he had a survey crew go around the entire 160-acre tract establishing each corner of the tract. This was done by using the southwest corner of the quarter section which had been

located and confirmed by the State of Arkansas Geological Commission, Land Survey Division, from the field notes of the early 1800 United States surveyors. Not only was each corner of the 160-acre tract established but the two corners which form the beginning and ending point of a line splitting the quarter section into its north half and south half were also established and marked. These corners were found and used in the surveys made by the parties in 1979.

In 1948, Virgil Allgood bought the south half of the quarter section and built a fence on the northern edge of his property. In 1949, his brother Cecil bought the north half of the quarter section. Cecil owned this half until 1952, when he sold it to his brother-in-law Gerald Brown. In 1979, Brown sold it to the appellants in this case, Ray and Marcia Camp.

The south half of the quarter section has been owned by various people through the years and in 1972 was purchased by the appellees, Lino and Marguerite Liberatore.

The fence that Virgil Allgood built in 1949 started at the southeast corner of his property and angled northwesterly to a point 180 feet north of the true boundary line, taking in approximately 3.46 acres of land that was in the north half of the quarter section which he did not own.

It is this acreage that the appellees get as a result of the majority decision in this case. They get this land because the chancellor found that the old fence line is a boundary line by acquiescence. There have been many cases decided by the Arkansas Supreme Court on this point. See *Hoskins* v. *Cook*, 239 Ark. 285, 388 S.W. 2d 914 (1965); *Fish* v. *Bush*, 253 Ark. 27, 484 S.W. 2d 525 (1972); *Hicks* v. *Newton*, 255 Ark. 867, 503 S.W. 2d 472 (1974); *Warren* v. *Collier*, 262 Ark. 656, 559 S.W. 2d 927 (1978) and *James* v. *Seward*, 265 Ark. 225, 578 S.W. 2d 16 (1979).

All of the above cases hold that the mere existence of a fence between adjoining landowners is not of itself sufficient to establish a boundary line by acquiescence. There must be a *mutual recognition* of the fence as the *boundary* line. That there has been no mutual recognition that the fence built in

1949 was a boundary line is shown by the testimony of Gerald Brown who owned the north half of the quarter section for over twenty-five years. During all these years the south half of the quarter section was owned by various people. Brown testified that when he bought the property from his brother-in-law Cecil Allgood he didn't recall any statement concerning the fence and he took Cecil's word that he was getting the acreage called for. During all the years from that time until the Liberatores purchased the adjoining property, there was never any dispute about the location of the fence. There was never any agreement whatsoever about whether the fence was the line or not. It just wasn't mentioned. And when Liberatore bought the adjoining property there was no agreement between them as to the line.

In addition to that, the evidence shows that when Liberatore bought his land in 1972 the fence built by Virgil Allgood in 1949 had practically disappeared. Liberatore himself testified that there were remnants of an old fence with intermittent posts either standing or lying down and that he tripped a few times because he couldn't tell where the wire was for it was buried in the leaves. He testified that when he started putting up a new fence in 1972 he sometimes tied to a remnant of wire or post from the original fence, that sometimes his fence ran within one foot of the old remnants and sometimes within five feet, and "if I thought it needed straightening, I would straighten it out." One can look at the pictures in the record and see that the fence involved is a zigzag, tree-to-tree and post-to-post fence. And the chancellor himself fixed the line, which he found to have been established by acquiescence, at one foot north of this new fence constructed by the Liberatores.

I agree with the appellants whose brief states that "a basic principle running throughout all of the cases is that the burden of proof is upon any landowner who seeks to have a boundary line established at any location other than the true boundary as revealed by the original surveys nearly 200 years ago."

I also agree with appellants' brief that to disrupt these original surveys allowing "nearly 200 years of history to go

down the drain ... in favor of the remnants of some ragtag fence wandering through the woods is ... undesirable."

Reviewing the evidence, as is our duty, under Rule 52 of the Rules of Civil Procedure, I think that the chancellor's finding is clearly against the preponderance of the evidence and I would reverse the decision.

CORBIN, J., joins in this dissent.

Linda VALENTINE *v.* Peggy BARNES, Acting Director of Labor, and McGEHEE INDUSTRIES

E 81-64 615 S.W. 2d 386

Court of Appeals of Arkansas
Opinion delivered May 13, 1981

No briefs filed.

GEORGE K. CRACRAFT, Judge. Appellant Linda Valentine's employment with McGehee Industries was terminated on October 2, 1980. The agency held her eligible for benefits under the Employment Security Act, and that determination was affirmed by the Appeal Tribunal. The Board of Review reversed the Tribunal's decision declaring her ineligible for benefits. We agree with the appellant that the Board of Review erred in that determination.

The facts are not seriously in dispute. The appellant was granted a maternity leave from her employment. After the birth of her child she received a certificate from the doctor permitting her to return to her employment on September 29, 1980. It was a policy of the company to grant such leaves of absence and to hold the position of the employee open for them on their return. On September 29, 1980, the appellant did return to work and worked that day. The next day she informed her supervisor that the baby was sick and that she would be back the following day.

On October 2, 1980, she informed the supervisor that the doctor had told her that it would be necessary for her to remain with the child until it was better and that she would be unable to return to work for a week or more. She thereupon asked for an extension on her leave of absence and was informed that under no circumstances could she be granted additional leave. The appellant stated that as she was not going to be granted a leave it appeared that she would have to terminate her employment. The supervisor said, "I hate for you to do it, but I have got to have somebody to run this line." The supervisor stated that she showed her as "terminated" because had she not quit, she would have been fired. There was in the record a notation of a telephone call with a Dr. L. K. Austin, concerning the extent of the baby's illness which reflected that "the child was very sick and that he did advise her that she needed to be with the baby until it was better," and that if any additional information or medical report was needed, to call him. It thus appears that the appellant's claim of personal emergency was corroborated by medical testimony. The question before the court is whether these circumstances excuse her from those penalties imposed upon one who voluntarily leaves his employment.

Ark. Stat. Ann. § 81-1106(a) (Supp. 1979) provides as follows:

> *Disqualification for benefits.* — For all claims filed on and after July 1, 1973, if so found by the Director an individual shall be disqualified for benefits:
>
> (a) *Voluntarily leaving work.* If he voluntarily and without good cause connected with the work, left his last work. Such disqualification shall continue until, subsequent to filing his claim, he has had at least thirty (30) days of employment covered by an unemployment compensation law of this State, or another state, or the United States.
>
> Provided no individual shall be disqualified under this subsection if, after making reasonable efforts to preserve his job rights, *he left his last work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification;* or, if after making reasonable efforts to preserve his job rights, he left his last work because of his illness, injury, pregnancy or other disability. (Emphasis added.)

In this case the appellant contended that she did not quit her job for personal reasons, but to care for her infant child on the advice of her doctor.

The evidence further indicated that by seeking additional leave she had made reasonable effort to preserve her job rights. She then had to choose between leaving her sick infant unattended or quitting the job.

We reach the conclusion that this appellant was confronted with a personal emergency of such compelling urgency that it would be contrary to good conscience to impose a disqualification upon her, and that she was therefore justified in quitting her job on October 2nd and was not disqualified for benefits under this section. *Wade* v. *Thornbrough*, 231 Ark. 454, 330 S.W. 2d 100.

The decision of the Board of Review is reversed.

John B. PENNINGTON et al *v.*
J. H. (Harvey) PENNINGTON

CA 80-492 615 S.W. 2d 391

Court of Appeals of Arkansas
Opinion delivered May 13, 1981

James M. Pratt, Jr., for appellants.

G. B. "Bing" Colvin, for appellee.

JAMES R. COOPER, Judge. This appeal arises from an order dismissing a suit in the Chancery Court of Dallas County, First Division, which sought to set aside a deed from Jackson M. Pennington, deceased, to Harvey Pennington, appellee herein, and an order dismissing an action in the Dallas County Probate Court which sought to set aside the will of Jackson M. Pennington. The Chancery Court action seeking to set aside the deed was consolidated for trial with the probate action seeking to set aside the will and the cases are being heard together here.

The facts are not generally in dispute in this case. Mr. Pennington was survived by eight children, seven natural children and the eldest an adopted child, Harvey Pennington, appellee herein. The will of Jackson M. Pennington left all his assets to appellee to the exclusion of the other seven children, appellants herein. The will was executed February 22, 1978. On April 30, 1979, thirty-nine days prior to his death, Jackson M. Pennington executed a quitclaim deed conveying all his real property to appellee Harvey Pennington. Four points are raised for reversal.

I. JACKSON M. PENNINGTON LACKED TESTAMENTARY CAPACITY TO MAKE A VALID WILL BECAUSE AT THE TIME HE EXECUTED THE DOCUMENT HE WAS SUFFERING FROM AN "INSANE DELUSION."

II. JACKSON M. PENNINGTON LACKED MENTAL CAPACITY TO MAKE A VALID DEED BECAUSE AT THE TIME HE EXECUTED THE DOCUMENT HE WAS SUFFERING FROM AN "INSANE DELUSION."

In 1977, Mr. Pennington became ill and was hospitalized and later transferred to a nursing home. After a petition was filed, an order was filed on August 23, 1977, in the Probate Court of Dallas County declaring Mr. Pennington incompetent and appointing Marvin Pennington, one of the seven natural children, as guardian of his estate and person. Mr. Pennington was extremely displeased about the guardianship and after he was released from the nursing home he hired an attorney and began efforts to dissolve the guardianship. In December of 1977, after a hearing on the petition to terminate the guardianship the Court found that Mr. Pennington was able to take care of his business to some extent although the Court found that he was still incompetent. John B. Pennington, another of the seven natural children, was named successor guardian to his estate and was given charge of savings accounts and real property. The appellee was appointed guardian of the person of Mr. Pennington. Jackson M. Pennington was given access to his checking account and other tangible personal property.

On January 20, 1978, appellee filed a petition to terminate the guardianship and on May 1, 1978, after viewing medical reports, the Court found Mr. Jackson M. Pennington to be competent and capable of managing his own affairs. The guardianship was dissolved and the guardians discharged. The May 1, 1978, order adjudged Mr. Pennington to be competent retroactive to October of 1977.

This Court has previously held that:

> ... an insane delusion is a false belief, for which there is no reasonable foundation, and which would be incredible under the given circumstances to the same person if of sound mind, and concerning which the mind of the decedent was not open to permanent correction, through evidence or argument. A delusion affects testamentary capacity only when it enters into and controls to some degree the making of a will. *Kirkpatrick* v. *Union Bank of Benton*, 269 Ark. 970, 601 S.W. 2d 607 (Ark. App. 1980).

In *Dumas* v. *Dumas*, 261 Ark. 178, 547 S.W. 2d 417 (1977) the Arkansas Supreme Court defined insane delusion as follows:

> An insane delusion is one which has no basis in facts; the conception of a fact which in reality does not exist. If there is *any basis in fact* for the delusion, then it is not such a delusion as to warrant setting aside a legal instrument. Furthermore, the instrument must be the product of the delusion. *Taylor* v. *McClintock*, 87 Ark. 243, 112 S.W. 405 (1908). [Emphasis supplied].

In *Taylor* v. *McClintock*, supra, the Court stated:

> ... A belief grounded on evidence, however slight, necessarily involves the exercise of the mental faculties of perception and reason; and where this is the case, no matter how imperfect the reasoning process may be, or how erroneous the conclusion reached, it is not an insane delusion. ...
> ... Mistake, whether of fact or law, moves from some external influence which is weighed by reason. Delusion arises from morbid internal impulse, and has no basis in reason.

Thus we see that in order to constitute an insane delusion there must be no basis whatsoever for the belief; no evidence which would support the belief.

In this case, appellants argue that Jackson M. Pennington suffered from the insane delusion that appellants had stolen $5,000.00 of his money during the time of the guard-

ianship. In support of this contention they cite us to the testimony of Harvey Pennington. Harvey Pennington, appellee here, testified that Jackson M. Pennington did believe that Marvin Pennington had stolen $5,000.00 of his money. He further testified that he, Harvey Pennington, believed that this was the reason Jackson M. Pennington made his will the way he did.

Marvin Pennington testified that he believed the reason the will was made excluding the natural children was because Jackson M. Pennington was mad about the guardianship.

It is clear from the record that Harvey Pennington apparently still believes that Marvin Pennington stole $5,000.00 from the guardianship funds, but there is no evidence in the record other than the testimony of Harvey Pennington to indicate that Jackson M. Pennington actually believed this. Further, and more important, there is nothing in the record to indicate that the will was the product of any delusion if he had same.

It appears from the record that the primary motivating factor behind the will of Mr. Pennington which disinherited his natural children was his extreme displeasure with them for instituting the guardianship and not his belief that money had been stolen from him. He believed that his natural children were afraid that he would have nothing to leave them and that they would not get their share. He was also upset about the payment of attorney's fees to appellant's attorney as a result of the guardianship. While it does appear that there is no basis in the record for a belief on the part of Jackson M. Pennington that Marvin Pennington had stolen $5,000.00, the finding by the trial court that Mr. Pennington was not suffering from an insane delusion is not clearly erroneous or against the preponderance of the evidence. In fact, a preponderance of the evidence requires the conclusion that the will was the product of Jackson M. Pennington's extreme displeasure with his natural children for establishing the guardianship over him. Whether or not the guardianship was in his best interests is of no importance

here as we are dealing with his belief and displeasure over its establishment rather than the necessity for it.

Although thus far we have dealt with the insane delusion argument as it relates to the will, the same conclusions are appropriate regarding the deed. The record is clear that the motivation behind the execution of the deed to Harvey Pennington was the belief by Mr. Pennington that deeds were better than wills.

III. APPELLEE FAILED TO PROVE:

(a) The signature of Jackson M. Pennington on the will as required by Ark. Stat. Ann. § 62-2117; and

(b) The valid execution of the will as required by Ark. Stat. Ann. § 60-403

At trial, two of the three attesting witnesses to the will of Jackson M. Pennington testified and identified their own signatures on the attestation clause of the will.

Appellants make much of the fact that Dr. Delamore and Mr. Abbott were not able to definitely testify that they saw Jackson M. Pennington sign the will. However, Dr. Delamore indicated that he did not believe that he would have signed the attestation clause unless Mr. Pennington had signed the will in his presence. Mr. Abbott was "pretty sure" that he had seen Mr. Pennington sign his name.

The will in this case appears to have been duly executed and the attestation clause was established correctly by the testimony of Dr. Delamore and Mr. Abbott. There is no evidence that the will was executed in any manner other than is required by statute and we believe the Court properly admitted the will to Probate. *Hollingsworth* v. *Hollingsworth*, 240 Ark. 582, 401 S.W. 2d 555.

IV. JACKSON M. PENNINGTON WAS MENTALLY INCOMPETENT ON APRIL 30, 1979, TO EXECUTE A VALID DEED.

We have already disposed of the argument regarding insane delusion under points I and II above and therefore will confine our discussion here to the capacity of Mr. Pennington to execute the deed without regard to the allegation of insane delusion. We believe the finding of the trial court that Mr. Pennington was competent at the time of execution of the deed is not clearly against the preponderance of the evidence. To show incompetency several essential elements must be demonstrated. First, an inability to appreciate the extent and condition of the grantor's property; second, a failure to appreciate the disposition of the property; the failure to understand the consideration; and proof that these elements existed at the time the deed was executed. *Garis* v. *Massey*, 270 Ark. 646, 606 S.W. 2d 109 (Ark. App. 1980).

The party attacking the validity of the deed has the burden of establishing the grantor's mental capacity. *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W. 2d 404 (1981). The findings of the chancellor will not be reversed unless clearly against the preponderance of the evidence. Since the question of the preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the chancellor. *Andres*, supra; *Hackworth* v. *First National Bank of Crossett*, 265 Ark. 668, 580 S.W. 2d 465 (1979).

In this case Judge G. B. Colvin, Jr. testified that he had known Jackson M. Pennington for over forty years. He further testified that he visited with Mr. Pennington for about forty-five minutes prior to the execution of the deed. He further testified that Mr. Pennington was alert during the visit and that Mr. Pennington understood the amount of land which was to be conveyed by the deed.

We find nothing in the record to contradict the presumption of competency and therefore we find no merit in this argument.

Affirmed.

Curtis Perry JONES *v.* STATE of Arkansas

CA CR 80-83 615 S.W. 2d 388

Court of Appeals of Arkansas
Opinion delivered May 13, 1981

E. Alvin Schay, State Appellate Defender, by: *Linda Faulkner Boone*, Deputy Defender, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. Appellant was tried on December 28, 1979, before a jury on a charge of first degree

murder. Following trial, he was found guilty of the lesser included offense of manslaughter, and was sentenced to 10 years in the Arkansas Department of Corrections. From that verdict and judgment comes this appeal.

The appellant was convicted of manslaughter in the shooting death of his stepfather, John Otis Jones. The appellant and some friends had been in a room off the back porch of the house listening to music. Appellant and his stepfather got into an argument, apparently about the volume of the music, and harsh words were exchanged. The decedent went into a bathroom, and appellant went into his bedroom and got his pistol. The parties met on the porch and the decedent threatened to knock appellant's brains out with a bed slat he had in his hand. The decedent moved toward appellant with the board and appellant shot him twice, causing his death.

As his first point for reversal appellant argues that the trial court erred in refusing to allow evidence of decedent's violent character to demonstrate appellant's state of mind. The proffered evidence related to the fact that some two days prior to the shooting the mother of appellant and wife of decedent, Dorothy Jones, had been choked by the decedent and that Curtis Jones, appellant here, was aware of this prior violence. The trial court refused to allow appellant's mother and sister to testify about this prior act.

At trial, defense counsel indicated that appellant was protecting himself and his mother at the time of the shooting and that the evidence was being offered as something which was "directly connected with it, an event, even on the Friday night immediately preceding the killing on Sunday afternoon at 2:30, . . ." There was no indication by counsel at that time that the evidence was being offered to show appellant's state of mind at the time of the shooting.

Although the appellant was charged with first degree murder he was convicted of a lesser included offense of manslaughter under Ark. Stat. Ann. § 41-1504 (Repl. 1977).

To convict on manslaughter the killing must have been

one which would have been murder but for "extreme emotional disturbance for which there is reasonable excuse." Reasonableness of the excuse is to be determined by reference to appellant's perception of the circumstances at the time of the killing. Ark. Stat. Ann. § 41-1504 (Repl. 1977).

Under Ark. Stat. Ann. § 41-506 (Repl. 1977) justification is a defense to the use of physical force where the person is defending himself or a third person if he reasonably believes the other is about to use unlawful physical force.

Under Ark. Stat. Ann. § 41-507 (Repl. 1977) deadly physical force may be used if the person reasonably believes the other is about to commit a felony involving force or violence or is about to use deadly physical force.

The appellant argues on appeal that his state of mind at the time of the shooting was an essential element of his defense of self-defense and therefore the trial court was in error in refusing to allow his mother and sister to testify about the violent act committed by decedent two days earlier.

We find this argument to be without merit and believe the trial court correctly excluded the testimony as to the specific instances of aggressive conduct on the part of decedent. Rule 405 (a) of the Uniform Rules of Evidence provides that a trait of character may be proved by testimony as to reputation or by testimony in the form of an opinion and that on cross-examination inquiry may be made as to relevant specific instances. Testimony was adduced as to decedent's reputation for violence.

Rule 405 (b) provides:

> (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct. [Ark. Stat. Ann. § 28-1001, Rule 405 (Supp. 1977).]

Thus, the question here is whether the trait of character of decedent was an essential element of appellant's defense of

self-defense. There is little question in this case that decedent was the aggressor, though there was evidence from which the jury could have found provocation by appellant. We hold that decedent's character as an aggressive person was not an essential element of appellant's defense of self-defense. "One might plead self-defense after having killed the most gentle soul who ever lived." *McClellan* v. *State*, 264 Ark. 223, 570 S.W. 2d 278 (1978).

Communicated threats and declarations of hostile purpose made at a point close in time to the killing may be admissible as part of the res gestae in self-defense cases. *Brockwell* v. *State*, 260 Ark. 807, 545 S.W. 2d 60 (1976). In *Brockwell*, the appellant was defending his daughter and his home from one who had made threats against the daughter the same day and near the time of the killing. Here, appellant was not a party to the choking incident (although he was aware of it) and there is no evidence in the record to indicate that he was defending his mother. In fact, appellant testified that he was not defending his mother. The evidence of prior acts was not admissible as part of the res gestae.

In the case at bar we are not even dealing with the appellant testifying as to his knowledge of prior violent acts. That type testimony has been held to be relevant in determining appellant's reasons for his apprehension of imminent danger. *Pope* v. *State*, 262 Ark. 476, 557 S.W. 2d 887 (1977). Appellant did not attempt to testify about the choking incident but did testify that his fear of imminent injury was based on prior threats against him by decedent with the same board. Appellant was able to fully develop his defense of justification and to show the reasonableness of his apprehension. We do not find any prejudice in the exclusion of the proffered testimony of the mother and sister.

For his second point for reversal, appellant argues that the trial court erred in modifying AMCI 4105. Appellant argues that the trial court replaced in its entirety a paragraph of that instruction. This actually was not the case. The Court inserted a paragraph from AMCI 4104 which dealt with the question of provocation. Ark. Stat. Ann. § 41-506 (Repl. 1977) and AMCI 4104 provide that a person is not

justified in using physical force if he provoked the use of unlawful force by the other person. Ark. Stat. Ann. § 41-507 (Repl. 1977) and AMCI 4105 enumerate the situations where the use of *deadly* physical force may be justified. No mention of provocation is found in Ark. Stat. Ann. § 41-507 (Repl. 1977) or AMCI 4105, but obviously the provocation restriction on the defense of justification applies equally to the use of "physical force" and "deadly physical force." "Deadly physical force" is defined under Ark. Stat. Ann. § 41-501 (Repl. 1977) to include "physical force."

The Court could have given both instructions, but the majority of AMCI 4104 would have been a repetition of AMCI 4105 and the trial court apparently felt it would be less confusing to the jury and would accurately state the applicable law to combine the two instructions. We agree with the approach taken by the trial court. We find no prejudice against the interests of the appellant by the combination of the two instructions nor do we find any misstatement of the law.

Appellant argues that the addition of the paragraph regarding provocation somehow gave the jury the impression that appellant was the aggressor. There is a great deal of difference in aggression and provocation and we do not see any basis for the claim that this instruction gave the impression that appellant was the aggressor. There was evidence from which the jury could have found that appellant had provoked decedent by virtue of the argument and obscene language directed back and forth between the two parties prior to the shooting.

We find no error on either point raised by appellant and therefore we affirm.

Affirmed.

Heulon BARRON *v.* Dorothy Ray BARRON

CA 80-522 615 S.W. 2d 394

Court of Appeals of Arkansas
Opinion delivered May 13, 1981

Bill W. Bristow, for appellant.

William B. Howard, for appellee.

LAWSON CLONINGER, Judge. Appellee Dorothy Ray Barron was granted an uncontested divorce from appellant Heulon Barron on September 5, 1980, and appellant prosecutes this appeal from the trial court's ruling that (1) appellee was not responsible for one-half of an income tax liability, (2) appellant was not entitled to recover one-half of the value of four grain bins and a shop building, and (3) appellant was not entitled to one-half of the funds alleged by appellant to be in a joint checking account at the time of separation.

We do not find any of the trial court's rulings to be in error and we affirm.

Appellant and appellee were married in February, 1974 and separated in November, 1979. It was not the first marriage for either party, and each brought property to the marriage. Appellee had a life estate in 450 acres of land and 91 acres in her own name; appellant had a large amount of tools and farm equipment. Appellee gave appellant a fifteen-year lease on her property, which appellant released at the time of the separation. During the marriage, a joint account was opened by the parties, and from that joint account was purchased, among other things, additional farm equipment used by appellant, grain storage bins and a shop building which were erected on the land in which appellee was a life tenant, and two acres of land with a house on it. The couple also jointly purchased several house trailers which were placed upon the two acres and rented. When appellant left appellee, he took numerous items of person-

alty with him, and the testimony of the parties regarding what was taken is in sharp conflict.

The property of each was freely intermingled with marital property, and that intermingling, coupled with the lapses of memory sometimes suffered by the parties, made it virtually impossible for the trial court to make a proper division of the property between the parties; e.g., appellant clearly remembered that he had taken twelve quarts of motor oil when he left, but he could not remember what a $20,511.56 check written on the joint account a few days before or after the separation was for. Appellee recalled that appellant had taken a $6.00 stove from their joint property, but she forgot what a $7,557.33 check written upon the joint account just after the separation was for.

The parties agreed that it would not be necessary for the trial court to itemize and evaluate each item of property awarded to the parties, nor would it be necessary for the court to cite any of the eight considerations for division of property other than an equal division as set out in Ark. Stat. Ann. § 34-1214 (Supp. 1979).

In February, 1979, during one of the several separations of the parties, appellant, without consulting appellee, sold the farm equipment at auction. Appellant testified that the sale brought a total of $138,000, which he used to pay the joint debts of the parties. The parties had filed joint federal and state income tax returns during the five years of their marriage, but appellee refused to file a joint return for the year 1979. Appellant discovered early in 1980 that the auction sale had a tax consequence he had not been previously aware of; some of the farm equipment sold had been depreciated out in prior years, and income taxes were now owing on the excess the equipment brought over the amount shown on the depreciation schedule. The tax liability was in excess of $27,000. Appellant argued in the trial court, and urges here on appeal, that appellee should be liable for one-half of the tax liability. The trial court found that the tax liability was the separate obligation of the appellant, and we are not in a position to say that the finding was incorrect. The allegation of appellant that the tax liability resulted

from depreciation on joint property claimed on the joint return of the parties in prior years is not supported by the record. Appellant treated the farm equipment as his sole property when he unilaterally sold it, and there is no evidence, except his statement, that the proceeds of the sale were used for the payment of joint debts. Appellant's 1979 tax return is not abstracted, and the couple's joint returns for years prior to 1979 were not offered in evidence. The trial court was left to speculate as to the reason for any tax liability on the part of appellant. The trial court's ruling on this point is not clearly against the preponderance of the evidence and will not be disturbed.

The trial court found that grain storage bins and a shop building placed by appellant on land in which appellee held a life estate were permanently affixed to real property not owned by either party, and that neither party has a right to remove them. Appellant's claim that the grain bins and shop building are personalty is not supported by the evidence. The grain bins have a 3300-bushel capacity, and were set in deep concrete, as was the shop building. Three of the grain bins and the shop building were purchased with joint funds of the parties; the fourth grain bin belonged to appellee, and was moved and reassembled on its new location by the appellant. Appellant testified that the bins could be moved, but admitted that the cost of moving and reassembling the one he had moved cost about as much as a new one.

The only Arkansas case cited by appellant to support his view is *Corning Bank* v. *Bank of Rector*, 265 Ark. 68, 576 S.W. 2d 949 (1979), which held that the question of whether a particular property constituted a fixture was sometimes one of fact only, but usually a mixed question of law and fact. The Court held that the chancellor's finding that grain bins having a capacity of 7,000 bushels and impractical to move constituted a fixture was not against the preponderance of the evidence. In discussing a rule as to trade fixtures as contrasted to fixtures which became a part of the realty, the Court said:

> . . . trade fixtures are articles erected or annexed to realty by a *tenant* for the purpose of carrying on a trade, and

> removable by him during his term (provided the removal does not affect the essential characteristics of the article moved or reduce it to a mass of crude materials) upon grounds of public policy ands because, from the nature of the tenure, they are not presumed to have been annexed with the intention of making them permanent additions to the realty.

The *Corning Bank* case appears to support the finding of the trial court in the instant case that the bins and shop building were not trade fixtures but were fixtures which became a part of the realty. It was shown in the *Corning Bank* case and in the instant case that the fixtures could have been moved piece by piece to another location, but that moving them would not be practical. In the instant case there is the further consideration that there was evidence presented that the fixtures could not be moved without doing injury to the realty of one not a party to the action. We are unable to say that the trial court's finding that the property involved here constituted fixtures attached to the realty is clearly against the preponderance of the evidence.

In addition to its findings in regard to the tax liability and the fixtures, the trial court ordered the sale of the two-acre tract along with the house trailers and a share of stock held jointly by the parties, with the proceeds to be equally divided between the parties. The Court stated that it considered it to be equitable, and so ordered, that the remainder of the personal property in the possession of each of the respective parties should become the absolute property of the person possessing the same. There was no specific provision regarding the joint bank accounts of the parties, and it is appellant's claim that he is entitled to one-half the funds in the account at the time of separation. Appellant alleges that there was a balance of $8,000 in the account at the time of separation, but the record does not reveal the date of separation. Both parties allege that the separation was in the "latter part of November, 1979," but appellant testified at one point that the separation was about the middle of November. The account is not abstracted, but even an examination of the transcript does not make the rights of the parties clear. The transcript shows that there was a balance of $2,722.02 in

the account on November 15, 1979; that deposits of $26,000 and $1,317.41 were made on November 27, 1979; that checks were written, or cleared the bank, in such amounts as to reduce the account to $7,545.67 on November 30, 1979. Appellee's uncontradicted testimony indicates that she took $26,000 from her separate account, which she deposited to the joint account on November 27, 1979, to pay joint obligations of the parties. On December 3, 1979, a check in the amount of $7,557.33 cleared the bank, leaving the joint account slightly overdrawn. Appellant states that he did not write the check, and appellee does not remember it. The check itself was not offered into evidence by either party. In such a confused state of the testimony, we cannot say the ruling of the trial court is clearly erroneous. The trial court, in fact, would have been justified in drawing an inference that appellee made the only deposits which were made after the separation from her separate funds, and that the only checks written after the separation were in payment of joint obligations of the parties.

Rule 52 of the Arkansas Rules of Civil Procedure provides that findings of fact by a trial court 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 trial court to judge the credibility of witnesses. The trial court's findings in the case before the Court are not clearly erroneous or clearly against the preponderance of the evidence as to any of the points urged by appellant, and its decision will not be disturbed.

Affirmed.

CORBIN and GLAZE, JJ., agree with the majority opinion except that they would reverse and remand, finding the parties' checking account is marital property and directing the trial court to hold a further proceeding to insure each party receives his respective one-half interest in the $7,545,67.

Rachel L. MASSEY *v.* Peggy BARNES, Director of Labor, and SEARS, ROEBUCK & COMPANY

E 81-54 615 S.W. 2d 398

Court of Appeals of Arkansas
Opinion delivered May 13, 1981

No briefs filed.

DONALD L. CORBIN, Judge. Claimant worked for Sears, Roebuck and Company in Arkansas for eleven and one-half years. In 1980, her husband was transferred to Joplin, Missouri, and she made arrangements with her employer to take a leave of absence for a ninety-day period. On July 18, 1980, she left her employment with Sears in Little Rock and within thirty days filed a job application with Sears in Joplin, Missouri. She was told that she would have to have permission from the Atlanta office of Sears to transfer; but, she was also told that Sears in Joplin was not hiring then. According to her testimony, she made one or two more trips back to Sears and was told on each occasion that they were not hiring.

On September 29, 1980, the Employment Security Division determined that claimant's request for benefits be denied because her voluntary leave of absence from Sears in

Little Rock had not yet expired. The claimant appealed and a hearing was held in December, 1980, in Joplin, Missouri, at which time claimant testified that she was willing to withdraw her claim for benefits accruing from the date of her leaving her employment with Sears in Little Rock to the end of her ninety-day leave of absence, which ended on November 11, 1980. The decision of the Referee simply stated that he would forward the tape to Arkansas where they would make a decision concerning her request to withdraw the issue of eligibility and the possibility of starting benefits or making her eligible for benefits from November 11, 1980.

The Appeals Tribunal, in its opinion dated December 10, 1980, affirmed the decision of the Employment Security Division denying benefits.

The Board of Review, in its opinion dated February 23, 1981, stated: "Since the claimant was afforded an opportunity to present testimony and chose not to present evidence in her behalf, the Board of Review will render its decision from the written record." The Board of Review then made a finding that the claimant was not unemployed from July 18, 1980 until November 11, 1980, but was on a leave of absence from her employer and therefore was not unemployed. The claimant has not disputed this finding. The Board of Review also made an additional finding that "Since that date (November 11, 1980) the record is silent as to the effort the claimant has made to secure work." However, in a letter postmarked December 22, 1980, from the claimant to the Appeal Tribunal, the claimant stated, "... *I then started looking elsewhere* and applied for my unemployment" and in a letter postmarked January 17, 1981, from the claimant to the Board of Review, the claimant stated, "... I went to the Employment Division here and applied for my benefits and *started looking for work elsewhere*." (Emphasis supplied.)

Ark. Stat. Ann. § 81-1107(d)(7) (Supp. 1979) provides, in part:

> In any proceeding under this subsection the findings of the Board of Review as to the facts, if supported by evidence and in the absence of fraud, shall be conclu-

sive and the jurisdiction of said court shall be confined to questions of law. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board of Review, and the Board may, after hearing such additional evidence, modify its findings of fact or conclusions, and file such additional or modified findings and conclusions, together with a certified transcript of the additional record, with the clerk of the court.

We believe under the present state of the record that this matter should be remanded for a development of the facts to determine whether the claimant is entitled to benefits after November 11, 1980. After the hearing is held, the Board of Review may make additional or modified findings of fact and conclusions and file them, together with a certified transcript of the additional record, with the clerk of this court as provided by Ark. Stat. Ann. § 81-1107 (Supp. 1979).

Remanded.

Gwendolyn RICHARDS *v.* Charles L. DANIELS, Director of Labor, and LUXORA ELEMENTARY SCHOOL

E 80-265 615 S.W. 2d 399

Court of Appeals of Arkansas
Opinion delivered May 13, 1981

Phillip J. Duncan, for appellant.

Herrn Northcutt, for appellees.

TOM GLAZE, Judge. This appeal arises from a denial of unemployment benefits. The claimant was a kindergarten teacher with the Luxora Elementary School for seven years. In May, 1980, the claimant did not renew her contract to teach due to problems she was experiencing with her co-workers.

At the hearing held on October 1, 1980, before the Employment Security Appeal Tribunal, the claimant appeared in her own behalf and no one appeared on behalf of the employer. According to the claimant, she chose not to

renew her contract because elementary principal and the other kindergarten teachers were operating as a clique, and the uncomfortable situation was more than the claimant could bear. She indicated that the problem began three years before when the teachers passed around a petition against the superintendent, and the claimant refused to sign it. She testified that thereafter the principal and the teachers failed to notify her of meetings, failed to give her messages, failed to assist her when she had problems with runaway students and scheduled her rest break at the end of the school day. Additionally, she related the principal sent cards to the superintendent which contained one-sided, bad reports about the claimant.

The claimant spoke to the superintendent on several occasions about the pressure she was under from this clique. For three years, the claimant made timely requests to be transferred to another grade, but the superintendent refused her requests because she was best qualified for the position as a kindergarten teacher. He was also unable to resolve the conflict between the claimant and the other members of the faculty.

The only evidence on behalf of the employer was a statement in the file which reflected a telephone conversation with some unnamed person at the school. The statement indicated that the claimant had voluntarily quit her job and had not asked the superintendent to move her to another position. We recognize hearsay to be admissible in hearings before administrative tribunals, but we have previously held that hearsay alone is not substantial evidence. *Woods* v. *Daniels*, 269 Ark. 613, 599 S.W. 2d 435 (Ark. App. 1980); *J. P. Price Lumber Company* v. *Daniels*, 270 Ark. 297, 604 S.W. 2d 579 (Ark. App. 1980). This unidentified hearsay statement is the only evidence in the record which refutes the claim that the conditions at work were such that the claimant could not continue to work there.

In *Parker* v. *Ramada Inn & Daniels*, 264 Ark. 472, 572 S.W. 2d 409 (1978), the Supreme Court held that the failure of an employer to appear or present evidence does not entitle a claimant to a default, and the Board of Review may

base a disqualification on the claimant's testimony alone. We agree with the holding in *Parker*, but we conclude the instant case is distinguishable. The only evidence on behalf of the employer is hearsay which we have held not to be substantial evidence. All other evidence presented to the Board supports an award of benefits to the claimant. In *Parker*, the claimant's own testimony was relied on by the Board of Review and provided a factual basis on which it denied benefits. Here, we find nothing in the testimony given by the claimant which would be evidence to support a denial of benefits, and neither the Appeal Tribunal nor the Board apparently relied on any part of her testimony to deny benefits. In fact, the Appeal Tribunal specifically found that "the reasons she gave for quitting are considered as such to have given her no other reasonable recourse than to quit her job." This finding was adopted by the Board of Review. Although claimant's testimony, as a matter of law, may be controverted, we are unable to say it is on the record before us. Although it is not argued by counsel or indicated in the Board's opinion, we are mindful that an occasion may exist when the Board may choose to disbelieve a claimant's testimony. The rule has been long established that it is not arbitrary for a fact finder to disregard testimony of a party it does not believe, if there is any basis for its disbelief. *E. C. Barton & Company* v. *Neal*, 263 Ark. 40, 562 S.W. 2d 294 (1978).[1] If the Board in reaching its decision had decided to disregard claimant's testimony, we are unable to find *any* evidence on which the Board could form its disbelief. Certainly, such disbelief must be based on something more than suspicion or speculation.

In conclusion, the entire record reflects that the claimant quit her job for good cause after making an effort to preserve her job rights by requesting a transfer within the school system. Good cause has been defined by this court as a cause which would reasonably impel the average able-bodied, qualified worker to give up his or her employment. It is dependent not only on the reaction of the average employee, but also on the good faith of the employee involved. Another element in determining good cause is

[1]Also cited as *Eudora Lumber Company* v. *Neal & Jones.*

whether the employee took appropriate steps to prevent the mistreatment from continuing. See *Teel* v. *Daniels*, 270 Ark. 766, 606 S.W. 2d 151 (Ark. App. 1980).

We hold, based upon the record before us, that this claimant had good cause for voluntarily quitting her job with this employer, and she quit only after making reasonable efforts to resolve the conflict she was presented with. We necessarily conclude that there is no substantial evidence to affirm the Board's decision to deny benefits to the claimant. We, therefore, reverse with directions to award her unemployment benefits.

Reversed.

MAYFIELD, C.J., concurs.

CORBIN, J., dissents.

Danny CALLISON *v.* STATE of Arkansas

CA CR 81-3 615 S.W. 2d 406

Court of Appeals of Arkansas
Opinion delivered May 20, 1981

Jeff Duty, for appellant.

Steve Clark, Atty. Gen., by: *Victra L. Fewell*, Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. Appellant was convicted of selling a controlled substance, lysergic acid diethylamide (LSD). He was sentenced to five years in the State Department of Corrections with two years suspended on condition of good behavior. Approximately thirty days after the judgment was entered of record, the appellant filed a

motion for new trial on the grounds of newly discovered evidence.

The motion was denied and on appeal the appellant argues two points: (1) the trial court erred in admitting into evidence a packet alleged to have been purchased from appellant and a report identifying the contents of the packet as LSD, and (2) the trial court erred in denying his motion for new trial.

We find no error in respect to either point and therefore affirm the judgment of the trial court.

Appellant was convicted upon evidence provided by an undercover police officer, Alan Strickland, employed by the Rogers Police Department. Strickland testified that on April 6, 1979, he purchased a packet from appellant which contained three "hits" of a substance later identified as LSD. It was his testimony that he purchased the packet in a tavern in Rogers, that he paid $12.00 for it, put it in his pocket, took it home that evening and locked it in a jewelry box. The next morning he delivered the packet and his report to Detective Mike Jones of the Rogers Police Department.

Jones testified that he received the packet from Strickland on the morning of April 7, placed it in an envelope marked with his case number, and mailed it by certified mail to the Crime Lab in Little Rock. A mail return receipt introduced into evidence shows that it was signed by Joe Allison and there was evidence that he was the evidence technician for the Crime Lab at that time. The packet, marked with its case number, was returned sealed to Jones from the Crime Lab on September 7, 1979.

The three white papers inside the packet which contained the individual "hits" of LSD were not marked with identifying numbers at any stage of the proceeding but the packet containing them was marked. Along with the packet, the Crime Lab returned to Jones a record of drug analysis signed by Gene Bangs, a chemist with the Crime Lab.

Bangs testified that the packet was assigned to him and

that he tested the contents on May 18, 1979. He further testified that all evidence samples received by the Crime Lab for testing are kept in a locked storage vault to which about eight persons, all chemists and technicians employed by the Crime Lab, have access, and that after testing and resealing, an evidence sample is kept in the storage vault until it is returned by mail to the police department which submitted it. The returned packet was identified at the trial by Jones as the one he had submitted for testing by reference to the case number which he had placed on it.

Appellant argues that the State failed to show an adequate chain of custody of the drug sample, and that therefore the sample and the resulting chemist's report showing that the substance was LSD should not have been admitted into evidence. Appellant says that the outlined sequence of events shows breaks in the chain and that others besides the chemist had access to the sample.

We find, however, that the chain of custody shown by the record of this proceeding fully meets the standards stated in *Munnerlyn* v. *State*, 264 Ark. 928, 576 S.W. 2d 714 (1979):

> To allow introduction of physical evidence, it is not necessary that every moment from the time the evidence comes into the possession of a law enforcement agency until it is introduced at trial be accounted for by every person who could have conceivably come in contact with the evidence during that period. Nor is it necessary that every possibility of tampering be eliminated; it is only necessary that the trial judge, in his discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with. See *Gardner* v. *State*, 263 Ark. 739, 569 S.W. 2d 74; *Wickliff & Scott* v. *State*, 258 Ark. 544, 527 S.W. 2d 640; *Rogers* v. *State*, 258 Ark. 314, 524 S.W. 2d 227, cert. den. 423 U.S. 995, 96 S. Ct. 423, 46 L. Ed. 2d 369 (1975).

This point in *Munnerlyn* has been cited and followed in *Baughman* v. *State*, 265 Ark. 869, 582 S.W. 2d 4 (1979), and most recently the *Baughman* case was cited in *Harkness* v.

State, 267 Ark. 274, 590 S.W. 2d 277 (1979), with the comment: "The purpose of showing a chain of custody is to prove authenticity. If there is a reasonable probability the evidence is genuine, the trial court's ruling will be upheld."

The appellant made no separate objection to the admissibility of the test report of the drug sample but we uphold the trial court in the admission of that exhibit also.

Appellant based his motion for new trial on an allegation of newly discovered evidence. In the motion, appellant's attorney stated that since the trial of the case he had discovered a witness who would testify that in January of 1979, she had seen Strickland, the undercover agent, in possession of LSD which Strickland offered to deliver to the witness and which he did deliver to a friend of the witness. In his brief, appellant acknowledges that the purpose of presenting such evidence would be to impeach the credibility of the State's primary witness against him. Appellant says, "Strickland's credibility would be enhanced by the fact that he was a police officer. Certainly if it were proven that he delivered LSD to [the witness' friend] and attempted to deliver LSD to the witness ... it would go to the very question of whether or not he was telling the truth."

We agree with the appellant that impeaching the credibility of the State's witness is the only possible effect of this evidence and that is the reason his motion for new trial was properly overruled on this point.

In *Edgeman* v. *State*, 183 Ark. 17, 34 S.W. 2d 753 (1931), the court denied a motion for new trial upon the finding: "There is nothing in the newly discovered evidence that would have any bearing at all on the case except that it might impeach the credibility of the prosecuting witness." And the court noted: "This court has often held that as a general rule newly discovered evidence that goes only to impeach the credibility of a witness is no ground for a new trial. [Citation omitted.]"

See also *Cooper* v. *State*, 246 Ark. 368, 438 S.W. 2d 681 (1969); *Therman* v. *State*, 205 Ark. 376, 168 S.W. 2d 833

(1943); and *Dewein* v. *State*, 114 Ark. 472, 170 S.W. 582 (1914).

The only case which appellant cites in support of his right to a new trial based on his newly discovered evidence, *Pierce* v. *State*, 201 Ark. 588, 145 S.W. 2d 714 (1940), is distinguishable on the facts from appellant's case. In *Pierce*, appellant's motion for new trial upon the ground of newly discovered evidence was supported by the affidavits of five witnesses who swore that the only eyewitness at the trial was with them at a place where he could not have seen the crime committed.

In the instant case the newly discovered evidence would simply tend to impeach the credibility of Strickland by showing he had previously delivered LSD to someone at a time when he was not acting as an undercover agent for the police. However, Strickland admitted on cross-examination that he had been guilty of dealing in controlled substances *illegally* in Washington County. The newly discovered evidence would be cumulative only.

In *Gross* v. *State*, 242 Ark. 142, 412 S.W. 2d 279 (1967), the court said:

> Newly discovered evidence is one of the least favored grounds of motion for new trial. ... Such a motion is addressed to the sound legal discretion of the trial judge and an appellate court will interfere only in case of an apparent abuse of discretion or injustice to the movant. ...
>
> ....
>
> ... The mere fact that the purported evidence would be contradictory to that offered at the trial by the State is insufficient. ... It must also be shown that, because of the proffered evidence, a different result upon a new trial is probable.

Based on our review of the law and record of proceedings in this case, we cannot say that the trial court abused its

discretion in overruling appellant's motion for new trial.

Affirmed.

CORBIN, J., not participating.

Charles E. FRAZIER, d/b/a EXECUTIVE MOTORS, INC. *v.* FARMERS INSURANCE EXCHANGE

CA 80-511 615 S.W. 2d 409

Court of Appeals of Arkansas
Opinion delivered May 20, 1981

John Biscoe Bingham, for appellant.

Laser, Sharp & Huckabay, for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, Charles E. Frazier, d/b/a Executive Motors, Inc., appeals from the action of the Circuit Court of Pulaski County dismissing his claim against the appellee, Farmers Insurance Exchange, his insurance carrier, for a loss alleged to have been sustained as a result of a theft of a motor vehicle belonging to the appellant. He asserts on this appeal that the trial court erred in its construction of the "newly acquired vehicle" clause contained in that policy and in failing to find that the appellee, through the action of its agent, should be estopped from asserting the cancellation of the policy as a defense to the newly acquired vehicle provision. We do not agree.

The facts are essentially not in dispute. The appellant, Charles E. Frazier, engages in the used car business in the City of Little Rock. On August 5, 1978, he purchased a policy of insurance from appellee which provided both

personal and business insurance coverage to the appellant and his used car business. The business portion of the insurance coverage provided only liability coverage for the vehicles contained in appellant's inventory. The policy also contained personal coverage providing liability, collision and comprehensive coverage to designated vehicles which were to be personally used and owned by appellant and his family.

At the time the policy was purchased only a portion of the premium was paid by the appellant, the balance being due within a sixty day period. The balance was not paid in the prescribed period and the appellant was given notice of cancellation, effective December 31, 1978. The policy was reinstated on January 23, 1979, by payment of the prescribed premium. The reinstatement policy then showed the period of coverage to be from January 23, 1979 to August 28, 1979, thus excluding the twenty-three day period during which the policy had been cancelled for nonpayment of premiums, but extending the period of insurance for twenty-three days beyond the expiration date of the original policy. On January 18, 1979, during the period of time that the policy was cancelled, the appellant acquired a new 1979 Scottsdale, four-wheel drive pickup truck, alleged to be for his personal use. On January 26, 1979, a date subsequent to the reinstatement, that vehicle was stolen and never recovered. No notice of its acquisition was given to the appellee until after that loss had occurred. At the time the policy was reinstated there were two vehicles described in that policy, a 1977 Datsun and a 1978 Cadillac. No mention was made at that time of the Scottsdale pickup truck. Appellant contends that the Scottsdale pickup truck was a "newly acquired automobile" as defined in the policy and was thereby automatically covered for the period of at least thirty days. Appellee contended, and the trial court agreed, that as the policy was not in force at the time that vehicle was acquired the newly acquired automobile clause did not apply.

The policy provision in question is as follows:

(d) Newly acquired automobile. An automobile ownership of which is acquired by the named insured (a) if it

> replaces the described automobile and the named insured notifies the company within thirty days following the date of its delivery to him or within the policy term then current, whichever is the longer period of time, or (b) if it is an *additional automobile and the company insures all automobiles owned by the named insured at such delivery date*, and the named insured notifies the company within thirty days following the date of its delivery to him; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other collectible insurance. The named insured shall pay any additional premium required.

The appellant contends that the reinstatement of a policy is merely a revival and restoration of the original policy, that the rights of the parties are to be measured by the terms of the policy alone, and that upon payment of premiums and reinstatement of the policy the forfeiture is set aside and coverage is reinstated as if it had never been interrupted. He argues that under such a rule, this was clearly "a newly acquired automobile" as defined in the policy — one acquired while the policy was in force. In support of his position the appellant relies upon *New York Life Insurance Company* v. *Campbell*, 191 Ark. 54, 83 S.W. 2d 542. The policy of insurance involved in *Campbell* was one of life insurance which contained an express provision and agreement that the policy might be reinstated at any time within five years after default, upon written application by the insured and evidence of insurability acceptable to the company, and upon payment of overdue premiums. The court held that the right of reinstatement was not a gratuity on the part of the insurer but a contractual right, and that the insurer had no right or authority to enlarge the terms upon which that reinstatement may be effected. The policy before this court contained no such agreement with regard to reinstatement. The appellee was free under the terms of the policy to reject the application to reinstate or to reinstate upon any terms and conditions deemed appropriate. *Mutual Life Insurance Company* v. *Hynson*, 171 Ark. 218, 283 S.W. 357. The notice of cancellation specifically stated that *only* by payment of the premium before December 31, 1978,

would the coverage be continued "without interruption." It is to be noted that the reinstated policy was a new one containing new effective and termination dates.

If the policy was not in force on January 18th when the Scottsdale four-wheel drive pickup was "delivered" to the appellant, the appellee did not "insure all automobiles owned by the named insured" on the date of delivery. Appellee did not reinstate this insurance or insure any of appellant's automobiles until January 23rd when the reinstated policy with the new effective date was issued.

There is nothing ambiguous or vague about the newly-acquired automobile clause contained in this policy. It is clear in its terms and the parties are bound by it. The liberal construction rule contended for by the appellant here does not require the court to constrain contractual language for the purpose of creating coverage where none is clearly intended. *Southern Farm Bureau Casualty Ins. Co.* v. *Williams*, 260 Ark. 659, 543 S.W. 2d 467.

Appellant contends that, in any event, appellee was estopped by the conduct of its agent to raise this defense. At the trial of the cause the appellant testified that upon receiving the notice of cancellation he contacted appellee's agent and was advised "to forget the notice of cancellation and that the cancellation had been issued by mistake." There was also testimony by appellant that he was not required to pay the balance of the premiums until after the policies were delivered and they were not delivered at the time the cancellation notice was received. He further testified that the agent had informed him not to worry about it because he had a "binder" and that the notice was nothing more than a computer printout error. This, he asserts, raised the estoppel.

This testimony was denied by the agent and fully controverted. The agent not only denied making the statements, but specifically stated that he had no authority to disregard a cancellation and under no circumstances would have attempted to exercise such authority.

The trial court accepted the denials of the agent in its finding that there were no facts of such a nature here as would estop the appellee from relying upon the cancellation of the policy from the period between December 31, 1978, through January 23, 1979. The proper standard of review in this court is to determine whether the decision of the trial court is supported by substantial evidence. In determining whether or not such substantial evidence exists, this court views the evidence in the light most favorable to the trial court's finding and draws all reasonable inferences in favor thereof. The findings of the trial court will not be reversed unless clearly against a preponderance of the evidence. As the question of preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the trial court. *Hackworth* v. *First National Bank of Crossett*, 265 Ark. 668, 580 S.W. 2d 465.

We affirm.

GLAZE, J., not participating.

Dorothye J. ALBRITTON *v.* PRUDENTIAL INSURANCE COMPANY

CA 80-520 615 S.W. 2d 412

Court of Appeals of Arkansas
Opinion delivered May 20, 1981

Eugene Hunt, for appellant.

No brief for appellee.

JAMES R. COOPER, Judge. This is an appeal from the portion of an order of dismissal which taxed costs of a jury against appellant. The case had been set for trial June 27, 1980, and on that morning, before the jury was seated, the parties settled the lawsuit. Affidavits have been filed here verifying that the trial court, when advised that the matter had been settled, informed counsel that the parties would have to pay the costs of the jury. The parties then apparently agreed that if any costs had to be paid, appellant would pay them.

An order was entered which provided:

> . . . the Court directed that a jury tax of $277.50 as well as other costs of the Court would be taxed to the parties. Thereupon, it was agreed by the parties that these costs would be paid by the plaintiff [Appellant]. . . .

Appellant cites *Miller* v. *Scroggins*, 260 Ark. 685, 543 S.W. 2d 476 (1976) for the proposition that there is no statutory authority for the imposition of costs against the losing party. That case does interpret Ark. Stat. Ann. § 39-302 (Repl. 1962) as allowing the Court to tax costs against the unsuccessful party *only* in county or probate cases. However, we are not dealing with that situation here. In this case, the Court indicated, in effect, that the parties would have to reimburse the county for its expense in providing a jury which was not going to be used. Appellant then, without objection to the Court's statement, agreed to pay the jury.

We have no record of an objection to such a ruling by the trial court, and, in fact, we find no ruling by the Court assessing costs. The order of dismissal shows that appellant agreed to pay the jury costs. We affirm the decision of the

trial court for this reason. *Arkansas State Highway Commission* v. *Newton*, 253 Ark. 903, 489 S.W. 2d 804 (1973).

Although we agree that there is no statutory authority to tax costs to the unsuccessful party, we do not decide that the Court could never tax the costs of a jury to the parties. We have found no case which holds that a local rule of the Court, properly filed under Rule 12 of the Uniform Rules for Circuit and Chancery Courts, Ark. Stat. Ann. Vol. 3A (Repl. 1979) could not allow the costs of a jury to be taxed to the parties under specified circumstances. However, that question is not now before us.

Affirmed.

John PRICE et al *v.* Jane MAUCH

CA 80-456 616 S.W. 2d 738

Court of Appeals of Arkansas
Opinion delivered May 20, 1981

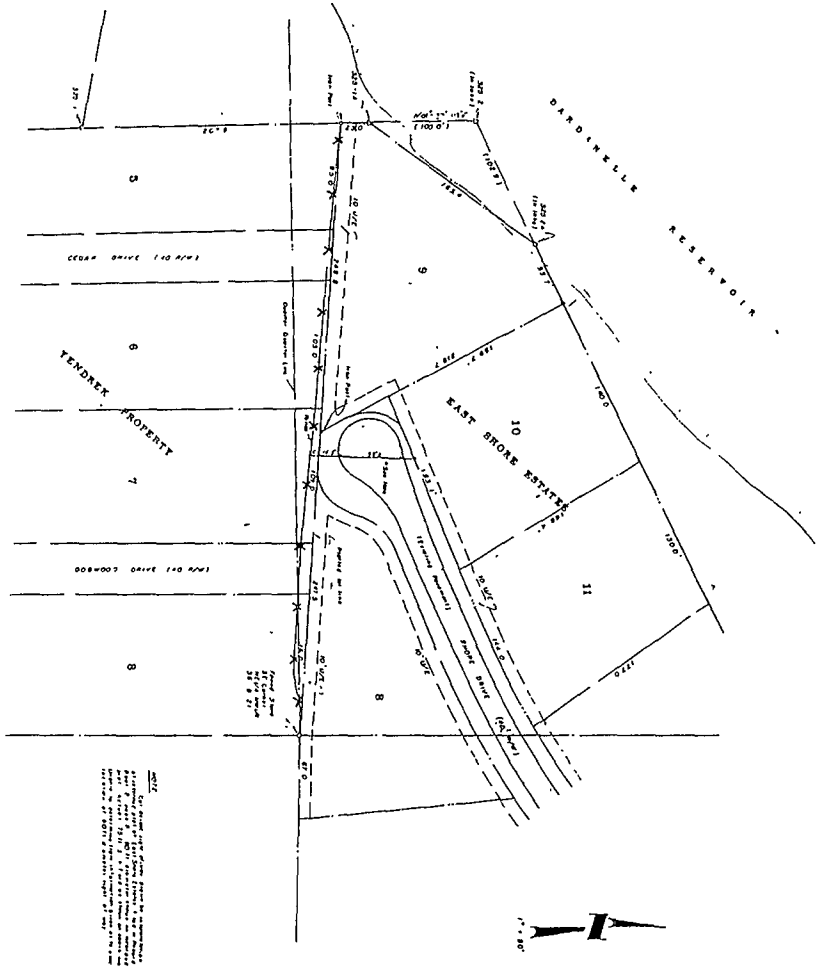
[Supplemental opinion on denial of rehearing
June 24, 1981.]

Bullock, Hardin & McCormick, for appellants.

Young & Finley, for appellee.

TOM GLAZE, Judge. This appeal involves a boundary dispute between the appellants and appellee who live in separate but adjoining additions in Russellville, Arkansas, *viz.*, East Shores Estates and Yendrek. At the trial of this case, appellants and the appellee presented expert testimony in an attempt to establish their respective claims to the property in question. Appellants relied on testimony given by C. R. Warndof, the engineer who surveyed and platted the two described adjoining additions. The appellee presented evidence to substantiate her claim through Danny Hale, an engineer who surveyed the subject property on several occasions as well as surrounding property located in both platted additions. For the sake of clarity and discussion, the survey map prepared by Hale and introduced at trial by appellee is reproduced as follows:

[redacted]


DARDANELLE RESERVOIR
EAST SHORE ESTATES
TENDREK PROPERTY
CEDAR DRIVE (40 R/W)
COOMBOS DRIVE (40 R/W)
SHORE DRIVE
10
11
9
8
7
6
5

In viewing the Hale survey map, appellee owns Lot 9 in East Shores Estates and appellant Charles Cauthon owns Lot 8 in East Shores Estates. Appellants Cordia Wilkinson and John and Nina Price own Lots 6 and 7 respectively in the Yendrek Addition. The boundary dispute between these parties arose when appellee claimed ownership to a narrow, triangular strip of land which lies adjacent to and some feet south of the appellee's and the Cauthon's platted lots. The survey map shows this strip, commencing at the southwest corner of appellee's Lot 9 and runs south to the fence (designated with X's), then runs easterly along the fence five hundred fifty feet, then north to the south line of Lot 8 of East Shores Estates, and then westerly along the south lot line of Lots 8 and 9 of East Shores Estates to the point of beginning.

Appellee contends that this described strip of land was never platted and was deeded to her by the developer of East Shores Estates. Appellants, on the other hand, contend that the Hale map is in error and varies from the certified plat survey prepared by Warndof, which they argue should control the boundary dispute. There are two major differences between Hale's survey map and the original plat filed by Warndof: (1) Hale shows the East Shores Estates south boundary lot lines to be some feet north of an old fence, while Warndof's plat depicts the south boundary of East Shores Estates to be the same as the fence line; (2) Hale's map reflects the fence to be six feet south of the East Shores Estates platted line at the point where the line touches the cul-de-sac portion of Shore Drive, a street located in East Shores Estates but which was used as a means of ingress and egress by the appellants who live in the Yendrek Addition. Warndof's plat places both the East Shores Estates platted line *and* the fence tangent to the cul-de-sac. The Warndof plat reflects the fence as the common plat line for the south boundary of East Shores Estates and the north boundary of the Yendrek Addition. In this event, the appellants would have continued access to their lots in the Yendrek Addition by Shore Drive where this street directly meets the respective additions' platted boundary lines. However, if the Hale survey is correct and controlling, the fence and the Yendrek north boundary line is at least six feet south of the cul-de-sac, and

this same area where the cul-de-sac touches the south plat line of East Shores Estates is also included within the strip of land to which appellee claims ownership. Thus, the appellants would have no legal right to cross this strip of property to gain access to their lots.

After reviewing the surveys, plats, photos and testimony of Warndof and Hale, we cannot say that the chancellor's finding was clearly erroneous in recognizing appellee's claim to the strip of land in dispute. Testifying relative to his original plat of East Shores Estates, Warndof stated that he marked the corners of appellee's Lot 9 and recalled placing the corner at the fence line. Hale testified that he had surveyed Lot 9 a few months prior to trial, and he found the iron fence post set by Warndof marking the lot's corner, and Hale stated the corner of the lot is located six feet north of the fence. Hale further testified that, in checking his survey, he found the dimensions and distances of Lot 9 came out to the described corner iron fence post which had been set by Warndof.

It is a well settled rule of surveying, recognized by the courts, that the lines actually run control over maps, plats or field notes. The actual survey originally made is evidenced by the fixed boundaries then established, and the actual survey must, therefore, govern over the erroneous plat thereof. *Pyburn* v. *Campbell*, 158 Ark. 321, 325, 250 S.W. 15 (1923). There were two surveyors who offered conflicting testimony below, and we cannot say that the chancellor's acceptance of Hale's survey as being correct with reference to the true boundary line is against the preponderance of the evidence. See *Carroll* v. *Reed*, 253 Ark. 1152, 491 S.W. 2d 58 (1973).

Appellants argue next that the strip of land claimed by appellee was never originally platted, and therefore, this land inures to the benefit of the public. In other words, appellants contend that the strip of property in question, including the six feet over which they must travel to gain access to their property from the cul-de-sac, was intended for public use since it was not platted. In support of this proposition, appellants cite *Davies* v. *Epstein*, 77 Ark. 221,

92 S.W. 19 (1905) and *Arkansas State Highway Commission* v. *Sherry*, 238 Ark. 127, 381 S.W. 2d 448 (1964). The court in each of these cases relied on the rule of law that:

> An owner of land, by laying out a town upon it, platting it into blocks and lots, intersected by streets and alleys, and selling lots by reference to the plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable.

The *Sherry* court additionally adopted the legal principle that:

> ... where an owner of a subdivision of land records a map thereof without reservation, he thereby offers to dedicate streets and roads shown thereon to public use, even though there is no express declaration of dedication in the plat.

In any case where the original plat does not clearly plat and dedicate certain property for public use, the underlying question to decide is whether the owner (developer) intended to dedicate the land in controversy. The intention to which courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts. *Davies* v. *Epstein, supra.*

Unlike the instant case, the lands in controversy in both *Sherry* and *Davies* abutted a dedicated public street or highway, and in *Davies* the land additionally was bordered on the opposite side by a navigable lake. In *Sherry*, the court held the disputed land was specifically and clearly dedicated on the plat as part of a fifty foot right-of-way for a U.S. Highway even though the owners of the property testified that they had not intended to do so. In *Davies*, as is true in the facts before us, the plat did not specifically dedicate the land in controversy. The *Davies* court decided the owner intended to dedicate the land to public use because it was inconceivable that the owner intended to lay out a town on the banks of navigable water, parallel to the bank with a street and at the same time entirely cut it off from access by the public. In so holding, the court relied on the legal presumption that a

grant or dedication was intended to enable the public to get to the water for the better enjoyment of the public right of navigation. *Davies* v. *Epstein, supra*, at page 225.

In the case at bar, the facts just do not support a dedication for public use. Contrary to appellants' contention, the land in dispute, as determined by the chancellor and affirmed by us, does not abut a street or the cul-de-sac portion of Shore Drive. As discussed earlier, the strip of land is bordered on the south by a fence and on the north by the south boundary of East Shores Estates. There is nothing in the original plat or the testimony of either surveyor that a public ingress or egress was to be constructed leading from East Shores Estates Addition into the Yendrek Addition. In fact, if one views the entire length of this extremely narrow strip of property, it is difficult to perceive of any intended public use to which this property could be put. We certainly agree with the chancellor that there is substantial evidence and reason to support a finding that the owner did not intend to dedicate the subject property.

In conclusion, we do wish to modify the chancellor's decision in one respect. The chancellor decreed that appellee's ownership not only extended from Lot 9 to the south boundary (fence) of the unplatted property discussed previously, but also the court held appellee is the owner of *all* other lands lying between the platted East Shores Estates and the quarter line, *i.e.*, from Lot 9 to the quarter line. The record clearly shows that the property south of the fence *was platted* as part of the Yendrek property. Any deed which appellee received from the owner was subject to the platted property in East Shores Estates and Yendrek. There is no evidence that we can find in the record which would support any claim appellee might assert to this additional land awarded appellee by the chancellor.

We, therefore, remand this cause to the trial court with directions to enter a decree consistent with this opinion, reducing accordingly the amount of land awarded appellee.

Affirmed in part and reversed and remanded in part.

Supplemental Opinion on Denial of
Petition for Rehearing
June 24, 1981

BOUNDARIES — BOUNDARY BY ACQUIESCENCE. — In the instant case, there is no doubt that appellants, appellee and their predecessors in title recognized the fence as the dividing line between the East Shores Estates and Yendrek additions, and the law is well settled that when adjoining landowners silently acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence.

Petition denied.

TOM GLAZE, Judge. We decided this boundary property dispute in *Price* v. *Mauch*, 1 Ark. App. 348, 616 S.W. 2d 738 (1981), and affirmed in part the trial court's decision, but reversed and remanded to modify the decree to show appellee owns the property in dispute to the fence but not to the quarter line. On June 5, 1981, appellee filed a petition for rehearing, contending appellee held legal title to the quarter line and that the Yendrek property could only be platted to the quarter line but not north of it. Neither appellee nor appellants cite any legal authority relative to this issue.

In denying appellee's petition, we take this opportunity to briefly mention certain factors we previously considered but omitted from our written opinion. As we noted in *Price* v. *Mauch, supra*, Warndof platted both additions, Yendrek in 1968 and East Shores Estates in 1969. Warndof repeatedly testified that the fence was considered to be the boundary line between East Shores Estates and Yendrek, and this is exactly the way he depicted it on the plat.[1] Appellee's predecessor in title, James K. Young, was the person who engaged Warndof to plat East Shores Estates, and Young never objected to the plat when it was prepared and filed. Appellee, in a letter introduced into evidence without

[1]We previously held that Warndof's actual survey established the south line of appellee's Lot 9 and the cul-de-sac are six (6) feet north of the fence.

objection, stated that the "old fence line was the property line and it should not be destroyed." Additionally, two other witnesses, grandchildren of the developer of Yendrek, testified that the purpose of the fence between Yendrek and East Shores Estates was intended to be the property line. One witness related the fence had been so considered for twelve years and the other testified it was the boundary line since 1940.

In reviewing the record *de novo*, we have no doubt that the appellants, appellee and their predecessors in title recognized the fence as the dividing line between the East Shores Estates and Yendrek additions. The law is well settled that when adjoining landowners silently acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence. *Morton* v. *Hall*, 239 Ark. 1094, 396 S.W. 2d 830 (1965), and *Williamson* v. *Rainwater*, 236 Ark. 885, 370 S.W. 2d 443 (1963).

Since we find that the record reflects that the parties and their predecessors acquiesced in the fence being the boundary line, we deny appellee's petition for rehearing.

[redacted]

[redacted]