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Douglas TERRELL *v.* AUSTIN BRIDGE CO.

CA 83-261 660 S.W.2d 941

Court of Appeals of Arkansas
Division II
Opinion delivered November 16, 1983

Louis F. Mathis, for appellant.

Lavender, Rochelle, Barnette, Franks & Arnold, by: *Charles D. Barnette,* for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal from a decision of the Workers' Compensation Commission which adopted an administrative law judge's finding that appellant had failed to prove by a preponderance of the evidence that he was entitled to permanent partial disability and rehabilitation benefits.

Appellant was injured when the bridge he was working on partially collapsed and he fell about 35 feet to the ground. He was unable to work for four months during which time he was paid compensation. His appeal for additional compensation is based on the contention that he has an extreme fear of heights due to his fall and, therefore, is no longer able to pursue his occupation of iron worker because it requires climbing.

The appellant relies on the testimony of Dr. John Ewing Harris, an independent witness selected by the law judge, that claimant's psychological injury and subconscious fear of heights and falling was as close to a permanent disability as he had seen; that the accident was the overriding

factor in this condition; and that this fear was ingrained and permanent. There was other evidence, however, that appellant was earning more at the time of the hearing, nearly two years after the accident, than he had been when he fell. Appellant admitted this was true but testified that, although he had been making this wage for more than a year, he did not think this would continue much longer because his supervisor was just doing him a favor. Also there was evidence that appellant had taken a welding course while working for another employer and had done some construction welding; that after the accident he had worked at heights of 10 to 15 feet; and that he was a good hand both before and after the accident.

Ark. Stat. Ann. § 81-1302 (e) (Repl. 1976) defines disability as being the "incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury." In discussing what is meant by this language, the Arkansas Supreme Court in *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961), quoted extensively from Larson, *Workmen's Compensation Law* as follows:

> The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: the first ingredient is disability in the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is de facto inability to earn wages, as evidenced by proof that claimant has not in fact earned anything.

And the court concluded by holding that "consideration should have been given, along with the medical evidence, to the appellant's age, education, experience, and other matters affecting wage loss."

In *Abbott* v. *C. J. Leavell & Co.*, 244 Ark. 544, 549, 426 S.W.2d 166 (1968), the court said "because appellant is

making as much money now as he did before does not necessarily mean he has the 'capacity' to earn that much," and that it was also proper to consider how long he would be able to make that much. The concurring opinion enlarges on these matters as follows:

> Compensation is paid to those suffering a compensable disability. In order to give the term disability substance and meaning it is keyed to the capacity to earn wages. Larson, *Workmen's Compensation Law,* §§ 57.22 and 57.34 discusses the problem similar to the case at bar. "If the employee, as often happens, returns to his former work for the same employer after his injury, or is offered it, at a wage at least as high as before, there is a strong presumption against loss of earning capacity. . . . Wages paid an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity, and, for purposes of determining permanent disability, are to be discounted accordingly. The same is true if the injured man's friends help him to hold his job by doing much of his work for him, or if he manages to continue only by delegating his more onerous tasks to a helper."
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> "The ultimate objective of the disability test is, by discounting these variables, to determine the wage that would have been paid in the open labor market under normal employment conditions to claimant as injured, taking wage levels, hours of work, and claimant's age and state of training as of exactly the same period used for calculating actual wages earned before the injury. Only by the elimination of all variables except the injury itself can a reasonably accurate estimate be made of the impairment of earning capacity to be attributed to that injury." Larson, *Workmen's Compensation Law,* § 57.21.

244 Ark. at 552 and 553.

From the above, we think it clear that a person injured on the job may suffer disability because of a physical loss or because of an inability to earn as much as he was earning when he was hurt and that a person can be disabled who has lost either or both. Also in *Owens* v. *National Health Laboratories,* 8 Ark. App. 92, 648 S.W.2d 829 (1983), we held that some psychological injuries might be compensable under our law. In the instant case, appellant was earning higher wages at the time of the hearing than he was at the time of the accident. Whether he had a compensable disability, however, was a question for the Commission to determine under the law we have discussed. We must affirm that decision unless we are convinced that fair-minded men could not have reached the same conclusion. *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1979). Guided by that standard, we affirm.

COOPER and CORBIN, JJ., agree.

Harriet BOYD *v.* Mary Ann MEADOR and Vivian Hope WINGO

CA 83-63 660 S.W.2d 943

Court of Appeals of Arkansas
Division I
Opinion delivered November 16, 1983

Ross & Ross, P.A., by: *Joseph Ross*, for appellant.

Gordon & Gordon, P.A., by: *Allen Gordon*, for appellees.

GEORGE K. CRACRAFT, Judge. Harriett Boyd appeals from a decree of the Chancery Court of Conway County which dismissed her petition to set aside a tax title to a 20 acre tract of land and quieted title to that same tract in Vivian Hope Wingo, contending that the chancellor erred in his application of the law to the facts disclosed in the record. We agree.

It was shown that the title to the property in question had been in appellant's family for over sixty years and that she had acquired an undivided one-fourth interest in it by inheritance more than thirty years ago. As she and her tenants in common were all non-residents of this State and rarely returned to it, they let their uncle E. C. Vaughn "work" the lands in exchange for his "looking out for it" for them. The appellant failed to pay the real estate taxes assessed on the land for 1970 and it was forfeited, sold and certified to the State. It was stipulated that the clerk had failed to make a certificate of publication and notice of the sale as required by Ark. Stat. Ann. § 84-1102 (Repl. 1980), but there were admitted into evidence copies of a Conway County newspaper showing that the notice had actually been published for the times and in the manner required by law.

The State conveyed its tax title to Mary Ann Meador in 1974. In 1976 Meador brought an action and on May 27, 1977 obtained a decree from the Chancery Court of Conway County quieting her title to the land. Although the appellant was named a defendant in that action the court specifically found that she had not been actually or con-

structively served with notice and was not bound by it. There was no evidence that she was ever made aware of the entry of that decree.

In 1980 Mary Ann Meador conveyed her interest in the property to the appellee, Vivian Hope Wingo, who entered into possession of the lands under that deed under the circumstances outlined in this opinion.

It is clear from the record that between 1974 and 1980 the only acts of actual possession exercised over the property were those of appellant's uncle E. C. Vaughn. Vaughn testified that for several years he had planted row crops on the land but later converted it into a meadow from which he cut hay through the fall of 1979. He testified that during that winter he went on the land and discovered someone claiming under Vivian Hope Wingo had planted a grain crop on the property and he therefore did not return in 1980. There was evidence from another witness supporting both Vaughn's testimony as to his activities on the land and Vaughn's statement that prior to the entry of Wingo's tenant he had not been interfered with. It was shown that shortly after the State's deed was issued Mary Ann Meador notified Vaughn that she had purchased a title to the property from the State and Vaughn had informed the appellant of that fact. The appellant testified that she had consulted an attorney and been advised that no action was required of her until her possession was actually interfered with.

Mary Ann Meador testified that shortly after her purchase of the State's title she went on the land, staked the corners and assumed that this constituted possession. She stated that during this period she also advised Vaughn of her purchase and informed him that her father would thereafter be in charge of the land. However, there is no evidence that Mary Ann Meador's father did interfere with Vaughn. Mary Ann Meador was also a non-resident who rarely returned to this State and, even though she paid taxes on it for the next six years, she denied any knowledge of the activities of Vaughn on the property.

It was stipulated and the chancellor specifically found that the clerk's certificate of publication of the notice and

sale of delinquent lands was never recorded as required by Ark. Stat. Ann. § 84-1102 (Repl. 1980). But he concluded that this was an irregularity which was barred under Ark. Stat. Ann. § 84-1118 (Repl. 1980) because the objection had not been raised within two years. He further concluded that this omission was not one which would invalidate the sale "since there was proof that the required notice was actually published." We do not address the arguments of counsel as to whether appellant's continued possession tolled the two year limitation contained in § 84-1118 because that section has no application to the defect here and extrinsic evidence of publication of the notice was not admissible to cure the defect. Section 84-1118 is as follows:

> Action to test validity of proceedings — Limitation. — All actions to test the validity of any proceeding in the appraisement, assessment, or levying of taxes upon any land or lot, or part thereof, and all proceedings, whereby is sought to be shown any irregularity of any officer, or defect or neglect thereof, having any duty to perform, under the provisions of this act, in the assessment, appraisement, levying of taxes, or in the sale of lands or lots delinquent for taxes, or proceedings whereby it is sought to avoid any sale under the provisions of this act, or irregularity or neglect of any kind by any officer having any duty or thing to perform under the provisions of this act, shall be commenced within two [2] years from the date of sale, and not afterward.

In a long line of cases collected in *Johnson* v. *Johnson,* 207 Ark. 1015, 183 S.W.2d 783 (1944) the Supreme Court has declared that this section deals only with *irregularities* of public officials in the performance of their statutory duties but has no application where the sale is *invalid* as a result of so substantial a defect as the omission of the required certification of the publication of notice of sale.

In *Cecil* v. *Tisher,* 206 Ark. 962, 178 S.W.2d 655 (1944) the court declared that the failure of the clerk to attach the certification of publication to the list of delinquent land is an invalidating omission which was neither subject to the

limitation of § 84-1118 nor curable by extrinsic evidence that the notice was in fact published. There the court stated:

> In *Hurst* v. *Munson,* 152 Ark. 313, 238 S.W. 42, this court said: 'The attack of appellees and their predecessors in the action on the validity of the tax sale is based, among other things, on the ground that the clerk's certificate of the publication of the list of delinquent lands was not recorded as required by statute (Crawford & Moses' Digest, § 10085, now § 13848 of Pope's Digest [now Ark. Stat. Ann. § 84-1102]) before the day of sale. . . . This court has decided that the certificate required by the statute cited above must be placed of record prior to the day of sale, otherwise the sale is invalid. *Logan* v. *Eastern Arkansas Land Co.,* 68 Ark. 248, 57 S.W. 798; *Hunt* v. *Gardner,* 74 Ark. 583, 86 S.W. 426. *We have also held that the clerk's certificate thus recorded is the sole evidence of the publication of the list. Hunt* v. *Gardner, supra; Cook* v. *Ziff Colored Masonic Lodge,* 80 Ark. 31, 96 S.W. 618. *The record being the sole evidence, the facts cannot be proved by evidence aliunde.*'
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> Appellant next argues that the suits of appellees were barred by the statute of limitation, as provided in § 13883 of Pope's Digest [now Ark. Stat. Ann. § 84-1118]. We think this contention is untenable. In construing § 7114 of Kirby's Digest, which is now § 13883 of Pope's Digest, this court, in the case of *Hewitt* v. *Ozark White Lime Co., supra,* held that the failure of the clerk to make the certificate as to the publication of delinquent lands *is fatal to the validity of the tax sale and that the defect is not cured by the two years statute of limitation, . . .* . (Emphasis supplied)

We conclude that the chancellor erred in declaring that the tax sale was valid and that appellant's right to question it was barred.

Nor are the provisions of Ark. Stat. Ann. § 34-1419 (Repl. 1962) (formerly found in Pope's Digest § 8925)

available to the appellee. This section, in essence, shortens the period of limitation for the recovery of lands adversely possessed under deeds based on tax sales to two years. Two years actual adverse possession by the holder of the tax deed is required before the original owner's right to recover the land is barred. *Cecil* v. *Tisher, supra.* The period of limitation begins to run, not from the date of the tax deed, but from the date actual possession is taken under it. *Sims* v. *Petree,* 206 Ark. 1023, 178 S.W.2d 1016 (1944); *Hoch* v. *Ratliff,* 216 Ark. 357, 226 S.W.2d 39 (1950).

The court further found that appellant had "actual knowledge of Mary Ann Meador's claim of ownership in the property prior to 1980 but took no action to assert her claim of title." He concluded that this failure barred appellant's claim by laches and estoppel.

The record discloses that the only act of possession exercised by Mary Ann Meador was the placing of stakes in the corners in 1974. There was no evidence that she ever did anything else with the property or that she had made any improvements on it. To the contrary the evidence discloses that whatever possession was maintained was through appellant's tenant Vaughn. It was undisputed that Vaughn was made aware of the tax title shortly after it was executed and that he notified the appellant of that fact. There was no evidence that Vaughn's activities were interfered with by anyone until Wingo planted the grain crop. If the activities of Vaughn did not constitute possession, at least constructive possession was in appellant who had the legal title. *Jackson* v. *Boyd,* 75 Ark. 194, 87 S.W. 126 (1905); *Union Sawmill* v. *Pagan,* 175 Ark. 559, 299 S.W. 1012 (1927); *Garrison* v. *Southern Enterprises,* 245 Ark. 927, 436 S.W.2d 278 (1969).

The mere fact that appellant was aware of appellee's claim of ownership does not require that she take action on it. Until there was an interference with her actual or constructive possession there was no occasion for action on her part and the payment of taxes by another for the period of time involved here is not sufficient of itself to call for that action. *Jackson* v. *Boyd, supra; Earle Improvement Co.* v. *Chatfield,* 81 Ark. 296, 99 S.W. 84 (1907); *Carmical* v.

Arkansas Lumber Co., 105 Ark. 663, 152 S.W. 286 (1912); *Bradley Lumber Co.* v. *Langford,* 109 Ark. 594, 160 S.W. 866 (1913). Where there is no intervening equity which of itself requires application of the doctrine of laches the owner will not be divested of his title to land unless he fails to assert such title for a period at least equal to that fixed by the Statute of Limitations. *Walker* v. *Ellis,* 212 Ark. 498, 207 S.W.2d 39 (1947). Mere laches does not of itself bar a plaintiff. Laches in legal significance is not mere delay, but delay that works a disadvantage to another. Before the doctrine of laches can be invoked, the delay of the true owner to take action must mislead and work a disadvantage to the other party in making his claim. *Carmical* v. *Arkansas Lumber Co., supra.* From our *de novo* review of the record we find no evidence of conduct on the part of the appellant which would bar her claim under the doctrines of laches and estoppel. This case is reversed and remanded with directions that a decree be entered not inconsistent with this opinion.

GLAZE and COOPER, JJ., agree.

Thomas GWIN *v.* R. D. HALL TANK COMPANY, Employer, and CRUM & FORSTER, INCORPORATED, Carrier

CA 83-222 660 S.W.2d 947

Court of Appeals of Arkansas
Division I
Opinion delivered November 16, 1983

Whetstone & Whetstone, by: *Bud Whetstone,* for appellant.

Barber, McCaskill, Amsler, Jones & Hale, for appellee.

GEORGE K. CRACRAFT, Judge. Thomas Gwin appeals from a determination of the Arkansas Workers' Compensation Commission that his attorney is not entitled to have the remaining attorney's fees allowed him by the Commission in one lump sum because an order filed on November 30, 1981 regarding the manner in which attorney's fees were to be paid had become res judicata. We agree with the Commission.

On March 27, 1978 the Commission found that Thomas Gwin was permanently and totally disabled and awarded him full benefits as provided in the Act. It also awarded his attorney the maximum attorney's fees allowable on the controverted portions of the claim. The award made no provision for the manner in which the attorney's fees would be paid but the carrier made these payments in quarterly installments. A subsequent petition filed by Gwin for

allowance of mileage expense incurred for medical treatment also included a petition that his attorney's fees be paid biweekly. On November 31, 1981 the Administrative Law Judge entered an order allowing the mileage expense and directing that the attorney's fees be paid "on a biweekly basis *as accrued.*" Although Ark. Stat. Ann. § 81-1332.1 (Supp. 1983) authorizing the Commission to approve lump sum attorney's fees for legal services was then in effect, no request for lump sum payment of attorney's fees was made. In this respect this case is distinguished from *Aluminum Co. of America* v. *Neal,* 4 Ark. App. 11, 626 S.W.2d 620 (1982) where we approved an order authorizing lump sum payment of fees awarded on a weekly basis prior to the effective date of the Act. There the issue of the manner of payment could not have been raised in the prior hearing.

Almost a year later a petition was filed asking that the balance of attorney's fees be paid in one lump sum as provided in § 81-1332.1. The Commission affirmed the Administrative Law Judge's determination that the order of November 30, 1981 was a bar to the relief requested under the doctrine of res judicata. The appellant contends that the Commission erred in that ruling. We disagree.

Generally speaking res judicata applies where there has been a final adjudication on the merits of an issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. *Wells* v. *Ark. Public Service Commission,* 272 Ark. 481, 616 S.W.2d 718 (1981). Although the Compensation Commission is not a court, its awards are in the nature of judgments. In *Andrews* v. *Gross & Janes Tie Co.,* 214 Ark. 210, 216 S.W.2d 386 (1948) and *Mohawk Tire & Rubber Co.* v. *Brider,* 259 Ark. 728, 536 S.W.2d 126 (1976), the court declared that the doctrine of res judicata, which forbids the reopening of matters once judicially determined by competent authority, applies to decisions of the Arkansas Workers' Compensation Commission.

The appellant argues that the issue of the lump sum attorney's fee was not "necessarily within the issue considered below and therefore not one which might have been

litigated in it." He argues that the issue of lump sum fee was not mentioned in the previous proceeding and had no bearing on a decision that the controverted fee previously awarded be paid in biweekly installments. He contends that he was not required to raise that issue and that his failure to do so does not foreclose his present request.

At the time the petition seeking biweekly payments was filed the claimant had a right to ask that his attorney be paid in one lump sum. He did not do so and the Administrative Law Judge entered an award directing that the attorney's fees be paid on a biweekly basis, *as they accrue.* The order of the Administrative Law Judge became final after a period of thirty days had expired and no petition for a review by the Full Commission was made. Ark. Stat. Ann. § 81-1325 (a) (Supp. 1983). We agree with the Commission that at the end of thirty days the award became final, not only as to the amount of compensation but also as to the manner in which it was to be paid, and that a reopening of the matter is barred by the doctrine of res judicata.

Affirmed.

GLAZE and COOPER, JJ., agree.

Robert CARTER, as Administrator of the Estate of Mark Clifton CARTER, Deceased *v.* GRAIN DEALERS MUTUAL INSURANCE COMPANY

CA 83-14 660 S.W.2d 952

Court of Appeals of Arkansas
Division I
Opinion delivered November 16, 1983

Boswell & Smith, P.A., by: *Robert P. Plummer,* for appellant.

Friday, Eldredge & Clark, by: *Michael G. Thompson,* for appellee.

JAMES R. COOPER, Judge. This is an appeal from an order granting the appellee's motion for summary judgment. The facts are essentially undisputed. On August 10, 1980, Mark Carter, the appellant's decedent, was shot four times by Roger Kight, the appellee's insured, while both

men were occupying a vehicle owned by Mr. Kight. Mr. Carter was in the process of driving Mr. Kight home following a party where Mr. Kight had become intoxicated. The two were being followed by the only witness to the shooting, Mr. Bobby Cecil. Mr. Cecil stated in his affidavit that he was behind Mr. Kight's car when it stopped, apparently to allow Mr. Kight to vomit. His testimony indicated that Mr. Kight got a gun from beneath the car seat and several shots were fired. No one testified as to the reason for the shooting.

Both Mr. Carter and Mr. Kight died as a result of the gunshot wounds they received. The appellant, administrator of the estate of Mark Carter, brought this action below to recover on the insurance policy the appellee issued to Mr. Kight. The appellee's policy contains the following provision:

> "*ACCIDENTAL DEATH BENEFIT.* The company will pay the amount stated in the schedule in the event of the death of an *eligible injured person* which shall result directly and independently of all other causes from bodily injury caused by accident and arising out of the maintenance or use of a motor vehicle as a *motor vehicle,* if the death occurs within one year from the date of the accident."

The issue in this case was whether the death of Mr. Carter was causally related to and flowed from the maintenance or use of Mr. Kight's insured automobile. The trial court found that, as a matter of law, the death of Mark Carter did not arise out of the maintenance or use of a motor vehicle within the meaning of the above quoted provision of Mr. Kight's automobile insurance policy. Therefore, the trial court granted the appellee's motion for summary judgment and dismissed the lawsuit. We affirm.

The Arkansas Supreme Court, in *Hartford Fire Ins. Co.* v. *State Farm Mut. Auto. Ins. Co.,* 264 Ark. 743, 574 S.W.2d 265 (1978) dealt with a case involving similar circumstances. Although, as the appellant argues, the *Hartford* case involved somewhat different facts, we find *Hartford* per-

suasive. In *Hartford,* two children were playing in a camper parked in the driveway of the insured's home while one stood outside. The engine was not running nor were the keys in the ignition. One child picked up a loaded gun which discharged causing the death of the child standing outside. The Court in *Hartford* quoted cases from other jurisdictions to the effect that "an injury caused by the accidental discharge of a gun held by a person who is in a moving or motionless vehicle is not an injury 'arising out of the use of' the vehicle." *Id.* at 745.

The *Hartford* court went on to quote from 89 A.L.R.2d 153 which states:

> All the cases agree that a causal relation or connection must exist between an accident or injury and the ownership, maintenance or use of a vehicle in order for the accident or injury to come within the meaning of the clause 'arising out of the ownership, maintenance, or use' of a vehicle, and where such causal connection or coverage is absent coverage will be denied.

The appellant correctly points out that *Hartford* does not stand for the proposition that all shootings in automobiles would be excluded from coverage. However, as previously noted, there must be a causal connection between the injury and the operation of the vehicle for there to be coverage. The only connection between the death of Mr. Carter and the use of the vehicle is that Mr. Kight and Mr. Carter happened to be in the automobile when the shooting occurred. They could have just as easily been outside the vehicle. The evidence in this record would not have permitted the fact finder to determine that Mr. Carter's death was causally related to the operation of the car.

On appeal, where the issue is the correctness of the trial court's decision to grant a motion for summary judgment, this Court must review the evidence in the light most favorable to the party resisting the motion. *Bourland* v. *Title Ins. Co. of Minnesota,* 4 Ark. App. 68, 627 S.W.2d 567 (1982). Where all the pleadings and the affidavits show there is no genuine issue as to any material fact, the moving party is

entitled to summary judgment. Rule 56, ARCP; *Davis, Adm'x* v. *Lingl Corp.*, 277 Ark. 303, 641 S.W.2d 27 (1982); *Turner* v. *Baptist Medical Center,* 275 Ark. 424, 631 S.W.2d 275 (1982). In the case at bar, we hold that the trial court correctly granted the appellee's motion for summary judgment.

Affirmed.

CRACRAFT and GLAZE, JJ., agree.

Lois ROGERS *v.* STATE of Arkansas

CA CR 83-60 660 S.W.2d 949

Court of Appeals of Arkansas
En Banc
Opinion delivered November 16, 1983
[Rehearing denied December 21, 1983.]

Murphy & Carlisle, by: *Marshall N. Carlisle,* for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was charged with possession of a controlled substance with intent to deliver. The appellant was also charged as an habitual criminal who had been convicted of more than two felonies. After waiving a jury trial, the appellant was tried by the court, found guilty, and sentenced to eight years in the Arkansas Department of Correction. From that decision, comes this appeal.

Pursuant to a search warrant, several Johnson County deputy sheriffs searched a residence, surrounding grounds, and outbuildings. During the course of the search, they found several marijuana plants growing outside the residence, and other marijuana located in various containers and within the residence. At the time the search was conducted, the appellant was not present. The officers testified that they left a copy of the search warrant on the kitchen table inside the residence. Sometime later, the appellant was found on the premises, and he was arrested.

For reversal, the appellant argues that the evidence obtained pursuant to the search warrant should have been

suppressed because the officers failed to comply with Rule 13.3 (b) of the Arkansas Rules of Criminal Procedure. That rule requires that, where the premises to be searched are unoccupied by any person in apparent control, the officers shall leave a copy of the warrant affixed to the premises. The appellant also argues that, because he was not served with a copy of the warrant when he was arrested, the evidence seized should have been suppressed. We find no merit to this argument. Rule 13 (b) and (d) deal with the problem of an unoccupied place which is to be searched and merely provide that, in that event, a copy of the search warrant and return are to be "affixed" to the premises. The trial court, after hearing the witnesses, found that the officers had, in fact, "affixed" the warrant and return to the premises by leaving copies of them on a table inside the premises. The appellant claimed he did not see the warrant or return, but the trial court found the officers' method of affixing the warrant and return to the premises to be reasonable. We agree with the trial court that this manner of affixing the warrant and return was reasonable, complied with Rule 13.3 (b) and (d), and the Fourth Amendment to the United States Constitution. The search was not an unreasonable one by virtue of the manner of affixing the warrant to the premises. Further, we find that the appellant's reliance on *Harris* v. *State,* 264 Ark. 391, 572 S.W.2d 389 (1978) is misplaced. It is enough to say that in *Harris* there were numerous defects which the majority found to warrant suppression, even though the court noted that none of the defects, standing alone, were sufficient to justify suppression of the evidence seized. No accumulation of defects is present in the case at bar, and, in fact, we find no defect at all in the manner in which the officers affixed the warrant and return to the premises.

Secondly, the appellant argues that the trial court, in considering the provisions of the habitual offender statute mandatory, erred in determining that eight years was the minimum prison sentence it could impose on the appellant. We find no merit to this argument. The trial court indicated that, having heard all the evidence and finding the appellant guilty, it felt it had no choice but to sentence the appellant. This statement by the trial court does not clearly indicate

that the court refused to consider the alternative fine provisions and considered a sentence to imprisonment as the only option it had. We believe the trial court exercised its discretion, and simply meant that, based on the appellant's prior record, and the facts of the case at bar, it had no choice, considering its duty, but to sentence the appellant to imprisonment. Secondly, we believe the trial court was correct in determining that, having decided to sentence the appellant to prison, eight years was the minimum sentence which could be imposed. Certainly, the appellant is correct in pointing out that Ark. Stat. Ann. §§ 41-901. -1101, and -1001, all use the permissive word "may" in defining sentences which are available for various classes of crimes. The use of the word "may", however, does not mean that in all habitual offender cases, both the provisions of Ark. Stat. Ann. § 41-901 and Ark. Stat. Ann. § 41-1001 are available, and that the court is required to choose from those two statutes. The sentences for habitual offenders are governed by Ark. Stat. Ann. § 41-1001, and the simple explanation is that the minimum sentences for habitual offenders are different than for persons who have not been convicted of two or more felonies. See *Jordan* v. *State,* 274 Ark. 572, 626 S.W.2d 947 (1982), where the Arkansas Supreme Court stated:

> The trial was bifurcated and appellant was found guilty of burglary and to have committed four or more previous felonies, *thus twenty years is the minimum sentence he could have received* under § 41-1001 (2) (b) irrespective of the issue of the firearm. [emphasis supplied]

See also, *Stocker* v. *State,* 280 Ark. 450, 658 S.W.2d 879 (1983). The appellant cites *Mathis* v. *State,* 267 Ark. 904, 591 S.W.2d 679 (Ark. App. 1980), for the proposition that the stiffer sentences provided in the habitual criminal statute are not mandatory. We agree with that statement, since the trial court is not required to sentence a convicted habitual offender to prison at all. Unfortunately, the following sentence appears in *Mathis*:

> The appellant could, however, permit the presiding judge to consider both possible sentencing statutes and impose the punishment.

That sentence can be read as implying that the non-habitual sentencing statutes are to be considered along with the habitual criminal sentencing statutes in determining what prison sentence, if any, a habitual felon is to receive. Our Supreme Court has clearly indicated, in at least the two cases cited above, that the minimum sentences for habitual offenders are different from other individuals. Therefore, to the extent that *Mathis* holds otherwise, it is expressly overruled.

This argument advanced on behalf of the appellant concerning sentencing fails for another reason. The appellant made no objection at the time sentence was imposed, and therefore, having accepted his sentence, he has no standing to complain. *McGee* v. *State,* 271 Ark. 611, 609 S.W.2d 73 (1980).

Finally, the appellant argues that his conviction is not supported by substantial evidence.

Without going into exhaustive detail, it is enough to say that the appellant was found on the premises in the process of feeding his dogs, that his clothing and bank statements were found inside the residence, and that he owned the mobile home located upon the premises. The appellant testified that he was separated from his wife and knew nothing of the marijuana. In criminal cases, we affirm where there is substantial evidence to support the verdict. *Pickens* v. *State,* 6 Ark. App. 58, 638 S.W.2d 682 (1982). Substantial evidence has been defined as evidence which is of sufficient force that it will compel a conclusion one way or the other. The evidence must be more than mere suspicion or conjecture. *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980). In determining whether there is substantial evidence to support a verdict, we review the evidence in the light most favorable to the appellee, *Pope* v. *State,* 262 Ark. 476, 557 S.W.2d 887 (1977), considering only the testimony which tends to support the guilty verdict. *Brown* v. *State,* 278 Ark.

604, 648 S.W.2d 67 (1983). After reviewing the evidence in the light most favorable to the appellee, we conclude that there is substantial evidence to support the verdict.

Affirmed.

Richard JOHNSON *v.* DIRECTOR OF LABOR

E 82-338 661 S.W.2d 401

Court of Appeals of Arkansas
Division I
Opinion delivered November 23, 1983

Charles L. Kennon, Rule XII Law Student, and *James R. Cromwell,* UALR School of Law Legal Clinic, for appellant.

Thelma Lorenzo, for appellee.

MELVIN MAYFIELD, Chief Judge. Appellant seeks review of a decision which allowed the Employment Security Division to recoup from current unemployment benefits an overpayment previously made.

In the summer of 1981, the agency denied appellant's claim for benefits because it found he had quit his job without good cause in connection with the work. However, he was inadvertently paid benefits for eight weeks which resulted in a total overpayment of $1,088.00. By notice dated October 21, 1981, appellant was informed of the amount of this overpayment and of his liability for repayment. That determination was appealed to the Appeal Tribunal and on November 23, 1981, the tribunal issued a decision affirming the agency determination. Ark. Stat. Ann. § 81-1107 (f) (2) (Supp. 1983) provides such overpayment may be recovered by deduction from future benefits unless it is found that it was made without fault on the part of the recipient and that its recovery would be against equity and good conscience. The decision issued by the tribunal was not appealed, but it made no finding as to whether recovery would be against equity and good conscience.

Appellant applied for unemployment benefits again in June of 1982 and the Employment Security Division notified him that those benefits would be withheld until the 1981 overpayment had been recovered. By a series of letters to the Appeal Tribunal and Board of Review, counsel for appel-

lant requested a hearing on the question of whether repayment would be against equity and good conscience. The tribunal and the board both refused to grant such a hearing because they contended the decision of November 23, 1981, became final and binding when the time for its appeal expired.

Appellant has filed a petition for review in this court and makes various arguments to support his contention that we should direct the Board of Review to afford him a hearing on whether recoupment of the overpayment would be against equity and good conscience. We find, however, that the petition should be denied.

In *Pritchett* v. *Director of Labor,* 5 Ark. App. 194, 634 S.W.2d 397 (1982), we affirmed the Board of Review's decision that the claimant had left her job without good cause in connection with the work, but we reversed the board's finding of liability to repay benefits already received and said:

> If appellant has been paid benefits to which she was not entitled, due process requires that her liability to repay the amount so received must be determined after she has been afforded the opportunity of a hearing, after proper notice, upon all the issues set out in Ark. Stat. Ann. § 81-1107 (f) (2) (Supp. 1981). *Whitford* v. *Daniels,* 263 Ark. 222, 563 S.W.2d 469 (1978); *Paulino* v. *Daniels,* 269 Ark. 676, 599 S.W.2d 760 (Ark. App. 1980).

It should be noted that *Pritchett* was in this court on a direct and timely appeal from a decision holding the appellant liable to repay benefits received. But that is not the situation here. In this case there was no appeal from the decision of liability to repay benefits and that decision was final and is not before us.

Pritchett and the *Paulino* case cited therein are relied upon by appellant for the proposition that the right to be heard is a fundamental requirement of due process. In *Paulino* the appellant attempted to appeal from the Appeal Tribunal to the Board of Review after the 15 days allowed by

the Employment Security Act had elapsed and the board dismissed her appeal. This court reversed and remanded for the board to consider the appellant's contention that her late filing was due to circumstances beyond her control — a statutory excuse which allowed the appeal to be considered as timely filed. Again, that case was before this court on appeal, but in the present case the issue of repaying benefits has been decided and has not been appealed to us.

In *Stover* v. *Deere,* 249 Ark. 334, 461 S.W.2d 393 (1971), an unemployment benefit case, the court was unwilling to allow an issue to be raised that should have been decided in the first instance. To grant appellant's petition for remand in the present case would result in piecemeal adjudication and in light of the nature and volume of unemployment claims is not a desirable method of handling those matters. Res judicata applies to the decisions of boards and commissions as well as courts. *Wells* v. *Ark. Public Service Comm'n,* 272 Ark. 481, 616 S.W.2d 718 (1981); *Mohawk Tire & Rubber Co.* v. *Brider,* 259 Ark. 728, 536 S.W.2d 126 (1976). In *Smith* v. *Smith,* 241 Ark. 465, 409 S.W.2d 317 (1966), the court quoted from an earlier decision as follows:

> The true reason for holding an issue res judicata is not necessarily for the identity or privity of the parties, but the policy of the law to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy. . . . Further, res judicata is applicable not only to an issue actually litigated, but also governs as to matters within the issue that might have been litigated.

We think the appellant was afforded a reasonable and meaningful opportunity to present the issue of equity and good conscience before the Appeal Tribunal and to appeal from its decision. This meets the requirements of due process, *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), and is in accordance with our statutory and case law. Therefore, his petition for review is denied.

COOPER and CORBIN, JJ., agree.

SILVICRAFT, INC. and GEORGIA CASUALTY AND SURETY, INC. *v.* J. A. LAMBERT

CA 83-232 661 S.W.2d 403

Court of Appeals of Arkansas
Division I
Opinion delivered November 23, 1983

Barber, McCaskill, Amsler, Jones & Hale, by: *Michael L. Alexander,* for appellants.

Williamson, Ball & Bird, by: *Samuel N. Bird,* for appellee.

JAMES R. COOPER, Judge. In this workers' compensation case the Commission affirmed the administrative law

judge's findings that the appellee was an employee of the appellant Silvicraft rather than an independent contractor; that the appellants were estopped from denying coverage to the appellee; and the "vendor's" provision in the appellants' workers' compensation insurance policy was in contravention of Ark. Stat. Ann. § 81-1338 (c) and therefore void as against public policy. From that decision, comes this appeal.

On September 8, 1981, the appellee injured his leg while cutting pulpwood for the appellant Silvicraft. The appellee had no written contract with Silvicraft. The appellee testified that he started to work for Silvicraft in April, 1980, and that until his accident, hauled pulpwood only for Silvicraft. He testified that he was directed to the timber he was to cut; that his promissory note for a pulpwood truck was cosigned by Silvicraft's manager; and that when equipment broke down Silvicraft repaired it and held the repair charges out of his check. However, he also testified that he hired his own helpers, bought his own gasoline, owned his own equipment, and that Silvicraft did not tell him how to cut trees but only marked the ones which were to be cut.

Silvicraft's manager testified that less experienced workers than the appellee would be more closely supervised; that Silvicraft did not direct the appellee to hire helpers; and that Silvicraft did not exercise control over the manner of cutting and hauling pulpwood. Further, Silvicraft purchases the timber from the landowners, designates the boundaries of the tracts to be cut, and marks the trees to be cut. In order to conduct its business of selling pulpwood to processors, Silvicraft has a business relationship with some thirty other persons who work similarly to the appellee. Also, Silvicraft did not withhold income or social security taxes from the appellee's checks.

In reaching his decision that the appellee was an employee of the appellant, the administrative law judge considered a number of factors approved by this court in *Franklin* v. *Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1982). The administrative law judge found that the appellant exercised a great deal of control over the appellee's

performance of his work; that the appellant could have terminated the appellee, had co-signed a note on the appellee's truck and would have called this demand note if the appellee had gone to work for another pulpwood broker; and that the appellee was engaged solely in the business of cutting pulpwood for the appellant. Also, the administrative law judge found the appellant's sole business was that of purchasing pulpwood from private owners and that the appellant could not have performed its work without the services of the appellee and other similarly situated persons. Finally, the administrative law judge found that the appellee had been employed by the appellant for a substantial period of time and that he would have continued in the employ of the appellant had he not sustained his injury. The Commission adopted the findings of the administrative law judge. In finding that the appellee was the employee rather than an independent contractor, the administrative law judge relied heavily on the relative nature of the work test, as espoused by Professor Larson. See, Larson, Workmen's Compensation Law §§ 43.42 et seq.

The appellants argue that, in determining whether an individual is an employee or an independent contractor, the most important test to apply is the control test. They cite *Franklin* in support of that argument. *Franklin* does not so state. Our opinion in *Franklin* does point out that, in applying the relative nature of the work test, the right to control may be sufficient to decide the employer/employee relationship question without consideration of other factors. The relative nature of the work is a combination of factors to be considered, all of which are utilized so as to give a clearer picture of the parties' relationship than is possible when only control is considered. Control of the manner of performing the work is significant, but, if considered determinative or controlling, may lead to clearly wrong results. In *Sandy* v. *Salter,* 260 Ark. 486, 541 S.W.2d 929 (1976) the Arkansas Supreme Court upheld the Commission's denial of benefits to Sandy, who was injured while remodeling a residence for the Salters, who were engaged in the trucking business. The Court stated:

> The case at hand confirms the soundness of Larson's approach to the problem. If the power to control is alone to be taken into account, the Salters might be found to have had that power, owing to their authority to dismiss the workmen at will. Yet there was certainly no actual power to control the men in the details of their work, for the Salters knew nothing about how to go about remodeling a home.

This Court approved the use of Professor Larson's relative nature of the work test in *Franklin, supra,* another case involving timber haulers.[1] The use of this test is consistent with the basic premise behind workers' compensation laws. As stated by Professor Larson,

> The theory of compensation legislation is that the cost of all industrial accidents should be borne by the consumer as a part of the cost of the product. It follows that any worker whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channelled, is within the presumptive area of intended protection.

Larson, Workmen's Compensation Law, § 43.51.

The right to control includes several items such as the right to determine the manner of completing the work; right to terminate; right to hire or control the hiring of helpers; the method of payment; and the furnishing of, or the obligation to furnish, tools or equipment necessary to perform the work. In determining the relative nature of the work to the alleged employer's business, some factors to be considered include whether the worker is engaged in a separate and distinct occupation or business, whether the work to be performed is an integral part of the employer's regular business, and the duration of the employment.

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[1]*Franklin* was remanded so that the Commission could consider matters in addition to control in deciding the employer/employee question.

All of these factors are intertwined in the case at bar, and, based on an analysis of both control and the relationship between Silvicraft's business and the work being performed by the appellee, the administrative law judge and the Commission found the appellee to be an employee of Silvicraft. The determination of whether, at the time of injury, a person was an employee or an independent contractor, is a factual one and the Commission is required to follow a liberal approach, resolving doubts in favor of employment status for the worker. *Franklin, supra; Liggett Construction Co.* v. *Griffin,* 4 Ark. App. 247, 629 S.W.2d 316 (1982); *Purdy* v. *Livingston,* 262 Ark. 575, 559 S.W.2d 24 (1977); *Feazell* v. *Summers,* 218 Ark. 136, 234 S.W.2d 765 (1950).

This Court's standard of review requires that we view the evidence in the light most favorable to the Commission's decision, and affirm if it is supported by substantial evidence. In order to reverse a decision of the Commission, we must be convinced that fair-minded persons, with the same facts before them, could not have arrived at the conclusion reached by the Commission. *Office of Emergency Services* v. *Home Ins. Co.,* 2 Ark. App. 185, 618 S.W.2d 573 (1981); *Bunny Bread* v. *Shipman,* 267 Ark. 926, 591 S.W.2d 692 (Ark. App. 1980).

On the facts of the case at bar, we find substantial evidence to support the Commission's decision regarding the appellee's status as an employee rather than an independent contractor.

The Commission also affirmed the administrative law judge's finding that the appellants were estopped from denying workers' compensation coverage to the appellee because of the method used to calculate workers' compensation insurance premiums. Because of our decision on the appellee's status, we do not reach this question. The appellant also argues that the Commission's decision that a vendor endorsement in the appellant's insurance policy is

void as against public policy has no basis in fact or law. Because of our affirmance on the employment issue, we need not decide this question.

Affirmed.

CRACRAFT and GLAZE, JJ., agree.

Estate of Mae PETTYJOHN *v.* Jimmie Lynn BALLARD and The CITIZENS BANK OF BATESVILLE

CA 83-31 661 S.W.2d 403

Court of Appeals of Arkansas
Division II
Opinion delivered November 23, 1983
[Rehearing denied December 21, 1983.*]

*COOPER, J., would grant rehearing and affirm on the merits of the appeal.

Boyette, Morgan & Millar, P.A., by: *Mike Millar*, for appellant.

Blair & Stroud, by: *Robert D. Stroud*, for appellee Ballard.

Highsmith, Gregg, Hart, Farris & Rutledge, by: *John C. Gregg*, for appellee Citizens Bank of Batesville.

LAWSON CLONINGER, Judge. The question at issue on this appeal is whether the execution of a "Depositor's Notice of Penalty for Payment of Time Deposit Before Maturity" constitutes substantial compliance with the "designate in writing" requirement of Ark. Stat. Ann. § 67-552 (Supp. 1981). We hold that there was no substantial compliance with the statute, and we reverse the finding of the trial court.

Ark. Stat. Ann. § 67-552 provides as follows:

> Checking accounts and savings accounts may be opened and certificates of deposit may be issued by any banking institution with the names of two or more persons, either minor or adult, or a combination of minor and adult, and such checking accounts, savings accounts and certificates of deposit may be held:
>
> (a) If the person opening such account, or purchasing such certificate of deposit, designates in writing to the banking institution that the account or the certificate of deposit is to be held in 'joint tenancy' or in 'joint tenancy with right of survivorship' . . . The opening of the account or the purchase of this certificate of deposit in such form shall be conclusive evidence in an action or proceeding to which either the association or surviving party or parties is a party, of the intention of all of the parties to the account or certificate of deposit to vest title to such account or certificate of deposit and the additions thereto in such survivor or survivors.

On February 18, 1981, the decedent, Mae Pettyjohn, purchased a thirty month certificate of deposit from appellee,

The Citizens Bank, which was issued in the name of "Mae Pettyjohn or Jimmie Lynn Ballard, either or survivor."

Upon the death of the decedent, her estate instituted this action for a declaratory judgment seeking a declaration of the court that the certificate of deposit was an asset of the estate. Appellee, Jimmie Lynn Ballard, filed her cross complaint against appellee. The Citizens Bank, asserting that she is entitled to judgment against The Citizens Bank in the event that it is found that the certificate is properly payable to the estate of Mae Pettyjohn. The trial court found that the certificate was the property of Jimmie Lynn Ballard and did not reach the question of the alternate liability of The Citizens Bank.

It is uncontroverted that Mae Pettyjohn was the purchaser, and the testimony of bank officials established that at the time of the purchase Mae Pettyjohn stated to representatives of the bank that it was her desire that the proceeds of the certificate be payable to the survivor as between her and Jimmie Lynn Ballard. However, the only document executed by Mae Pettyjohn in conjunction with the issuance of the certificate of deposit was a "Depositor's Notice of Penalty for Payment of Time Deposit Before Maturity," which bore the number of the certificate of deposit.

We need not hold that there must be a strict and literal compliance with the wording of the Act, but we do hold that there must be a substantial compliance. See *Ratliff* v. *Ratliff, Adm'x.*, 237 Ark. 191, 372 S.W.2d 216 (1963); *Cook* v. *Bevill,* 246 Ark. 805, 440 S.W.2d 570 (1969); *Carlton, Adm'r.* v. *Baker,* 267 Ark. 949, 591 S.W.2d 696 (Ark. App. 1980).

In *Corning Bank* v. *Rice, Adm'r.,* 278 Ark. 295, 645 S.W.2d 675 (1983), the Arkansas Supreme Court observed:

> Ever since the *Cook* case was decided in 1969 we have consistently held that a payable-on-death certificate is not payable unless the holder signs some instrument to that effect.

In *Gibson* v. *Boling, Sp. Adm'r.,* 274 Ark. 53, 622 S.W.2d 180 (1981), the court stated:

> It is clear from the act and we have held that the depositor must designate the survivor in a separate writing, other than as payee, if the transaction is to be treated as one of joint tenancy with right of survivorship.

In *Carlton, Adm'r.* v. *Baker, supra,* this court held that a receipt signed by the depositor constituted substantial compliance with the statute. In that case, the certificate of deposit was prepared with three copies and the depositor signed one of the copies in a space provided for that purpose. See *Baker* v. *Bank of Northeast Arkansas,* 271 Ark. 948, 611 S.W.2d 783 (Ark. App. 1981). In the instant case, the instrument signed by Mae Pettyjohn bore the number of the certificate of deposit, but the instrument itself contained nothing to express the intent of Mae Pettyjohn to create a joint interest with right of survivorship.

In *Ratliff* v. *Ratliff, Adm'x., supra,* the Arkansas Supreme Court stated:

> A joint account with survivorship is similar to a will in that both are statutory devices by which property may be disposed of at death. In each case certain minimum formal action in the exercise of the statutory privilege has been required by the legislature, doubtless to avoid the dangers of perjury and the uncertainties of parol evidence after death has sealed the lips of the person principally concerned.

There is ample evidence that it was the intention of Mae Pettyjohn to create a survivorship interest, but we must hold that the writing signed by Mae Pettyjohn does not constitute substantial compliance with the statute.

The decision of the trial court is reversed and the cause is remanded for determination of the issue raised by Jimmie Lynn Ballard in her cross complaint against The Citizens Bank.

MAYFIELD, C.J., and CORBIN, J., agree.

Tommy IRONS, Employer, and ROCKWOOD INSURANCE COMPANY *v.* Kenneth MINTON, Employee

CA 83-200 661 S.W.2d 408

Court of Appeals of Arkansas
Division I
Opinion delivered November 23, 1983

Walter A. Murray, for appellants.

Bud Whetstone, for appellee.

TOM GLAZE, Judge. In this Workers' Compensation case, appellants' arguments for reversal center around whether they controverted appellee's claim. The Commission affirmed the administrative law judge's decision that appellants, commencing October 15, 1981, controverted appellee's claim for temporary total disability benefits, but it reversed that part of the law judge's finding that the controversion had ceased upon appellant's reinstatement of benefits. We affirm the Commission's holdings on both points.

First, appellants contend there is no substantial evidence to support controversion. Our review of the record reveals just the opposite. In reviewing the evidence, we are guided by the principle announced in *Aluminum Company of America* v. *Henning,* 260 Ark. 699, 543 S.W.2d 480 (1976), that the determination whether a claim was controverted is a question of fact for the Commission. *See also Hamrick* v. *Colson Company,* 271 Ark. 740, 610 S.W.2d 281 (1981). The Commission's decision on controversion will not be disturbed if it is supported by substantial evidence. *Aluminum Company of America* v. *Henning, supra.* Here, appellee sustained an injury on January 9, 1980, and accepting the injury as compensable, appellants promptly paid appellee temporary total disability benefits. Dr. Dubose Murray initially treated appellee's injury, finding he suffered from a compression fracture of his dorsal spine. Because Murray failed to communicate with appellants, they referred appellee to Dr. Richard Logue. After examining appellee on October 10, 1980, Logue concluded appellee had recovered from his injury and that, with a vigorous exercise program, he could return to work in four to six weeks.

Dissatisfied with Dr. Logue's evaluation, appellee saw other physicians, one of whom was Dr. Dale Kincheloe. Dr. Kincheloe first saw appellee on June 8, 1981, but it is unclear when appellants first learned that Kincheloe was treating appellee. Nonetheless, appellants admittedly paid Kincheloe's bills for his treatment of appellee, and they conceded that they received a short letter dated October 1, 1981, from Kincheloe, reflecting that he had seen appellee since June 8, 1981, and that appellee would be unable to work for three

months. Prior to receiving Kincheloe's October 1 letter, appellants had terminated appellee's benefits on July 10, 1981, because on that date appellee declined to keep an appointment for a second evaluation by Dr. Logue. On October 15, 1981, appellee filed his claim, alleging his benefits had been controverted.

Appellants argue that they did not consider Dr. Kincheloe's letter of October 1, 1981, a medical report; therefore they found it unnecessary to reinstate benefits. Admittedly brief, Kincheloe's letter did place appellants on notice that he was treating appellee and considered him unable to work. Although furnished this information, appellants not only declined to resume benefits to appellee, they also made no further inquiry or investigation into the matter. Even so, they chose, quite anomalously, to pay Kincheloe's bills for his treatment of appellee's injury. Based on these facts, the Commission held appellants controverted benefits when they failed to reinstate them before appellee filed his claim. We believe the evidence supports such a holding.

Appellants' second contention is couched in terms suggesting that in reaching her decision, the administrative law judge erroneously considered facts which emerged after the December 15, 1981, hearing. Specifically, the law judge initially determined that the controversion of benefits ended on December 15, because it was at the hearing that the appellants voluntarily reinstated benefits. However, appellee did not receive these accumulated benefits until January 7, 1982, because appellants purportedly did not mail them until January 4, 1982. Based upon these events that transpired after December 15, the law judge, without a hearing or formal submission of evidence, extended the period of controversion to January 4, 1982. Appellants argue they were prejudiced by the law judge's supplemental decision to controvert benefits until January 4, and the Commission arbitrarily refused to consider this issue of prejudice on appeal. We disagree.

The Commission obviously disagreed with the judge's findings that controversion ended on January 4, or for that matter December 15. In doing so, it held that *all* temporary

total disability benefits were controverted. Thus, none of the events that occurred after the December 15 hearing in any way influenced the Commission's decision.

Because we review the Commission's findings and decision, not the law judge's, we simply fail to see how the appellants were prejudiced under the circumstances of this case. As discussed earlier, the Commission's finding that appellants controverted benefits is supported by substantial evidence. After making that finding, the Commission's decision to controvert all temporary total benefits was correct. *Cf. Siegrist* v. *K. C. Penny Co.,* 271 Ark. 409, 609 S.W.2d 87 (Ark. App. 1980). Accordingly, we affirm.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Charles R. SMALLWOOD and Carolyn SMALLWOOD, His Wife *v.* ELLIS GIN COMPANY, INC.

CA 82-502 661 S.W.2d 410

Court of Appeals of Arkansas
Division I
Opinion delivered November 30, 1983

R. James Lyons, for appellants.

Gardner & Steinsiek, for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal from a portion of a chancery court decree. The suit was filed by a bank in Blytheville seeking judgment on a note and foreclosure of a mortgage executed by Charles and Carolyn Smallwood. The bank made Planters Production Credit Association and Ellis Gin Company parties alleging they also held mortgages on the property but that the bank's mortgage was superior and paramount. The bank specifically alleged that the Ellis Gin mortgage was barred by the statute of limitations.

Both Ellis and Planters filed answers to the bank's complaint admitting and denying certain of its allegations and filed cross-complaints against the Smallwoods seeking foreclosure of the Smallwood mortgages held by Ellis and Planters. The pleading filed by Ellis did not, however, specifically deny the bank's allegation that the mortgage held by Ellis was barred by limitations, although the prayer of its "Answer and Cross-Complaint" asked that all claims made by the bank and Planters be declared junior and inferior to the Ellis claim.

The Smallwoods were served with summons on the bank's complaint and Planter's cross-complaint, and they filed an entry of appearance and waiver of service on the Ellis cross-complaint. No answer, however, was filed by them to the complaint or cross-complaints and eventually a decree was entered in which judgments were granted against them and the priority of liens was fixed. Ellis was given a fourth lien on the Smallwood home and a third lien on the other real property. Foreclosure of all the property was ordered and on the day of the foreclosure sale, the Smallwoods filed a motion alleging that the failure of Ellis to deny the bank's allegation that the Smallwoods' indebtedness was barred by limitations was an admission that it was so barred and,

additionally, that even though the Smallwoods failed to plead the statute of limitations as to the claim of Ellis, this was pled by the bank and Planters and their pleadings inured to the Smallwoods' benefit.

The Smallwoods' motion asked that the court's decree be "changed and corrected" to reflect that the claim of Ellis is barred by limitation. This motion was denied and from that denial the Smallwoods have appealed.

On appeal the appellants first argue that the failure to deny the bank's allegation that the claim of Ellis is barred is deemed to be an admission of that allegation. We do not agree. The cases cited in support of this point, *St. Louis I. M. & S. Ry. Co.* v. *State,* 85 Ark. 561, 109 S.W. 545 (1908) and *Meek* v. *United States Rubber Tire Co.,* 244 Ark. 359, 425 S.W.2d 323 (1968), do not apply to the situation in this case. It is true that some allegations are taken as admitted unless specifically denied and Civil Procedure Rule 8 (d), which was in effect at the time here involved, provides that "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied . . . ." In this case, however, the Smallwoods made no pleading to which Ellis could respond. The bank alleged that the Ellis lien was barred by limitations and that the bank's lien was superior to the Ellis lien. The failure to deny those allegations might admit them as far as the bank's claim is concerned, but this does not affect the Ellis claim against the Smallwoods.

The statute of limitations is an affirmative defense which has long been required to be specially pleaded. *Livingston* v. *New England Mortgage Security Co.,* 77 Ark. 379, 91 S.W. 752 (1906); Civil Procedure Rule 8 (c). However, pleading the statute of limitations is a personal matter and is a defense only to the party pleading it. *Henry* v. *Coe,* 200 Ark. 44, 137 S.W.2d 897 (1940); *Hall* v. *Bonville,* 36 Ark. 491 (1880). Thus, the plea of limitations made by the bank in this case applied only to the issues between it and Ellis. There was no plea of limitations as a defense to the Ellis claim against the appellants Charles and Carolyn Smallwood.

What we have just said also applies to the appellants' second argument, i.e., that the plea of limitations made by the bank inured to the appellants' benefit. The cases of *Southland Mobile Home Corp.* v. *Winders,* 262 Ark. 693, 561 S.W.2d 281 (1978) and *Firestone Tire & Rubber Co.* v. *Little,* 269 Ark. 636, 599 S.W.2d 756 (Ark. App. 1980), are cited in support of appellants' contention in this regard. Those cases involved default judgments entered against a defendant where there was another defendant, alleged to be jointly and severally liable, who had filed an answer which denied the material allegations of the complaint. Both cases held that the answer filed by the one defendant stated a defense common to both defendants and therefore inured to the benefit of the defendant in default. In the present case, however, the plea of the statute of limitations was a personal plea of the bank and did not inure to appellants' benefit. In *Hall* v. *Bonville, supra,* the court said:

> Where several are sued on a contract, a successful plea by one going to the validity of the contract, or to the satisfaction or discharge of the debt, operates as a discharge to all the defendants; but it is otherwise where the plea goes to the personal discharge of the party interposing it. The plea of limitation interposed in the separate answer of appellee Howell, was personal to him, and the court erred in rendering judgment discharging both him and appellee Bonville on the plea. . . . One defendant may think proper to plead the statute of limitation, and another may not.

The plea of limitations is personal to the party pleading it. Therefore, it is not a common defense and cannot inure to the benefit of a party who does not plead it.

Affirmed.

COOPER and CORBIN, JJ., agree.

Donald Wayne TAYLOR and Betty Joe TAYLOR *v.*
Mark Allen HILL, Bobby Lee HILL and Carlene HILL

CA 82-445 661 S.W.2d 412

Court of Appeals of Arkansas
En Banc
Opinion delivered November 30, 1983

Felver A. Rowell, Jr., for appellants.

Sanford, Pate & Marschewski, by: *Jon R. Sanford,* for appellees.

GEORGE K. CRACRAFT, Judge. Donald Wayne Taylor and Betty Jo Taylor, great uncle and great aunt of Mark Hill, sought to adopt him without the consent of his natural parents, Mark Allen Hill and Carlene Hill, relying on Ark. Stat. Ann. § 56-207 (Supp. 1981) which provides in pertinent part as follows:

> (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 year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree;

The appellants appeal from the order dismissing their petition for adoption, contending that the court erred in ruling that they had not sustained their burden of proving a statutory ground for dispensing with consent by clear and convincing evidence. We do not agree and affirm the action of the probate judge.

Ark. Stat. Ann. § 56-207 has been the subject of a number of recent opinions of the appellate courts of this state from which the principles governing the issues of this appeal have been established. Statutory provisions involving the adoption of minors are strictly construed and applied. *Roberts* v. *Swim,* 268 Ark. 917, 597 S.W.2d 840 (Ark. App. 1980). The 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 parents have failed significantly *and* without justifiable cause to communicate with the child or to provide for its care and support for the prescribed period. *Harper* v. *Caskin,* 265 Ark. 558, 580 S.W.2d 176 (1979).

"Clear and convincing evidence" has been defined as evidence of a credible witness whose memory of the facts about which he testified is distinct and whose narration of the details is so clear, direct, weighty, and convincing as to enable the finder of fact to come to a clear conviction, without hesitancy, of the truth of the facts related. This measure of proof lies somewhere between a preponderance

of the evidence and proof beyond a reasonable doubt. It is simply that degree of proof which will produce in the trier of fact a firm conviction as to the allegation sought to be established. *Kelly* v. *Kelly,* 264 Ark. 865, 575 S.W.2d 672 (1979). "Failed significantly" does not mean "failed totally" but the failure must be a significant one as contrasted with an insignificant one. It denotes a failure that is meaningful or important. "Justifiable cause" means that the significant failure must be willful in the sense of being voluntary and intentional; it must appear that the parent acted arbitrarily and without just cause or adequate excuse. *Henson* v. *Money,* 1 Ark. App. 97, 613 S.W.2d 123 (1981) [affirmed on appeal 273 Ark. 203, 617 S.W.2d 367 (1981)]; *Pender* v. *McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979).

While we review probate proceedings *de novo* on the record, it is well settled that the decision of a probate judge will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the trial judge to judge the credibility of witnesses. ARCP Rule 52 (a); *Chrisos* v. *Egleston,* 7 Ark. App. 82, 644 S.W.2d 326 (1983); *Henson* v. *Money, supra.* Personal observations of the judge are entitled to even more weight in cases involving the welfare of a small child. *Wilson* v. *Wilson,* 228 Ark. 789, 310 S.W.2d 500 (1958).

In 1974 Mark, then sixteen months old, was removed from the custody of his natural parents by a juvenile court. He was placed in the Taylor's home where he has remained since that time. The father testified that during the entire period he had, except on rare occasions, visited with the child at least once a week. He testified that his wife had visited less frequently because she did not feel welcome in the Taylor home. There was evidence in the record of an antagonistic feeling on the part of Mrs. Taylor toward the appellees, particularly toward the natural mother. Both natural parents testified that the visits with the child in the Taylor home were of short duration because of the action and attitude of Mrs. Taylor. They both testified that a short time after their arrival for visitation, she would state that she needed to go to the store, take Mark from the home with her, and would not return until after the natural parents had

tired of waiting and gone home. The father testified, however, that he saw the child on many occasions in places other than appellants' home. Mrs. Taylor admitted that there was visitation with Mark "a few minutes maybe once or twice a month." Both parents testified that they had consulted several attorneys seeking to regain custody of the child.

The appellants do not argue that the parents did not visit with the child but only that the infrequency and short duration of the various visits constituted a significant failure to communicate. If the trial court believed the testimony of the natural father, as he obviously did, he could easily conclude that there was adequate communication between the natural parents and their child, especially in view of the testimony that the duration of the visits was determined by Mrs. Taylor rather than by the appellees.

The court's ruling on failure to support the child presents a more difficult question. Appellants testified that during a seven year period appellees neither contributed anything for the child's support nor purchased food or clothing for him. Appellees admitted that they had furnished little or no cash for his support but had on occasions given him clothing. The natural father testified that they had given him presents on Christmas and other special occasions. While admitting that he had provided little or no support for the child during that period the father testified that he was at all times ready, willing and able to do so but that it would not be received by appellants. He testified that he initially informed Mrs. Taylor, and repeated on several subsequent occasions, that he would provide whatever financial assistance was needed, but she told him that they neither desired nor needed any help from him. He testified that this was a continuing offer which was consistently refused — "everytime I told her she said, 'we don't need anything for him'."

The failure to support the child must be "without justifiable cause" and the heavy burden of proving by clear and convincing evidence that the failure to support was intentional, willful, arbitrary and without justifiable cause

lay upon the appellants. In *Harper* v. *Caskin, supra,* the Supreme Court in declaring the heavy burden cast upon one wishing to adopt a child against the consent of a parent stated:

> "'. . . In order to grant an order or decree of adoption in opposition to the wishes and against the consent of the natural parent, the conditions prescribed by statute which make that consent unnecessary must be clearly proven and the statute construed in support of the right of the natural parent. Natural rights of parents should not be passed over lightly, even though the court is given power to enter decree of adoption without the consent of the parent or guardian when the judge considers that the best interests of the child will be promoted. The law is solicitous toward maintaining the integrity of the natural relation of parent and child, and where the absolute severance of the relation is sought without the consent and against the protest of the parent, the inclination of the courts is in favor of maintaining the natural relation.'"

There were several factors in this record which could have caused the trial judge to remain unconvinced that the natural parents had willfully and arbitrarily failed to discharge their obligation of support. Giving due regard and deference to the superior position of the trial judge to determine the weight of the evidence and the credibility of the testimony we cannot conclude that his ruling that appellants had failed in their burden of proof was clearly erroneous.

Affirmed.

Kim Bates McKEE and Larry McKEE *v.* Michael BATES

CA 82-465 661 S.W.2d 415

Court of Appeals of Arkansas
En Banc
Opinion delivered November 30, 1983

Bob Keeter, for appellants.

Maddox & Miller, by: *David Maddox,* for appellee.

JAMES R. COOPER, Judge. The appellant, Kim (Bates) McKee, and the appellee, Michael Bates, were married in 1972 and lived together one day before they separated. One child, Patrick John Bates, was born of the marriage on January 29, 1973. They were divorced on October 5, 1973. Kim (Bates) McKee then married the appellant, Larry McKee, on February 11, 1974. One child, Charity, was born of this marriage. Patrick was in the sole custody of the appellants until January 8, 1979, when the appellants divorced. After their divorce, Kim McKee had custody of both children. Larry McKee supported both children during this period and visited the children on a regular basis. In October, 1980, both children went to live with Larry. Kim gave Larry custody of Charity and a Special Power of Attorney to authorize Larry to care for Patrick.

The appellee admittedly did not communicate with or support Patrick from 1973 through 1979. Although the appellee did see Patrick occasionally in 1980, he did not furnish any support. In 1981, the appellee did not see or support the child until October, when he filed a petition for change of custody. The appellants answered the petition and also filed a petition for adoption in probate court. Kim

had given her written consent to Larry to adopt Patrick. The matters were combined for trial. On the day of trial, March 31, 1982, the appellants amended their petition to request that custody of Patrick be granted to Larry or, in the alternative, to Kim, should the adoption petition be denied. After hearing the evidence, the probate judge denied the adoption based on a finding that it would not be in the best interest of Patrick, but granted custody of the child to Larry, subject to reasonable visitation and child support payments by the appellee. The appellants appeal the denial of the petition for adoption. The appellee cross-appeals the denial of his custody petition.

For their first two points for reversal the appellants argue that the probate judge erred in denying the petition for adoption because they had proven by clear and convincing evidence that the appellee had failed, without justifiable cause, to support or communicate with the child, and thus the appellee's consent was not required for the adoption. The appellants rely on Ark. Stat. Ann. § 56-207 (a) (2) (Supp. 1983), which provides:

> Consent to adoption is not required of 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.

This statute will allow an adoption over the objections of a non-consenting parent, but only if all of the elements are proven by clear and convincing evidence. Since the probate judge determined that, considering the best interests of the child, the adoption should *not* be granted, he appears to have found it unnecessary to determine whether the appellee's consent was necessary. Therefore, we need not address this issue. However, we note that even if the trial court *had* decided that the father's consent was unnecessary, such a finding would not require that the adoption be granted. Before an adoption petition may be granted, the probate judge must find that the adoption is in the best interest of the child. See *Watkins* v. *Dudgeon,* 270 Ark. 516, 606 S.W.2d 78

(Ark. App. 1980). In this case, the probate judge found that, although the appellee had not supported or communicated with his son and by his conduct might deserve termination of his parental rights, he was unwilling to sever the appellee's parental relationship with his son. The probate judge found that the child knew of his natural father and should have the opportunity to know his natural father. Therefore, it is evident that the trial court, after observing the parties, refused to grant the adoption because he believed to do so would not be in the child's best interest, though he did grant custody to McKee.

In adoption proceedings, this Court reviews the record *de novo,* but we will not reverse the probate judge's decision unless it is clearly erroneous or against a preponderance of the evidence, after giving due regard to his opportunity to determine the credibility of the witnesses. Rule 52, ARCP; *Henson* v. *Money,* 273 Ark. 203, 617 S.W.2d 367 (1981). After reviewing the evidence as required, we cannot say that the probate judge's finding that the best interest of the child would be served by denying the adoption was clearly erroneous. As to the denial of the adoption, we affirm.

On cross-appeal, the appellee argues that the probate judge erred in granting custody of Patrick to Larry. The appellee contends that the probate judge applied the wrong burden of proof concerning custody and reversed the presumption that a child should be with his natural parent.

The paramount consideration in child custody cases must always be the welfare and best interest of the child. *Digby* v. *Digby,* 263 Ark. 813, 567 S.W.2d 290 (1978); *Daniel* v. *Daniel,* 244 Ark. 899, 428 S.W.2d 73 (1968). However, it should be noted that there is a preference for a parent above all other custodians. In *Perkins & Diggs* v. *Perkins,* 266 Ark. 957, 589 S.W.2d 588 (1979), this Court, citing *Baker* v. *Durham,* 95 Ark. 355 (1910), stated:

> . . . [A]s between the parent and the grandparent, or anyone else, the law prefers the former unless the parent is incompetent or unfit, because of his or her poverty or depravity, to provide the physical comforts

> and moral training essential to the life and well being of the child. It must be an exceptional case where the evidence shows such lack of financial ability or such delinquencies in character on the part of the father as to imperil the present and future welfare of his child before a court of chancery will deprive him of the duty and privilege of maintaining and educating his child, and of the pleasure of its companionship. *See Also: Wofford* v. *Clark,* 82 Ark. 461 (1907).

After carefully reviewing the evidence, we cannot say that the probate judge's decision is clearly erroneous or against a preponderance of the evidence. In *Calhoun* v. *Calhoun,* 3 Ark. App. 270, 625 S.W.2d 545 (1981), this Court stated:

> In cases involving child custody a heavier burden is cast upon the chancellor to utilize to the fullest extent all of his powers of perception in evaluating the witnesses, their testimony and the child's best interest. This court has no such opportunity. We know of no case in which the superior position, ability and opportunity of the chancellor to observe the parties carry as great weight as one involving minor children. [citations omitted]

In the case at bar, the probate judge found that although the appellee's situation has improved, the father has not shown sufficient ability to care for his child. We do not find this statement to indicate that the trial court shifted the burden of proof to the appellee or that he ignored the presumption that a child should be with his natural parent. Instead, we find that this statement demonstrates that the trial court's overriding concern was with the child's best interest. There was a substantial amount of evidence that Patrick is happy and content in Larry's custody. We cannot find that the trial court's decision is clearly erroneous or against a preponderance of the evidence. Therefore, as to the cross-appeal, we must affirm. Rule 52, ARCP.

Affirmed.

AMERICAN TRANSPORTATION CO. and ARGONAUT INSURANCE CO. *v.* Charles PAYNE

CA 83-239 661 S.W.2d 418

Court of Appeals of Arkansas
Division II
Opinion delivered November 30, 1983

Friday, Eldredge & Clark, by: *Elizabeth J. Robben,* for appellants.

Blevins, Pierce & Stanley, by: *James W. Stanley, Jr.,* for appellee.

LAWSON CLONINGER, Judge. In this workers' compensation case, the claimant, Charles Payne, sustained a job-related injury to his lower back on April 28, 1981, while employed by respnodent, American Transportation Company. Claimant was initially treated by Dr. Tom Beasley, a

physician selected by respondent. Dr. Beasley eventually referred appellant to Dr. Jerry L. Thomas, an orthopedic surgeon. Dr. Thomas treated claimant with conservative measures and released him to return to work on August 24, 1981, with a permanent partial disability rating of 5% to the body as a whole. After an October 2, 1981 examination, Dr. Beasley concurred in the disability rating set by Dr. Thomas and recommended that claimant return to work with some restrictions.

On October 14, 1981, claimant, on his own initiative, sought the services of Dr. Joe Lester. Dr. Lester performed a myelogram on claimant on January 5, 1982, and on January 11, 1982, Dr. Lester operated on claimant, removing a disc at the L5-S1 level. Dr. Lester rated claimant has having a disability of 12½% to the body as a whole.

At a hearing held on July 29, 1982, claimant requested a permanent partial disability of 12½%, a change of physicians to Dr. Lester, and rehabilitative services. The administrative law judge found that the change of physicians to Dr. Lester was unauthorized; that claimant had failed to prove by a preponderance of the evidence that rehabilitative services were necessary; and that claimant was entitled to a permanent partial disability rating of 12½% to the body as a whole. Claimant appealed the decision to the full Commission concerning the unauthorized change of physicians, and expressly stated that he was not appealing any other issue.

In an opinion dated May 19, 1983, the full Commission retroactively approved the claimant's unauthorized change of physicians and remanded the matter to the administrative law judge for a redetermination of the issues of permanent partial disability and rehabilitative services.

For reversal, respondents contend, first, that the Commission erred in retroactively approving the claimant's unauthorized change of physician. Respondents also contend that the Commission erred in reviewing decisions of the law judge relating to rehabilitative services and disability, issues not included in the claimant's appeal to the Commission.

We must reverse the decision of the Commission relating to authorization for change of physicians and affirm the action of the Commission relating to the hearing of issues not appealed.

While our courts have had numerous opportunities to interpret the change of physicians provision contained in the Arkansas Workers' Compensation Act, this is the first instance for this court to interpret the change of physicians provision, Ark. Stat. Ann. § 81-1311 (Supp. 1983), as amended by Act 290 of 1981.

Act 290 of 1981 was approved on March 3, 1981, and contains an emergency clause which provides that the provision of the Act would be effective after the date of its passage and approval. Accordingly, the 1981 amendment was in effect at the time of claimant's injury and is the applicable statute in this case.

The Commission based its decision on the case of *Caldwell* v. *Vestal,* 237 Ark. 142, 371 S.W.2d 836 (1963). In *Caldwell,* surgery was performed by an unauthorized physician and the Commission refused to charge the employer with the expenses of the operation. The Arkansas Supreme Court found that the surgery was necessary and was successful, and reversed the decision of the Commission. Ark. Stat. Ann. § 81-1311, *supra,* at that time, required an employer to provide prompt medical and surgical services as might be necessary for an injured employee during a period of six months after the injury and for such additional time as the Commission might require. That provision is unchanged in the present law, except that the six-month period limitation was deleted by a 1975 amendment.

In ruling that the Commission should have retroactively approved a change of physicians for Caldwell, the court stated:

> The appellees also rely heavily upon this sentence in our compensation act: 'The Commission may order a change of physicians at the expense of the employer when, in its discretion, such change is deemed neces-

sary or desirable.' Ark. Stat. Ann. § 81-1311 (Repl. 1960). We believe that this provision was inserted in the statute to anticipate any possible doubt about the power of the commission to order a change of physicians. It should not be regarded as establishing an exclusive method of procedure, for, as a practical matter, an injured employee ordinarily has no lawyer and is not in a position to apply to the commission for a change of physicians. To construe the statute as narrowly as the appellees would have us do would convert this provision from a remedial measure designed to help the workman into a punitive measure designed to hurt him.

Act 290 of 1981 amended Ark. Stat. Ann. § 81-1311 to provide, in pertinent parts, as follows:

> If the employer selects a physician, the claimant may petition the Commission one time only for a change of physician, and if the Commission approves the change, with or without a hearing, the Commission shall determine the second physician and shall not be bound by recommendations of claimant or respondent. . . . Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing, except emergency treatment, shall be at the claimant's expense. After being notified of an injury, the employer or insurance carrier shall deliver to the employee, in person or by certified or registered mail, return receipt requested, copy of a notice, approved or prescribed by the Commission, which explains the employee's rights and responsibilities concerning change of physician. If after notice of injury the employee is not furnished a copy of the aforesaid notice, the change of physician rules do not apply. Any unauthorized medical expense incurred after the employee has received a copy of the aforesaid notice shall not be the responsibility of the employer.

Since the *Caldwell* decision, the change of physician provisions in Ark. Stat. Ann. § 81-1311 have been significantly changed by legislative amendment on two occa-

sions. While preserving the grant of discretionary power to the Commission, by Act 253 of 1979, the Legislature added the requirement that an injured employee be provided with a copy of Section 11 of the Workers' Compensation Act, Ark. Stat. Ann. § 81-1311, and a copy of Commission Rule 21, enacted in 1963, which together outlined the conditions under which a claimant would be entitled to a change of physicians. The 1979 amendment also required the claimant to file a petition with the Commission requesting a change of physicians.

This court has refused to approve an unauthorized change of physicians under Ark. Stat. Ann. § 81-1311 as amended in 1979, when the claimant has failed to comply with Rule 21. *Markham* v. *K-Mart Corporation,* 4 Ark. App. 310, 630 S.W.2d 550 (1982). Deviations from the procedures were permitted under narrow circumstances. Commission Rule 23 allows the Commission the discretion to deviate from a Commission rule when compliance is determined to be impossible or impracticable. Accordingly, when the conditions of Rule 23 had been met, this court on occasion excused noncompliance with Rule 21 and approved a change of physicians. *Mad Butcher, Inc.* v. *Parker,* 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Act 290 of 1981 deleted the provision in § 81-1311 giving the Commission discretion to order a change of physicians when it was deemed necessary or desirable, and the statute set out a detailed procedure to be followed when an employee desires a change of physicians. Because the latter provision and Rule 21 were in conflict, Rule 21 was effectively repealed. Under the present law, the Commission no longer has the broad discretion to retroactively approve change of physicians.

The evidence indicates that the respondent fully complied with § 81-1311, as amended by Act 290 of 1981, by providing the claimant with medical care immediately following his injury and by sending him Commission form A-29, which sets out the requirements for a change of physician. The evidence also indicates that there was no medical emergency situation, inasmuch as Dr. Lester

initially treated the claimant conservatively and did not perform the myelogram and surgery until some three months after he first examined the claimant. At no time prior to the hearing on July 29, 1982, did the claimant request that the Commission approve a change of physicians. Ark. Stat. Ann. § 81-1311, as amended, clearly provides that treatment or services furnished by any physician other than the one selected according to the outlined procedures, except emergency treatment, shall be at the claimant's expense. The claimant has simply failed to comply with the clear intent of the statute, and the expense of Dr. Lester's services is not the responsibility of the respondent.

The respondent's second point for reversal is that the Commission erred in reviewing the decision of the administrative law judge relating to rehabilitative services and permanent partial disability because the claimant had expressly waived a review of those issues in his notice of appeal. The respondent bases this argument on Commission Rule 25 which relates to the scope of review on appeal to the Commission. Rule 25 provides as follows:

> (a) Parties appealing or cross-appealing to Full Commission from an order or award of an Administrative Law Judge or a single Commissioner shall specify in the notice of appeal or cross-appeal all issues to be presented.
>
> (b) All legal and factual issues should be developed at the hearing before the Administrative Law Judge or single commissioner. The Commission may refuse to consider issues not raised below.

Rule 25 does not preclude the Commission from reviewing issues not appealed from or not raised at the administrative law judge level if it so chooses. There is no indication that the Commission has failed to apply Rule 25 impartially, or that this respondent has been prejudiced. The respondent registered no objection to the Commission's consideration of the issues of rehabilitation and permanent partial disability, and the Commission expressed no opinion on the merits of the claimant's position. The administra-

tive law judge was merely requested to determine if claimant was entitled to rehabilitative benefits and to take wage loss factors and physical impairment into consideration in redetermining claimant's award for permanent partial disability.

Affirmed in part and reversed in part.

MAYFIELD, C.J., concurs.

CORBIN, J., agrees.

MELVIN MAYFIELD, Chief Judge, concurring. I concur in the results reached by the majority but think it might be beneficial to discuss more fully the appellant's contention that the Commission erred in reviewing the administrative law judge's decision relating to rehabilitation and disability when the claimant's notice of appeal had expressly waived review of those issues.

In the first place, Ark. Stat. Ann. § 81-1323 (b) (Repl. 1976) contains these provisions:

> If an application for review is filed in the office of the Commission within thirty (30) days from the date of the receipt of the award, the full Commission shall review the evidence, or if deemed advisable, hear the parties, their representatives and witnesses, and shall make awards, together with its rulings of law . . . .

Almost twenty years ago, the Arkansas Supreme Court held those provisions to mean that it was the duty of the Commission to make a finding according to a preponderance of the evidence and not whether there was substantial evidence to support the referee's decision. *Ark. Coal Co.* v. *Steele,* 237 Ark. 727, 375 S.W.2d 673 (1964). In recent years this court has reaffirmed that holding. *Dedmon* v. *Dillard Dept. Stores,* 3 Ark. App. 108, 623 S.W.2d 207 (1981); *Roberts* v. *Leo Levi Hospital,* 8 Ark. App. 184, 649 S.W.2d 402 (1983). That de novo review is obviously incongruous with the contention that the Commission's review is limited to the issues set out in the request for review.

It is, of course, within the Commission's statutory authority to make rules and regulations to administer the act and process the claims filed for compensation. *See* Ark. Stat. Ann. §§ 81-1342 (f) and 81-1343 (9) (Repl. 1976). The Commission's Rule 25 (a) provides that parties appealing from the decision of an administrative law judge shall specify in the notice of appeal, or cross-appeal, all issues to be presented, but this does not negate the Commission's statutory authority of review. Moreover, any reasonable construction or interpretation given its rules by the Commission is entitled to great weight upon judicial review and some relaxation of them, in the Commission's discretion, is permissible. *Mohawk Rubber Co.* v. *Buford,* 259 Ark. 614, 535 S.W.2d 819 (1976).

It should be remembered that parties cannot make a binding lump-sum settlement unless the Commission finds it is in the claimant's best interest, Ark. Stat. Ann. § 81-1319 (k) (Supp. 1983); and no employee can make a valid agreement to waive his right to compensation, Ark. Stat. Ann. § 81-1320 (a) (Supp. 1983).

Considering the purpose of the Workers' Compensation Act and the scope and authority it gives the Commission to accomplish that purpose, I think the Commission clearly had the discretion to remand this matter to the law judge for further proceedings in regard to the issues of rehabilitation and disability.

Terry Dean DODSON *v.* Melvin Gale DONALDSON
and Debra Kay DONALDSON

CA 82-476 661 S.W.2d 425

Court of Appeals of Arkansas
En Banc
Opinion delivered November 30, 1983

[redacted]

Jerry D. Pruitt, for appellant.

Wiggins, Christian & Garner, by: *Gary F. Wence,* for appellees.

DONALD L. CORBIN, Judge. The sole issue presented by this appeal is whether or not appellant, Terry Dean Dodson, had justifiable cause not to pay child support or communicate with his minor child for a period of one year. The trial judge found no justifiable cause existed and ruled that appellant's consent to the adoption was not required pursuant to Ark. Stat. Ann. § 56-207 (a) (1) and (2) (Supp. 1983), which provides:

> (a) Consent to adoption is not required of:
> (1) a parent who has deserted a child without affording means of identification, or who has abandoned a child;
> (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;

We find no error and affirm.

Appellant Terry Dodson and appellee Debra Kay Donaldson were married and are the natural parents of a daughter born on January 19, 1979. By an Oklahoma decree of divorce entered on October 26, 1979, appellee Debra Kay Donaldson was awarded custody of the minor child and appellee was ordered to make support payments in the amount of $35.00 per week through the office of the clerk of that court and was awarded visitation rights. Stipulated exhibit number 1 made part of the record of the proceedings below reveals that appellant's support payments were paid to the clerk and forwarded to the parents of appellee who resided in Alma, Arkansas. Appellee remarried in June, 1980, and shortly thereafter both she, her daughter and appellee Melvin Gale Donaldson moved to Kansas City, Kansas. They resided there until April, 1981, when another move was made to Mountainburg, Arkansas. They subsequently moved to Fort Smith in February, 1982. Appellees filed a petition for adoption in the probate court of Sebastian County in May, 1982, to which appellant answered objecting to the adotion of his minor child by appellees.

It was stipulated at trial that appellant did not support or communicate with his child from January 13, 1981, until the day of the trial, September 8, 1982. This was a period of approximately one year and eight months. The failure of appellant to pay child support or communicate with his minor child was found by the probate judge to constitute abandonment, thus dispensing with the necessity of obtaining appellant's consent to the adoption of his minor child by appellees.

Statutory provisions involving the adoption of minors are strictly construed and applied. *Roberts* v. *Swim,* 268 Ark. 917, 597 S.W.2d 840 (Ark. App. 1980). The holding of the Arkansas Supreme Court in *Harper* v. *Caskin,* 265 Ark. 558, 580 S.W.2d 176 (1979), places a heavy burden upon the party seeking to adopt a child without the consent of a natural parent of proving by clear and convincing evidence that the parent has failed significantly or 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. In *Kelly* v. *Kelly,* 264 Ark. 865, 575 S.W.2d 672 (1979), the

Supreme Court defined clear and convincing evidence as being:

> Evidence by a credible witness whose memory of the facts about which he testifies is distinct and whose narration of the details thereof is exact and in due order and whose testimony is so clear, direct, weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the facts related is clear and convincing. (cites omitted). This measure of proof lies somewhere between a preponderance of the evidence and proof beyond a reasonable doubt. (cites omitted). It is simply that degree of proof which will produce in the trier of fact a firm conviction as to the allegation sought to be established. (cites omitted).

While we review probate proceedings *de novo* on the record, it is well-settled that the decision of a probate judge will not be disturbed unless clearly erroneous (clearly against the preponderance of the evidence), giving due regard to the opportunity and superior position of the trial judge to judge the credibility of the witnesses. A.R.C.P. Rule 52 (a); *Henson* v. *Money,* 1 Ark. App. 97, 613 S.W.2d 123 (1981).

Judge Kimbrough thoroughly covered the evidentiary issues in his findings of fact. In summary, the court found from the facts and evidence that appellant and his family knew at all times where appellee's mother's family lived and made no inquiry or effort through them to learn of appellee's whereabouts and that of the minor child except for one brief contact with appellee's brother; that appellant was aware at all times that the child support payments went to appellee from the Clerk's office to her mother's home in Alma; that appellant knew appellee and the minor child went to Kansas City to live as appellee's husband had a job there and this information was disclosed by word of mouth, by correspondence and by phone call to appellant's sister to verify the address and phone number which appellee supplied to appellant; that there was no effort or intention on the part of appellee, her husband, family or otherwise to

not make her whereabouts and that of the minor child known at any time to appellant; and that appellant had frequent contact by reason of his employment and union affiliation with the maternal grandfather. In addition, there was a specific finding by the trial court that the adoption was in the best interest and welfare of the minor child.

Appellant's contention that he had justifiable cause not to pay child support or communicate with the minor child for more than twelve months is without merit. The thrust of his argument is that his justifiable cause came about as a direct result of appellee keeping the location of the child a secret. The record reveals that appellant made one attempt to inquire of his former in-laws as to his daughter's whereabouts following the move to Kansas. Appellant was employed by the Whirlpool Corporation in Fort Smith and his former father-in-law was his union representative. The testimony was in conflict as to what occurred on that date between appellant and his former in-laws. Appellant testified that he went to their home at approximately 9:00 a.m. and was not allowed to speak to them. Appellant stated that he made no further efforts to contact appellee's parents as he felt that "it would do no good". Appellee's mother testified that she was aware of her daughter's whereabouts at all times following her remarriage. She further testified that appellant came to their home on one occasion at 6:30 a.m. to inquire about his daughter and they were still in bed. She stated she had no hostility toward appellant and that appellant had always known that he could telephone them at any time to inquire about his daughter. Appellee wrote a letter to appellant shortly before their move to Kansas informing him of her new address, phone number, and assuring him that he could visit with his daughter either in Kansas or Alma. Shortly thereafter, appellant and his attorney wrote to appellee in Kansas City and the letter was returned as "not deliverable". Appellee testified that she never changed her address in Kansas City. Appellant testified that he then attempted to telephone appellee at the number she had provided and was unable to reach her as he either got a recording or static on the line. Appellee testified that she maintained the same phone number the entire time she resided in Kansas and that it was never disconnected.

Appellant continued to pay child support to the clerk of the court for another month and a half. Appellant testified that he then consulted with his attorney in Oklahoma and made the decision to discontinue child support payments based upon his perception that he was being denied his visitation rights. It is important to note that the above events occurred during a two-month period commencing with appellees' move to Kansas in November 1980, and ending in January 1981, when appellant made his last child support payment. Appellees both testified that at no time did they seek to keep appellant from seeing his child or keep her whereabouts a secret.

The asserted justifiable cause of appellant in his failure to support or communicate with the minor child is not supported by the evidence. In this regard, the probate judge found and stated the following in his decree:

> That the Respondent contends that he had justifiable cause in ceasing to make the payments of child support, and was prevented from having contact with the minor child, for the reason that he did not know where the Petitioner mother and child lived; that his efforts for help from his attorney in the divorce case, or an opportunity to talk with the Court in that case, were not productive; and that he was reluctant to talk to the natural mother's parents as they had said previously that they didn't want to be involved; so he therefore unilaterally terminated the child support payments and waited for reasons known to himself until he learned where the child was, which knowledge he contends first came to him as a result of this adoption proceeding being filed and processed and notice being issued therein.
>
> . . . .
>
> That the facts, testimony, and circumstances of this case demonstrate by clear and convincing evidence that Respondent natural father made no genuine or diligent effort to contact, locate, communicate with, support or assist his minor child herein concerned, from and since

> January, 1981. That his actions were voluntary and constituted abandonment, and a failure to communicate with or provide care and support for the minor child as required by law and judicial Decree, so that his consent to this adoption is not required.

Giving due regard and deference to the superior position of the probate judge to determine the weight of evidence and the credibility of the testimony, we cannot conclude that his ruling that appellant did not have justifiable cause to not support or communicate with the minor child was error. Recognizing that the father's duty to support his minor child cannot be excused on the basis of the conduct of others, unless that conduct prevents him from performing his duty, *Green* v. *Green,* 232 Ark. 868, 341 S.W.2d 41 (1960), we cannot say that the probate judge's finding to the contrary is clearly against the preponderance of the evidence.

We believe the probate judge correctly found appellees met their heavy burden of proving by clear and convincing evidence that appellant had failed significantly and without justifiable cause to communicate with or to provide for the care and support of the minor child, so that the appellant's consent to the adoption was not required.

Affirmed.

GLAZE, J., dissents.

TOM GLAZE, Judge, dissenting. I dissented in *Henson* v. *Money,* 1 Ark. App. 97, 613 S.W.2d 123, *aff'd,* 273 Ark. 203, 617 S.W.2d 367 (1981), and for similar reasons, I do so here. In my opinion, *Henson* was a deplorable decision, and the decision reached in the instant case is no better.

The threshhold issue is whether the appellant's consent to adoption was required under Ark. Stat. Ann. § 56-207 (a) (2) (Supp. 1983). That statutory provision dispenses with the non-custodial parent's consent if he or she fails significantly without justifiable cause for a one-year period to communicate with or to support his or her child as required by law or judicial decree. Before today, our appellate courts have

construed § 56-207 (a) (2) in seven published opinions. In three cases, the courts affirmed the trial court's finding that the non-custodial parent justifiably withheld his or her support/contact with the child. *See Loveless* v. *May,* 278 Ark. 127, 644 S.W.2d 261 (1983); *Harper* v. *Caskin,* 265 Ark. 558, 580 S.W.2d 176 (1979); and *Chrisos* v. *Egleston,* 7 Ark. App. 82, 644 S.W.2d 326 (1983). In the other four cases, the courts held the non-custodial parents' consents were not required because they had failed without justifiable cause to support or communicate with their children. *See Henson* v. *Money, supra; Pender* v. *McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979); *Watkins* v. *Dudgeon,* 270 Ark. 516, 606 S.W.2d 78 (Ark. App. 1980); and *Brown* v. *Fleming,* 266 Ark. 814, 586 S.W.2d 8 (Ark. App. 1979). The Supreme Court cases of *Harper* and *Pender* are controlling when considering whether a non-custodial parent's consent is necessary under § 56-207 (a) (2). Unfortunately, these two decisions tend to lead us in opposite directions. In *Harper,* the court construed § 56-207 (a) (2) for the first time and held that one wishing to adopt a child without a parent's consent must show by *clear and convincing evidence* that the parent has failed without justifiable cause to support or communicate with his or her child. Justice Fogleman wrote in a concurring opinion in *Harper* that the clear and convincing burden adopted by the majority was incorrect; he opined a preponderance of the evidence was the correct standard. The *Harper* court refused to dispense with the father's consent even though he had paid only $100 child support during a one-year period. Although the father had epilepsy and was unemployed, he was a veteran and his child was entitled to V.A. benefits, which he did not provide because the mother said that she was not interested in receiving such benefits. Because the mother prevented him from doing so, the father also had not visited with his child for nearly three years. He made no effort to petition to court to gain access to his child. Nonetheless, the court in *Harper* imposed a heavy burden on the mother to prove the father's failure to support or communicate was without justification and affirmed the lower court's finding that she did not meet that burden.

Two months after *Harper,* Justice Fogleman authored *Pender* v. *McKee.* The Supreme Court affirmed the lower

court, but this time it found the father's consent was not required. In *Pender,* the father apparently paid $615 in support for three children over a period of approximately two and one-half years. During most of this time, either the paternal grandparents or Social Services, *vis a vis,* the adopting parents, the McKees, had custody of the father's child. The father asserted his failure to pay support was justified because no one had asked him to pay anything, nor had any court ordered him to make payments. The father had visited his daughter regularly, and while she was at his parent's home, he bought food and milk for her. The court held the father was not relieved of his obligation to support his child because someone else had custody of her. It concluded a parent must furnish the support and maintenance himself, and the duty is a personal one. *But see Loveless* v. *May, supra* (mother's failure to provide support was found justified because she was not advised or ordered to contribute to her child's support, and the appellants, seeking adoption, had gained custody of the child by juvenile court order).

Relying heavily on *Pender,* the courts in *Watkins* v. *Dudgeon, supra,* and *Henson* v. *Money, supra,* held the respective fathers' consents were not required. *Henson* is worthy of discussion. There the father supported his son for nine years but withheld child support for a fifty-one week period because of a dispute with his former wife and her new husband over visitation rights. The Supreme Court held the father was not justified in withholding the support, stating he could have petitioned the court to compel his ex-wife to abide by the terms of their divorce decree concerning visitation privileges with his child. *But see Harper* v. *McCaskin* (wherein father never petitioned the court to enforce visitation rights when ex-wife prevented him from seeing child, yet court held father's failure to contact child justifiable and not a sufficient ground to dispense with his consent).

The foregoing cases reflect inconsistent applications of known principles, which in turn pose real problems in deciding any adoption case involving a consent issue under § 56-207 (a) (2). From my review of the cases, I come to this

conclusion: One should rely heavily on the language contained in *Harper* when arguing that the non-custodial parent's consent should be required; but when one is contending the parent's consent is unnecessary, cite liberally the principles contained in *Pender*.

In the present case, the majority fails to cite *Pender* at all and borrows little from *Harper*. It does rely on a case cited in *Pender* for the rule that a father's duty to support his minor child cannot be excused on the basis of the conduct of others, unless that conduct prevents him from performing his duty. *Green* v. *Green,* 232 Ark. 868, 341 S.W.2d 41 (1960). *Green* was a case in which a father was found errant in failing to make monthly payments to his son's education fund as directed by the court's decree. The Supreme Court dismissed the father's argument that his former wife moved to another State and prevented him from visiting his son; it ordered the father to continue the monthly payments and directed that all arrearages be reduced to judgment. Whether the holding or rule in *Green* is applicable to adoption proceedings is most dubious in my opinion. After all, in most adoption cases, a court terminates a parent's rights to his child; few consequences of judicial action are so grave as the severance of natural family ties. *See Santosky* v. *Kramer,* 455 U.S. 745 (1982). Even assuming the rule in *Green* is applicable in adoption cases, we are met with a different burden of proof — a preponderance of the evidence is employed when imposing support obligations while clear and convincing evidence is required to terminate a parent's rights to his or her child. Here, the majority court held that the father, Terry Dodson, was unjustified in withholding child support payments and in failing to communicate with his child, concluding the mother's conduct did not prevent him from performing his duties. Under the circumstances of this case, the court, at most, (in a proper action) should enforce and reduce to judgment any arrearages in support Terry Dodson has accrued; it should not, however, permit the law to take this father's child away. A fair review of the facts clearly shows the mother made no effort to comply with the visitation provisions contained in the parties' divorce decree. The undisputed evidence also reveals that of the twenty months the father did not support or communicate

with his child, the mother had informed him of her whereabouts just one time, *viz.*, when she first moved to Kansas City, Missouri, where she resided for only six months.

A more detailed account of the sequence of events is necessary. Terry Dodson met all of his fatherly duties from the time his daughter was born on January 19, 1979, until January 13, 1981, or two months after her mother, Debra Donaldson, married Melvin Donaldson and moved to Kansas City. Until this time, Terry visited his daughter as often as her mother would permit, even though the parties' divorce decree directed he was entitled to visit every Saturday.

The Donaldsons moved to Kansas City in November, 1980; Debra admitted she never attempted to communicate with Terry after January 31, 1981. She made no efforts to obtain child support from Terry, nor did she make the parties' daughter available for visitation, as ordered by their divorce decree. Curiously, Debra's parents' address was on the records of the court clerk, whose duty it was to receive support payments. Thus, even though Debra moved at least three times during the twenty-month period involved here, only her parents knew where she lived — with the possible exception that Terry might have known of her move to Kansas City in November, 1980. However, accepting the fact he knew Debra resided in Kansas City, she lived there only six months. She candidly admitted that she never told Terry of her subsequent moves to Mountainburg in April, 1981, and to Fort Smith in February, 1982. Terry resided in Fort Smith throughout this entire ordeal.

The trial court (and this Court's majority) placed much emphasis on the fact that Terry failed to contact Debra's parents to discover her whereabouts. To require a divorced parent to contact his or her former mother- or father-in-law to locate his former wife or husband is pure folly. The folly is even greater in the situation here considering that on one occasion, Terry *did* go to the home of his former in-laws, but they refused to talk to him about where she lived. Their excuse for not telling Terry where Debra lived was that it was

too early in the morning, *viz.*, 6:30 A.M., when he requested this information. Of course, they could have given him the address in as much time as it took them to tell him to leave. At least, it would seem, they could have called him later and made arrangements which accommodated their schedule. On another occasion, according to Terry, these same maternal grandparents said that they did not want to be involved in his and Debra's business. Furthermore, the evidence reflects that pending Terry's and Debra's divorce, Terry was threatened with arrest by his in-laws when he went to their home to exercise his visitation rights with his daughter. Surely, in view of these circumstances, no one could reasonably expect Terry to seek information from such a hostile source. Neither do I agree that Terry was required to file an action to enforce his visitation rights, especially in view of Debra's admission that she did not tell him when she moved to Mountainburg and Fort Smith. Certainly, the court in *Harper* v. *Caskin* did not require such legal action.

The majority's result imposes a greater duty upon the father in this case than the mother, who has an equal and correlative legal duty to discharge. Terry was directed by the court to pay child support — which he did until two months after Debra moved to Kansas City. Debra, on the other hand, was to afford Terry visitation with their child every Saturday — which she failed to do from the time she left the State in November, 1980, until this matter was tried in September, 1982. Yet, the majority would require Terry to pay child support to his former in-laws who, in turn, would forward it wherever Debra might live at the time, albeit unknown to Terry. At the same time, the majority requires no action by Debra to provide Terry with the opportunity to visit his daughter. The facts of this case do not warrant a court's order to dispense with this father's consent and to terminate his legal — not to mention his emotional — ties with his daughter.

Section 56-207 (a) (2) affords a less stringent standard for dispensing with consent than that required under prior law on adoptions. As a consequence, more adoption cases are now being filed involving children of divorced parents.

Warring divorced parents commonly feud over support and visitation issues, and because of § 56-207 (a) (2), we are seeing their disputes in probate court in the form of adoption proceedings. The Arkansas General Assembly should review our 1977 Adoption Act and either repeal or modify the language contained in § 56-207 (a) (2). I do not believe the members of the General Assembly envisioned terminating parental rights in situations such as those presented in *Henson* v. *Money* or in the case at bar.[1]

I would reverse.

[1]*Cf. A. B.* v. *Arkansas Social Services,* 273 Ark. 261, 620 S.W.2d 271 (1981), in which Social Services, proceeding under Ark. Stat. Ann. § 56-128 (Supp. 1980), attempted to terminate a "putative" father's parental rights; even though he was a felon serving time in the penitentiary and had never supported his child, the Supreme Court refused to sever his parental rights because the State failed in its proof to show the requirements under § 56-128. If the State had proceeded under the 1977 Adoption Act, *ivz.,* § 56-220, the result most likely would have been different. In fact, consent, notice and an opportunity to be heard is not provided for a putative father under §§ 56-206 (a) (2) and 56-207 (a) (3) of the Adoption Code.

Nora HOPKINS *v.* Dewey STILES, Director of Labor, and SEARS PORTRAIT STUDIO

E 83-87 662 S.W.2d 177

Court of Appeals of Arkansas
Division II
Opinion delivered November 30, 1983
[Rehearing denied January 18, 1984.]

Wilson, Grider & Castleman and *Ponder & Jarboe,* by: *Murrey L. Grider,* for appellant.

Thelma Lorenzo, for appellees.

DONALD L. CORBIN, Judge. This appeal is from a decision of the Board of Review which held appellant ineligible to receive unemployment compensation benefits. The Board's decision was based on the finding that appellant left her last work voluntarily and without good cause connected with the work. [Section 5 (a) of the Arkansas Employment Security Law, Ark. Stat. Ann. § 81-1106 (a) (Supp. 1983)]. The Board of Review affirmed and adopted the Appeal Tribunal's decision which contained the following findings of fact and conclusions of law:

> The claimant quit her part-time job with this employer because she was not getting enough hours to pay for her driving to and from work. She indicated when she was first hired she was told her hours might fluctuate and she might have to work some evening hours. In fact, this happened and the claimant was requested to work one four hour shift in the day-time and two evening shifts consisting of two hours each. She indicates she lives approximately 10 miles one-way from her job and this would not be economically feasible to drive this distance. She does admit she was told though her hours

> would fluctuate and she would have to work some evenings. She also indicated that she was hired on a part-time basis and knew this could possibly happen.

This appeal raises two issues. The first is whether there is substantial evidence to support the Board's finding that appellant voluntarily left her part-time work without good cause connected with the work. And secondly, whether an individual who is receiving unemployment compensation benefits may be totally disqualified from receiving benefits attributable to their prior full-time employment because they voluntarily quit their subsequent part-time employment. The first issue raised, dealing with good cause to leave employment, has been dealt with many times by this Court. However, the second issue raised by this appeal is one of first impression in this state.

As to whether appellant had good cause to leave her employment, the testimony and record support the finding that appellant was aware at the time she was hired that "her hours would fluctuate and she would have to work some evenings." This Court has stated in *Broyles* v. *Daniels,* 269 Ark. 712, 600 S.W.2d 426 (Ark. App. 1980): "We agree with the board of review's conclusion that general economic conditions which lead to seeking higher wages or lower living costs do not constitute 'good cause connected with the work,' as contemplated in the statute." And in *Armstrong* v. *Daniels,* 270 Ark. 303, 603 S.W.2d 481 (Ark. App. 1980) this Court held: "While we will consider allegations of substantial decrease in wages as good cause for voluntary departure from employment, we will not say that complaints based primarily upon economic conditions beyond the control of the employer fit the statutory exemption for disqualification." Based upon the evidence and testimony, we cannot say the Board's decision that appellant voluntarily left her part-time work without good cause is not supported by substantial evidence or that it is contrary to law. See, *Harris* v. *Daniels,* 263 Ark. 897, 567 S.W.2d 954 (1978).

We now turn to the second issue raised by this appeal. The record reveals that appellant's eligibility to receive unemployment benefits was not affected by her acceptance

of part-time work and that the amount of her benefit check was only slightly reduced on two occasions because of her part-time wages. The statutory provision governing the amount of weekly benefits awarded during partial employment is Section 3 (c) of the Arkansas Employment Security Law [Ark. Stat. Ann. § 81-1104 (c) (Supp. 1983)] which provides in part:

> For all claims filed on and after July 1, 1971, any insured worker who is unemployed in any week as defined in subsection 2 (m) [§ 81-1103 (m)] and who meets the eligibility requirements of Section 4 [§ 81-1105] shall be paid, with respect to such week, an amount equal to his weekly benefit amount less that part of the remuneration (if any) payable to him with respect to such week which is in excess of forty percent (40%) of his weekly benefit amount.

The California Court of Appeal was presented with a similar issue in *Tomlin* v. *California Unemployment Ins. Appeals,* 82 Cal. App. 3d 642, 147 Cal. Rptr. 403 (1978). The California court held that voluntary quitting of part-time work without good cause did not disqualify appellant from receiving benefits accruing to her by reason of prior full-time employment. The California court reached its decision by interpreting the meaning of the phrase "most recent work" used in the statute precluding recovery of unemployment compensation benefits if employee left "most recent work" voluntarily without good cause. The court's opinion in *Tomlin, supra,* states:

> We conclude that the phrase "most recent work" should not be construed to mean merely the last employment of any kind prior to filing for benefits. It must refer to significant or regular employment in order to effectuate the purposes of the act. The most reasonable meaning for the term "most recent work," taken in the context of the entire Unemployment Insurance Code and the purposes and policies behind it, is the most recent primary or principal or full-time employment of the individual. . . . Therefore, if an individual had a full time job, on the basis of which he

> is now eligible for unemployment insurance benefits, his qualification for benefits is not totally eliminated because he voluntarily leaves a part-time job.

The Supreme Court of Nebraska in *Gilbert* v. *Hanlon,* 214 Neb. 676, 335 N.W.2d 548 (1983), cited the following language found in the *Tomlin, supra,* case:

> If the claimant qualifies for full benefits in the absence of part time work, and for at least partial benefits when the claimant has part time work, then it makes no sense that should the optional part time work cease, for any reason, the claimant would become disqualified from any and all benefits.

The Nebraska Court went on to say, "We do not believe that the act requires an all or nothing interpretation as urged by the commissioner."

And, likewise, in *Unemployment Comp. Board of Review* v. *Fabric,* 24 Pa.C. 238, 354 A.2d 905 (1976), the Commonwealth Court of Pennsylvania held that when a claimant voluntarily leaves part-time employment, he is rendered ineligible for further benefits only to the extent that his benefits were decreased by virtue of his part-time earnings. The Pennsylvania court reached its holding through an interpretation of the statute which disqualifies a claimant whose "unemployment" is due to voluntarily leaving work without cause of necessitious and compelling nature and the statutory definition of "unemployment". The court concluded that:

> [T]he part-time job must have . . . decreased the amount of the weekly benefits payable before a claimant can be denied any benefits because of a voluntary separation. Under the statutory definition, a claimant is only "unemployed" due to his voluntary separation to the extent of the wages he was earning; and we see no provision in the Act which requires or authorizes the Board to deny *all* of claimant's benefits.

The District Court of Appeal of Florida relied upon the Pennsylvania Court's decision in *Fabric, supra,* to reach its

decision in *Neese* v. *Sizzler Family Steak House,* 404 So.2d 371 (Fla. 1981). The court in *Neese* enunciated three reasons for its liberal interpretation of the governing statute:

(1) The statute should not be interpreted in such a manner that it discourages part-time employment since part-time wages help to provide for claimants and their families during a time of unemployment and because part-time wages, in some instances, reduce the amount of benefits a claimant is entitled to and therefore reduces the compensation fund's liability.

(2) The legislature clearly stated that the purpose of the act is to lighten the economic burden on unemployed worker and his family. The elimination of benefits solely because a claimant voluntarily accepts a part-time job which he later quits does not further this purpose.

(3) To deny all benefits to claimants who would otherwise be eligible to receive them except for the fact that they voluntarily left a part-time job would result in an unwarranted benefit to a claimant's former full-time employer in the form of reduced contribution rate.

We are in agreement with the rule expressed in the above-cited cases. Therefore, we hold that a claimant who voluntarily leaves part-time employment is ineligible for further unemployment benefits only to the extent that his benefits would have been decreased by his part-time wages.

Turning to the case at bar, appellant testified that she quit her work when her hours were changed to three hours on Monday and two hours on two evenings a week for a total of seven hours a week. Appellant also stated that she could work up to eleven hours a week without having her part-time wages cause a reduction in her unemployment benefits. She did, however, testify that her benefits were reduced during two weeks of her five weeks of part-time employment. The employer-representative testified as follows at the hearing:

> The first four [weeks] that she worked were considered training, and they always . . . allow you more hours for

> training periods than what the person would normally work during the rest of the time.

It, therefore, appears from the record that had appellant continued her part-time employment, she would have worked an average of seven hours a week at minimum wage ($2.95 per hour as of March, 1983) which would have earned her a total of $20.65 per week. The record contains a copy of appellant's monetary benefit determination showing that appellant was entitled to receive $95.00 per week in extended benefits. It follows that appellant could earn up to $38.00 ($95.00 x 40%) without causing a reduction in her benefit amount. Since appellant could have expected to earn only $20.65 a week, her part-time wages would have had no effect on her unemployment benefits.

We therefore reverse and remand this case for the entering of an order awarding appellant benefits in accordance with this opinion.

Affirmed in part, reversed and remanded in part.

CLONINGER and CRACRAFT, JJ., agree.

Denver FLETCHER *v.* FARM BUREAU INSURANCE COMPANY

CA 83-266 661 S.W.2d 431

Court of Appeals of Arkansas
Division II
Opinion delivered November 30, 1983

Odom, Elliott, Lee & Martin, by: *Mark L. Martin,* for appellant.

Friday, Eldredge & Clark, by: *Frederick S. Ursery,* for appellee.

TOM GLAZE, Judge. Appellant appeals the Workers' Compensation Commission decision denying him benefits. He asserts the Commission erred (1) in finding his injury did not arise out of and in the course of his employment, and (2) in denying his petition to introduce new evidence. We disagree and therefore affirm the Commission's decision.

Appellant's basic claim is that he was exposed to large amounts of formaldehyde from the wall paneling in his new office into which he moved on September 1, 1975, and that exposure led to allergy problems which have rendered him totally and permanently disabled. He denied having any allergies or symptoms prior to moving into the new Farm Bureau office. Upon medical advice, appellant left his office in August, 1978, and continued his work as an insurance adjuster for appellee at his home. He either quit or was terminated from his employment in August, 1979, and has not worked since.

In a seventeen-page opinion, the Administrative Law Judge tracked the relevant evidence in detail and concluded it was in sharp conflict concerning the origin and cause of appellant's allergy problems. For example, appellant never recalled being treated for allergies prior to September 1, 1975 (when he moved to his new office), but his family physician testified that on April 28, 1975, he had treated appellant for an allergic reaction involving post-nasal drainage. In addition, the medical testimony offered by appellant and appellees was in sharp contrast. Dr. William Rea, testifying on appellant's behalf, concluded that appellant's exposure to the formaldehyde fumes in his office damaged his immune system so that he now is highly sensitive to almost everything in the environment. Dr. Rea's conclusion was largely contradicted by the other doctors testifying in this case. For instance, Dr. Edwin L. Harper noted appellant's treatment for allergy problems prior to the formaldehyde exposure, which lead him to believe other allergies — besides the formaldehyde irritant — had contributed to appellant's condition. In fact, Harper believed any of appellant's

symptoms caused by formaldehyde would have ended six months after he left his office in August, 1978. Another doctor, Kelsey Caplinger, whose medical practice is confined to allergy and immunology, was critical of Dr. Rea's testing protocol and referred to Rea's treatment of appellant as "unconventional." Dr. Caplinger concluded that appellant's condition was not produced by formaldehyde exposure. Other doctors testified concerning their treatment or evaluation of appellant, and none of their testimonies established that appellant's symptomology or condition was caused by formaldehyde exposure.

Of course, the Commission's duty is to weigh medical evidence as it does other evidence. We have held that when medical testimony is conflicting, the resolution of the conflict is a question 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. *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981). If the Commission had accepted Dr. Rea's opinion and believed appellant's version of what caused his condition, the Commission certainly could have held appellant's claim work-related and compensable. Instead, the Commission viewed Dr. Rea's testimony as lacking in credibility and surmised from the other evidence presented that appellant's symptoms arose out of an allergy condition he had suffered prior to his exposure to formaldehyde. In sum, we believe the evidence substantially supports the Commission's finding that appellant failed to show by the preponderance of credible evidence that his condition was work-related.

Appellant's second contention for reversal is that the Commission erred in failing to allow the introduction of new evidence to rebut evidence (an exhibit) placed into the record by the Administrative Law Judge after the final hearing was held in this cause on July 2, 1981. The case was actually submitted to the Law Judge sometime after December 10, 1981. The exhibit in question is a regulation, 29 C.F.R. § 1910.1000, Table Z-2 (July 1, 1981), which reflects the OSHA ceiling levels for formaldehyde exposure. On his appeal to the Commission, appellant sought to introduce

into evidence an M.I.T. study on the relationship between formaldehyde and cancer. The Commission ruled the study was inadmissible, and appellant duly proffered it, stating the study rebutted and discredited the OSHA levels set out in the C.F.R. regulation admitted into evidence by the Administrative Law Judge. We agree with the Commission, and in doing so, we first observe that appellant simply was not prejudiced by the admission of the C.F.R. regulation, and consequently the regulation in no way served as a basis to admit the M.I.T. study as "rebuttal evidence." The OSHA ceiling levels for formaldehyde — to which appellant takes exception — is not only set out in the C.F.R. regulation admitted by the Law Judge as an exhibit; that same maximum formaldehyde level information was fully set forth in a National Institute for Occupational Safety and Health (NIOSH) report that had been introduced by the appellant *before* this case was submitted to the Law Judge for decision.[1] In brief, the C.F.R. regulation admitted by the Law Judge served as the citation of authority for the maximum formaldehyde level information contained in the NIOSH report which already was made a part of the record *by the appellant.*

Although appellant does not argue that the M.I.T. study is newly discovered evidence, we dispose of that issue as a possibility for admission as well. Both the NIOSH report and M.I.T. study were dated April, 1981; however, the NIOSH report was timely submitted into evidence prior to submission of the case to the Law Judge, but the M.I.T. study was not. Clearly, the study was neither newly discovered evidence nor admissible as such.

In sum, the C.F.R. regulation was made a part of the record in this case by the appellant's introduction of the NIOSH report, and its admission into evidence occurred prior to the Law Judge's taking this matter under submission. We fail to see how appellant can complain of the

[1]Appellee argues this case was submitted to the Administrative Law Judge in January, 1982. The record reveals the case was submitted at least after December 10, 1981, which is the date Dr. Caplinger was deposed by the parties; the NIOSH report was introduced at this same time.

Law Judge's making the C.F.R. regulation a separate exhibit to the record when that regulation was contained in and was an integral part of the NIOSH report which he had introduced earlier in the proceeding.

We affirm.

Affirmed.

MAYFIELD, C.J., and COOPER, J., agree.

James D. BREWER *v.* TYSON FOODS, INC. et al

CA 83-273 661 S.W.2d 423

Court of Appeals of Arkansas
Division I
Opinion delivered November 30, 1983

Ronald C. McCann, for appellant.

Bassett Law Firm, by: *Wm. Robert Still, Jr.,* for appellees.

TOM GLAZE, Judge. In this Workers' Compensation case, the Commission denied appellant's claim for benefits. We do not reach appellant's contention that the Commission's findings and decision are not supported by substantial evidence because we reverse for another reason.

Appellee, Tyson Foods, initially accepted appellant's claim that he suffered a compensable back injury. It later denied benefits after learning appellant had suffered a back injury before working for Tyson, but had applied for employment with Tyson without disclosing his prior injury. Appellant subsequently filed his claim for benefits, but the administrative law judge, relying on *Shippers Transport of Georgia* v. *Stepp,* 265 Ark. 365, 578 S.W.2d 232 (1979), denied benefits, finding that appellant willfully misrepresented his physical condition, and that the misrepresentation was a substantial factor on which appellee relied in hiring appellant. The Commission reversed the judge's decision, holding it had misapplied the *Shippers Transport of Georgia* v. *Stepp* decision and remanded the case for further proceedings on the entitlement of benefits issue.

At the second hearing before the law judge, appellant's claim was again denied, but on this occasion the law judge considered two documents that had not previously been introduced into evidence. In fact, after the Judge conducted his final hearing in this case, he notified the parties that he intended to make the documents a part of the record and solicited their comments on the matter. In response, appellant objected, stating that the parties had agreed at the end of the last hearing that the record was complete; however, if the judge decided to admit the two documents into evidence, appellant requested a hearing to present additional evidence concerning them. The judge overruled appellant's objection, including his request for a hearing. In support of his ruling, the judge reasoned that the Commission was not bound by technical or statutory rules of evidence and

procedure, and besides, the documents had been in the Commission's file for two years, readily available to both the appellant and appellee. Upon its *de novo* review, the Commission affirmed the law judge's findings and denied appellant benefits.

The documents in question are a claim form and hospital insurance form; each has an "X" typed into a box indicating that appellant's injury was not related to his job at Tyson Foods. In its argument, Tyson admits the documents are relevant to the work-relation issue but contends the law judge and Commission did not rely on those documents in their decisions. We simply cannot agree with that contention. Neither the judge nor the Commission indicated they did not consider the documents in denying benefits to appellant, and in fact, they indicated just the opposite. The Commission conducted a *de novo* review, and we must presume it considered all the evidence in the record. Also, as was the law judge's, the Commission's decision was based, at least in part, on the credibility (or lack thereof) of the appellant's testimony. The documents clearly bore on that issue of credibility since the Commission apparently disbelieved appellant's story that he suffered his back injury while employed at Tyson.

We agree, of course, that the compensation law provides that the Commission is not bound by technical rules of evidence or procedure, but may "conduct the hearing in a manner as will best ascertain the rights of the parties." *St. Paul Insurance Co.* v. *Touzin,* 267 Ark. 539, 592 S.W.2d 447 (1980); and *Davis* v. *C & M Tractor Co.,* 4 Ark. App. 34, 627 S.W.2d 561 (1982); Ark. Stat. Ann. § 81-1327 (Repl. 1976). However, the fact-finders are expected to adhere to basic rules of fair play, such as recognizing the right of cross-examination and the necessity of having all the evidence in the record. *St. Paul Insurance Co.* v. *Touzin, supra.* Here, the appellant was effectively denied a hearing concerning the documents admitted and considered by the law judge and was thereby precluded from cross-examining the individuals who completed the two exhibits. It was only after the conclusion of the final hearing before the law judge that appellant was apprised that the two documents would

be considered in the judge's determination of appellant's claim for benefits. Although these two exhibits had been in the Commission's file, they had never been introduced or made a part of the record until the law judge's belated decision to admit them.

In *Potlatch Forests* v. *Funk,* 239 Ark. 330, 389 S.W.2d 237 (1965), the Supreme Court upheld the admission of a doctor's opinion letter, but it did so because the doctor subsequently appeared as a witness and the appellant was afforded the opportunity to cross-examine. In a later case, *Browning's Restaurant* v. *Kuykendall,* 263 Ark. 374, 565 S.W.2d 33 (1978), the Court rejected appellant's argument that the Commission erred in admitting into evidence a doctor's letter written subsequent to the findings of the administrative law judge; however, it found no merit in appellant's argument because the Commission specifically stated the doctor's letter was disregarded for the purposes of arriving at its decision.

As we have previously noted, appellant was denied any opportunity to cross-examine or to be heard concerning the two relevant documents. The Commission did not indicate, nor can we assume, that it did not consider these documents in reaching its decision. Therefore, we reverse and remand this cause for further proceedings consistent with this opinion.

Reversed and remanded.

CRACRAFT and COOPER, JJ., agree.

ARKANSAS LOUISIANA GAS COMPANY and UNITED STATES FIDELITY & GUARANTY COMPANY *v.* Jerry GROOMS

CA 83-212 661 S.W.2d 433

Court of Appeals of Arkansas
Division I
Opinion delivered December 7, 1983

Bridges, Young, Matthews, Holmes & Drake, by: *Michael J. Dennis,* for appellants.

Kenneth E. Buckner, for appellee.

GEORGE K. CRACRAFT, Judge. Arkansas Louisiana Gas Company and United States Fidelity & Guaranty Company, its carrier, appeal from a ruling of the Workers' Compensation Commission that Jerry Grooms' claim for disability benefits was not barred by the two year limitation of Ark. Stat. Ann. § 81-1318 (Repl. 1976). They contend first that the Administrative Law Judge erred in withdrawing *sua sponte* a stipulation of the parties as to the date of "injury" and in basing his decision on a principle of law not advanced or relied on by either party, and secondly that the Commission exceeded its authority in affirming these actions of the Administrative Law Judge. We agree.

The narrow issues presented in this appeal can be brought into focus only by a recitation of the course of the

proceedings. The pertinent facts leading up to the hearing were not in dispute. On August 25, 1977 the appellee hurt his lower back when he was pinned against a truck while unloading pipe for Arkla and the employer was immediately notified. The appellee was treated on one occasion by Dr. Paulk who gave him a shot of cortisone and he returned to work after two weeks. He was paid full wages during that two week period and the carrier promptly paid Dr. Paulk's bill of $33.00.

The appellee then worked full time and received full wages from that date until September 21, 1979 when he was operated on by Dr. Adametz to remove a ruptured disk. The carrier promptly notified appellee that it denied liability for the surgery and other benefits under the Workers' Compensation Act pursuant to Ark. Stat. Ann. § 81-1318 which provides that a claim for disability on account of injury shall be barred if not filed with the Commission within two years of the injury.

The appellee returned to work in January 1980 but his back condition forced him to stop work completely on June 18, 1980. Despite the fact that he missed many days of work during this period he was paid full wages until that date. He did not file his claim for benefits under the Act until March 26, 1981 — more than three and a half years after the August 1977 incident.

At the hearing it was stipulated that appellee "sustained an injury on August 25, 1977," the carrier had paid the medical bill of $33.00 and, if the Statute of Limitations had not run, appellee would be entitled to maximum benefits. The parties stated their respective contentions, which were accurately recited by the Administrative Law Judge in his opinion as follows:

> Claimant contends: (1) he received an injury arising out of and in the course of his employment in August, 1977; (2) as a result of this injury he had back surgery, a laminectomy, in September, 1979; (3) a workers' compensation claim was filed on March 26, 1981; (4) payment by or through respondent employer

> of sickness and accident insurance plan benefits in lieu of workers' compensation benefits has tolled the statute of limitations; . . . .
>
> Respondent contends: (1) Ark. Stat. Ann. § 81-1318 (Repl. 1976 and Supp. 1981) bars this claim; (2) claimant is now receiving $418.59 per month in sickness and accident insurance plan benefits; (3) under the policy terms claimant will receive this amount until May 1, 2011; (4) if the statute of limitations does not bar this claim, respondents are entitled to a credit for all sickness and accident benefits already paid and to be paid in the future, so that no workers' compensation benefits are now owed or will ever be owed to claimant; . . .

It was further stipulated that the only issue to be decided at this hearing was the question of the tolling of the Statute of Limitations by payment of sickness and accident benefits under the plan. If it was found that the statute had not run the parties would then present evidence on the remaining issues. The appellee testified that from the time of the 1977 incident to his operation in 1979 he had been treated weekly by Dr. Carter of Sheridan and that his bills for those services had been submitted to and were paid by a private employer/employee benefits plan provided by Arkla under which 90% of the medical expense was paid by the plan and the balance by appellee. He testified that he received full pay from Arkla from the date of the 1977 incident until June 1980 when he received a monthly gratuity check in the amount of $388.00 under the private plan and that he began to draw "retirement pay" in the amount of $418.59 under that plan beginning December 1980.

Arkla offered evidence to prove that no bills, either for Dr. Carter or anyone else, were submitted to either the carrier or the Pension Plan from August 1977 through September 1979 when the operation was performed, and that the medical expense for the September 1979 operation was submitted to and paid by that Plan.

The appellee, relying on *Mohawk Tire & Rubber Company* v. *Brider,* 257 Ark. 587, 518 S.W.2d 499 (1975),

contended that the payments during the 1977 to 1979 period from the private employer/employee benefit plan tolled the statute. Appellant argued that no such payments had been made by the Plan but that if payments had been made it was entitled to credit for all such payments against future compenstion as provided in Ark. Stat. Ann. § 81-1319 (m) (Repl. 1976).

The Administrative Law Judge ruled that appellant was not entitled to credit for any amounts paid claimant under the private employer/employee benefits insurance plan as there was no evidence that either party intended that these payments constitute payments of compensation in advance as provided by § 81-1319 (m). The Commission correctly affirmed the ruling of the Administrative Law Judge on this point. *Emerson Electric* v. *Cargile,* 5 Ark. App. 123, 633 S.W.2d 389 (1982); *Southwestern Bell Tel. Co.* v. *Siegler,* 240 Ark. 132, 398 S.W.2d 531 (1966); *Looney* v. *Sears Roebuck,* 236 Ark. 868, 371 S.W.2d 6 (1963). No appeal is taken from that ruling.

On the issue on which the controversy was submitted the Administrative Law Judge concluded that whether Dr. Carter's bills had been paid by the employer was immaterial and made no finding on that issue. He based this conclusion on the finding that "although the *accident* in issue occurred in August of 1977 the *in jury* occurred less than two years before the March 26, 1981 filing of the claim, so the Statute of Limitations had not run." The Full Commission affirmed the Administrative Law Judge's ruling in the following language:

> Regarding the Statute of Limitations question, we are unable to distinguish this case factually or in principle from the cases cited and relied on by the Administrative Law Judge. *Donaldson* v. *Calvert-McBride Printing Co.,* 217 Ark. 625, 232 S.W.2d 651 (1950); *Woodard* v. *ITT Higbie Mfg. Co.,* 271 Ark. 498, 609 S.W.2d 114 (Ark. App. 1980).

Donaldson and *Woodard* differ from each other both as to facts and principles applied. *Donaldson* deals with the

question of when an injury becomes compensable and starts the period of limitations running. *Woodard* is concerned with the tolling of limitations once it has begun to run. We cannot tell from the opinion which of these cases was the basis for the Commission's decision but we conclude that it was error to apply either of them in the circumstances of this case.

Reference to three sections of our Workers' Compensation Act is required for an understanding of the decision in *Donaldson*. Ark. Stat. Ann. § 81-1318 (a) (Repl. 1976) provides:

> Filing of claims. — (a) Time for filing. (1) A claim for compensation for disability on account of an injury (other than an occupational disease and occupational infection) shall be barred unless filed with the Commission within two [2] years from the date of the injury.
>
> [At the time *Donaldson* was decided the limitations period was one year.]

Ark. Stat. Ann. § 81-1302 (e) (Repl. 1976):

> (e) "Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury.

Ark. Stat. Ann. § 81-1310 (a) (Repl. 1976):

> (a) Disability. Compensation to the injured employee shall not be allowed for the first seven (7) days disability resulting from injury, excluding the day of injury. If a disability extends beyond that period, compensation shall commence with the ninth (9th) day of disability. If a disability extends for a period of two (2) weeks, compensation shall be allowed beginning the first day of disability, excluding the day of injury.

In *Donaldson* the worker was hurt on the job on March 10, 1947 and he returned to work within one week. He was

paid no compensation under the Act during that week's disability as none was required under § 81-1310 (a). The employer did pay a $25.00 medical bill. He continued to work for the same wages until his deteriorating condition required that he be given a lighter job at lower wages in October 1948. In March 1949 surgery was performed upon him which was attributable to his initial injury of March 1947. His claim for compensation was filed on May 24, 1947. The court rejected the contention that the Statute of Limitations began to run from the date of the March 10, 1947 incident pointing out that "injury" as used in § 81-1318 does not mean the date of the "accident" but the date on which the injury becomes a compensable one. The court there held that the worker's injury did not become compensable on March 10, 1947 because his loss of ability to earn wages due to disability had not continued for the period required in § 81-1310. The statute did not begin to run until October 1948 when he suffered his first wage loss due to the injury by reduction in pay which did continue for the requisite period. With respect to the payment of an initial medical bill for a noncompensable injury the court said:

> Obviously this medical payment was not and could not have been a payment of compensation . . . on account of such injury (compensable injury) . . . .

This court reached that same result in *Shepherd* v. *Easterling Const. Co.*, 7 Ark. App. 192, 646 S.W.2d 37 (1983) where the worker injured his knee in May of 1978, received only first aid, and continued to work. His medical bill of $92.25 as paid by the carrier. He lost no wages until September 19, 1979 when he became unable to perform his regular job due to difficulty with his knee which required surgery. Following *Donaldson* we held that the appellant's injury did not become a compensable one until he suffered a loss of earnings in September 1979 and that the two year Statute of Limitations did not commence running until that date. The clear holding in *Donaldson* and in *Shepherd* is that the Statute of Limitations provided in § 81-1318 (a) does not begin to run until the true extent of the injury manifests *and* causes an incapacity to earn the wages which the employee was receiving at the time of the accident, which

wage loss continued long enough to entitle him to benefits under § 81-1310.

In the case at bar the appellee, due to his August 25 injury, was incapacitated to earn the wages he was receiving at the time of his accident. This continued for a long enough period to entitle him to benefits under § 81-1310 (2 weeks). The fact that he was paid full wages during this period does not compel a different conclusion. Disability which is compensable under our statute is based upon *incapacity to earn* because of injury. The payment of full wages during a compensable disability does not negate the incapacity to earn but may, in proper circumstances, dispense with the requirement that compensation benefits be paid under § 81-1319 (m) (Repl. 1976).

We conclude that this appellee sustained a compensable injury within the meaning of Ark. Stat. Ann. § 81-1318 on August 25, 1977 and that the Administrative Law Judge and Commission erred in holding to the contrary. The Statute of Limitations began running at that time.

The fact that the initial injury was a compensable one within the meaning of the Act does not necessarily mean that the Statute of Limitations bars the claim at the end of two years from that date. Where the full extent and nature of the injury are not known, nor reasonably ought to be known, until a later date, the running of the Statute of Limitations may be postponed under the "latent injury rule" in *Woodard.*

In *Woodard* the worker sustained a compensable injury for which he was paid benefits under the Act. The full extent of the injury, however, did not become known until the period of limitations had run from the date of the injury and the date of the last payment of compensation. There this court in allowing the claim applied the rule that the claimant is not required under this Statute of Limitations to file his claim until the substantial character of the injury becomes known or until the employee knows or should reasonably be expected to be aware of the full extent or nature of his injury. In the earlier cases of *T. J. Moss Tie &*

Timber Co. v. *Martin,* 220 Ark. 265, 247 S.W.2d 198 (1952) and *Sanderson & Porter* v. *Crow,* 214 Ark. 416, 216 S.W.2d 796 (1949) this latent injury exception had been recognized and applied. It was recognized most recently by the Supreme Court in *Cornish Welding Shop* v. *Galbraith,* 278 Ark. 185, 644 S.W.2d 926 (1983) where the court found the rule to be inapplicable to the facts.

If, as appellant suggests, the Administrative Law Judge and Commission relied on *Woodard,* we must agree with the appellant that this was erroneous for an entirely different reason. In *Woodard* the court held that the claim was not barred by the Statute of Limitations where it was not proved that the appellant knew or should have known the nature and extent of his injury more than two years prior to filing his claim. In *Cornish Welding Shop* v. *Galbraith, supra,* however, the Supreme Court held that the claim was barred where the evidence disclosed that the substantial nature of the injury was known more than two years before the filing of the claim. It is clear from these cases that if the employer can show to the satisfaction of the Commission that the appellee knew the substantial nature of the injury or that he should reasonably be expected to have been aware of the extent and nature of his injury for more than two years his claim would be barred.

It is also clear from the statements of counsel in the record and the contentions of the parties as recited by the Administrative Law Judge that the case was submitted on an agreement that it would be determined on a finding as to whether the Statute of Limitations was tolled by the payment of Dr. Carter's medical expenses within the two years preceding the date of filing the claim. Whether the statute was tolled because of the latent nature of the injury and appellee's lack of awareness of the extent and nature of it was not an issue and was not developed at the hearing. With the clear statement of counsel that the issue to be presented was whether the Statute of Limitations had been tolled by the payment of compensation within the statutory period, the decision by the Administrative Law Judge based upon a finding of fact on an issue not submitted or developed by either party effectively denied the employer the right to be

heard on that issue. It is also clear from the record that the decision of the employer not to introduce evidence of medical witnesses allegedly treating appellee during the period in question was based on the stipulation to narrow the issues to those recited by the Administrative Law Judge in his opinion. When the diagnosis was made or became apparent or when the appellee knew or ought to have known the extent of his injury was not developed or submitted for determination.

Had the issue of latent injury been fully developed by the parties despite the stipulations narrowing the issues a different question would be presented. However, this record discloses that it was not. We fully recognize that the function of the Commission is to conduct a fair and impartial hearing in a manner that will best ascertain the rights of the parties and that pleading and practice before the Commission is less formal and not governed by the stricter rules of procedure applicable to courts. Ark. Stat. Ann. § 81-1327 (Supp. 1983). Subject to its own rules the Commission is given great latitude in this area. We do not mean to imply otherwise but we hold only that the Commission erred under the circumstances of this case when it based its decision on a finding of fact which was clearly not in issue or developed by the evidence without notice to the parties of its intent to do so and no opportunity to offer proof on that issue was afforded. *Glavin* v. *Michigan State Hwy. Dept.*, 269 Mich. 672, 257 N.W. 753 (1934); 100 CJS Workers' Compensation § 648, p. 959.

Reversed and remanded.

COOPER and GLAZE, JJ., agree.

Joy BARRETT *v.* ARKANSAS REHABILITATION SERVICES

CA 83-214 661 S.W.2d 439

Court of Appeals of Arkansas
Division I
Opinion delivered December 7, 1983

Odom, Elliott, Lee & Martin, by: *Mark L. Martin,* for appellant.

David B. Simmons, E. Diane Graham and *Jerry G. James,* Public Employee Claims Division, for appellee.

GEORGE K. CRACRAFT, Judge. Joy Barrett appeals from a determination by the Workers' Compensation Commission that she had failed in her burden of proving that her disability due to mental illness arose out of and in the course of her employment with Arkansas Rehabilitation Services. She contends that the decision of the Commission is not supported by substantial evidence, that a contrary conclusion was supported by both the lay and medical evidence, and that the Commission erred in failing to resolve all reasonable doubts in favor of the appellant. We do not agree.

In *Owens* v. *Nat'l Health Laboratories, Inc.,* 8 Ark. App. 92, 648 S.W.2d 829 (1983) we declared the appropriate standard for determining compensability of nontraumatically induced mental illness which is alleged to have resulted from the individual's work. Where psychological injury results from nontraumatically induced events, the worker must show more than the ordinary day to day job stress to which all workers are subjected. We also pointed out that whether the stress was more than ordinary and the psychological injury was causally connected to it or aggravated by it were questions of fact for the Commission to determine.

On appellate review of Workers' Compensation cases the evidence is viewed in the light most favorable to the findings of the Commission and given its strongest probative value in favor of its order. The issue is not whether we might have reached a different result or whether the evidence

would have supported a contrary finding. The extent of our inquiry is to determine if the finding of the Commission is supported by substantial evidence. Even where a preponderance of the evidence might indicate a contrary result we would affirm if reasonable minds could reach the Commission's conclusion. *Bankston* v. *Prime West Corp.*, 271 Ark. 727, 601 S.W.2d 586 (Ark. App. 1981); *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1970).

The appellant was a forty-four year old woman with a twenty year history of mental illness. She was employed by the appellee as a case worker from the fall of 1980 until the spring of 1982. On several occasions in 1981 and in early 1982 the appellant was hospitalized for physical problems as well as for mental depression. She was terminated from her employment in April 1982 and then filed a claim for workers' compensation benefits contending that she had suffered a compensable mental injury as a result of job stress endured as a case worker for the appellee. She contended that as a case worker she was under tremendous job stress, that her job duties were overwhelming, that she appealed to the supervisors for assistance but received none, that her case load increased so much that she could not keep up with it, and as a direct result of job stress and pressure her previous mental illness was so aggravated as to become disabling. The appellee contended that the illness was not job connected, that any problems appellant had were a result of her longstanding mental illness, and that current problems were nothing more than a continuation of earlier ones.

The appellant testified that her job duties were endless. She was responsible for picking up the patients at the hospital and placing them into training or other rehabilitation programs. In addition she had twenty children with open places in their spines who required monthly care and she had to visit the children's crippled service monthly and "purchase everything from diapers to wheelchairs." She stated that during the first year she had less than fifty clients and that the case load increased thereafter to almost a hundred. She complained about the paper work which required her to fill out from ten to thirty forms per client per month and this required her to work at home for a couple of

hours at night and to make her visits to her clients at night. She stated that she had never had a complaint that she had not provided the proper services.

Her complaints were also aimed at her supervisor. She testified that during the first year he would "cuss at the male counselors" and that she had never worked in a situation where this occurred. She stated that after the first year her supervisor began to criticize her for traveling too much and told her to stay in the office more. She stated that after she stayed in the office he told her she didn't travel enough. She stated that one of the supervisors had handled guns around her and she thought that he was becoming irritated with her and starting to harass her. She stated that on one occasion her supervisors had made her job more difficult by transferring her secretary who had been a great help to her. She stated that there was a great deal of tension between co-employees and that this too was stressful. When her case load increased she had gone to her supervisors for help but had received none. While admitting to family and financial problems, she stated that the job stress was "95 to 97% more stressful than any family or financial stress. I got swamped at work with all the rules and regulations, I received no help, there was constant tension in the office and there was harassment."

There was testimony from her supervisor that her case load did not increase during the period she worked for the rehabilitation service. He testified that her case load was no more than that of twelve other case workers employed by the service and that all other case workers had the same job duties as the appellant. He stated that appellant did complain to him after about a year that she felt her job was more than one person ought to be asked to do. He then tried to assist her in developing methods of doing her job more efficiently. In November of 1981 an assistant was assigned to appellant to get her caught up but this was "because the work had simply not been done, not that the work load was unmanageable." Additionally he had been receiving complaints from appellant's clients that services were not being performed. With regard to the reassignment of the secretary the supervisor testified that this was done at appellant's

request and that he had immediately given her the secretarial replacement she had requested. There was an immediate confict between the new secretary and the appellant and she wanted her former one back; that secretary refused to come back. There was other testimony tending to establish that the allegations of harassment and tension in the office existed only in appellant's mind and this was a manifestation of her illness, rather than a cause of it.

From our review of the lay testimony, of which the recited portion is merely a part, we cannot say that reasonable minds could not conclude that the appellant's job stress was no more than the ordinary stress to which all workers are subjected. Particularly is this apparent when her testimony and that of her co-workers is coupled with the evidence of her other emotional problems which existed during the first year of employment and which she initially told her doctors were causing her mental deterioration. In reviewing this testimony it is significant to note that both the appellant and her supervisors and co-workers testified that during the "first year" of her employment (fall of 1980 to the fall of 1981) she encountered little difficulty with her job duties and that her expression of those difficulties began "after the first year."

Appellant was hospitalized in June of 1981 and on several occasions after that and was seen by a number of doctors. In Dr. Simmons' report he recited that she had a history of depression of varying severity which extended over a period of twenty years, that she had been depressed for most of the past three years, and a few months ago the depression began to increase. He concluded that it was "apparently aggravated significantly by her fifteen year old daughter moving out of her house to the home of her ex-husband. She felt very rejected by this move . . . ." In an exhaustive history recited in Dr. Simmons' report he noted a strong family history of depression. No mention was made in this report of any expression by the appellant of job stress in connection with her depression.

Dr. Simmons referred her to Dr. Glover who recited again the history of her mental problems but stated that she

seemed to have functioned for the past several years without therapy until the last several months where increasing amounts of depressive symptoms occurred. He recited that "a couple of weeks ago when her fifteen year old daughter and she had an argument and her daughter moved out with her father this sort of *finally brought her depression to its full flower.*" Again there was no recitation in the history given the doctor of any job stress or emotional problems resulting from it.

During the period of hospitalization she was also seen by Dr. Howell, whose report also made no mention of job stress. The first mention of her job was contained in Dr. Johnson's report which contained a statement that she "is currently working as a counselor for the rehabilitation services at Hot Springs. She does not find this job *satisfying* either intellectually, emotionally or physically." A report made by Dr. Wanda Stephens in August 1981 also diagnosed her as having severe depressive neurosis but made no mention of appellant's job or any claimed job stress.

The appellant was again hospitalized for several weeks during July of 1981 and the history and discharge summary failed to reveal any claim of job stress although the diagnosis remained the same. The appellant was again hospitalized in January 1982. The report of Dr. Stephens indicated that she had been having difficulty "functioning on the job and had been under a lot of pressure due to *financial difficulties.*" There was no mention of any complaints about job stress. She was hospitalized again in February and again complained of not being able to function on the job but made no mention of job stress. The appellant relies heavily upon the depositions of Dr. Granger, Dr. Wanda Stephens and Dr. Jackson as establishing that the job stress aggravated the mental condition. The testimony of medical experts is an aid to the Commission in its duty to resolve issues of fact. It has a duty to use its experience and expertise in translating that testimony into findings of fact. *Bearden Lumber Co.* v. *Bond,* 7 Ark. App. 65, 644 S.W.2d 322 (1983). We cannot conclude that the Commission did not do so here or that reasonable minds could not conclude from the testimony of these doctors as a whole that they were not using the word

"aggravation" in the legal sense in which our cases impose liability.

Dr. Granger testified that he saw appellant for the first time during the February 1982 hospitalization at which time she stated that she had had problems with depression for over ten years and that on the third occasion he saw her she listed five problem areas that she was concerned about — *bankruptcy, marriage failure, parenting failure* with regard to her own children, friends that had let her down, and *extensive job dissatisfaction.* She had informed him that she was primarily upset about family relationships. With regard to job dissatisfaction, she expressed a distaste for the bureaucratic red tape and conflicts with her supervisor. The doctor stated, however, that from his observations of her he would expect her to have trouble with "interpersonal relationships among her co-workers." He clearly stated that his opinion as to aggravation of the condition was based on having seen her and having obtained the information from her.

Dr. Stephens had stated that the condition was aggravated by her work but she also testified "while I'm not saying her work was strenuous, her condition did cause the work to become strenuous. While it is possible any kind of work would have aggravated Ms. Barrett's problem, her job was demanding. I think, toward the end of the time Ms. Barrett worked, her job did aggravate her condition. Initially I don't think the job caused the symptoms but at the end the working did aggravate her symptoms. Her symptoms were compounded by the stress of her job, her visual problems, any alcohol or drugs she may have been using. Over a period of time her job did aggravate a preexisting condition but it wasn't the cause. The workload toward the end of her job aggravated her condition."

Dr. Jackson's conclusions were also based upon what she had told him as to the conditions under which she worked.

According to the medical reports mentioned herein and others contained in the record during her first three periods of hospitalization appellant was diagnosed has having a

serious mental problem which was considered by the doctors to have resulted from family and financial problems, her physical condition of hypoglycemia and complications resulting from a prior hysterectomy. She apparently did not mention during this period any connection of job stress with her illness. Her only mention of her job was an expression of dissatisfaction with it and the red tape involved. It was not until the hospitalization immediately before her termination that she made mention in her history of job stress. This was subsequent to a time when her illness had developed to such a point that one doctor had described it as a "feeling of inadequacy which caused her to blame her shortcomings and failures on others." The job stress factors to which these doctors used the word "aggravation" were those factors furnished to them by the appellant. There was substantial testimony from lay witnesses that these factors did not in fact exist.

From our review of the record as a whole we cannot say that reasonable minds could not have reached the conclusion reached by the Commission in this case.

Affirmed.

CORBIN and CLONINGER, JJ., agree.

Pete BROWN III *v.* Lola M. JOHNSON

CA 83-4 661 S.W.2d 443

Court of Appeals of Arkansas
En Banc
Opinion delivered December 7, 1983

[redacted]

Gibson & Bearden, by: *Michael R. Bearden* and *Stephen P. Hale,* for appellant.

Holland & Todd, by: *Michael E. Todd,* for appellee.

JAMES R. COOPER, Judge. The appellee, the maternal grandmother of Kevin Rea'l Brown, sought to adopt her grandson without the consent of the appellant, the child's natural father. The probate judge granted the petition for adoption, finding that the appellant's consent was unnecessary under Ark. Stat. Ann. § 56-207 (Supp. 1983). From that decision comes this appeal.

The appellant, Pete Brown III, was married to Lilly Brenda Brown on September 19, 1970. One child was born of this marriage on December 20, 1975. Less than one year after the birth of their child, Mrs. Brown filed for divorce. The appellant, who was working in Alaska, did not file an answer or otherwise contest the divorce. On December 14, 1976, a divorce decree was entered which awarded the appellant's ex-wife legal custody of the couple's minor child, Kevin Rea'l Brown, with reasonable visitation rights granted to the appellant.

On January 14, 1977, the appellee and her husband filed a petition for adoption of the child. The appellant intervened, contesting the adoption and the petition was subsequently dismissed.

Later that year, in December, 1977, the chancellor modified the original divorce decree to award physical custody of the child to the appellee and her husband, who were the parents of the child's natural mother. During this proceeding, the appellant agreed to make child support

payments of $100.00 per month through the registry of the court. The chancellor also established definite visitation rights for the appellant, awarding him temporary custody of the child for thirty days in June of every year and one week during the Christmas holidays every other year beginning in 1978.

On June 1, 1978, the appellant filed a petition against the natural mother, the appellee and the appellee's husband for contempt of court. The appellant alleged that these persons had failed to comply with the court's order because they had prevented the appellant from exercising his visitation rights. The following day, June 2, 1978, the chancellor entered an order allowing the appellant to visit with his son for thirty days beginning on June 15, 1978. As a result, the contempt petition was dismissed by the mutual agreement of the parties.

On November 3, 1980, the appellee filed a second petition for adoption. The natural mother had already consented to the adoption and waived notice of all proceedings or hearings. The motion to dismiss, which stated that the appellee had failed to comply with the Uniform Adoption Statutes, was never acted upon.

On July 6, 1981, the appellant again filed a motion for contempt of court against the appellee for her failure to allow the appellant to have his child for the thirty day visitation period in June, 1981. The appellee responded by denying the charges and additionally filing a separate petition to have the divorce decree modified to reflect that the appellant was not the natural father of the minor child. In seeking a modification, the appellee additionally requested that the appellant be ordered to take a physical exam to determine paternity. A settlement was arranged between the parties and the actions were dismissed. The contempt action was dismissed on the condition that the appellant be allowed to visit his child, outside of the presence of the appellee, during the Labor Day weekend.

On November 19, 1981, the appellee filed an amended petition for adoption, which stated that the consent of the

appellant was not required because the appellant failed significantly, without justifiable cause, to not only communicate with the child, but to provide child support for a period of one year. In his answer to the amended petition, the appellant affirmatively stated his consent was required because he had justifiable cause in not seeing or supporting his child. The appellant argued that he had been prevented from exercising his rights and providing support because of actions by the appellee.

On August 23, 1982, a hearing was held on the adoption petition. After hearing the evidence, the probate judge found the appellant's consent was not required under Ark. Stat. Ann. § 56-207 (Supp. 1983). The probate judge granted the adoption.

The appellant argues that the probate judge erred in finding that the appellant had failed significantly, without justifiable cause, to both communicate with his minor son and to provide child support for his son from February 12, 1979 through December 31, 1980. We disagree.

Generally, in order for a valid adoption to be granted, the natural parents of the child must consent. *See* Ark. Stat. Ann. § 56-201 (Supp. 1983). However, there are certain statutory exceptions to this general rule. Arkansas Statutes Annotated § 56-207 (a) (2) (Supp. 1983) provides:

> Consent to adoption is not required of 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;

Although this revised act has eliminated many of the more stringent requirements for adoption without consent, the statute is still to be strictly construed and applied. *Roberts* v. *Swim,* 268 Ark. 917, 597 S.W.2d 840 (1980). *See also Henson* v. *Money,* 273 Ark. 203, 617 S.W.2d 367 (1981).

To avail herself of the provision (a) (2) of Ark. Stat. Ann. § 56-207 (Supp. 1983), the appellee was required to establish

all of the above mentioned factors by clear and convincing evidence. In *Watkins* v. *Dudgeon,* 270 Ark. 516, 606 S.W.2d 78 (Ark. App. 1980), this Court stated:

> Like the court below, we recognize the heavy burden which the law places upon one wishing to adopt a child against the consent of a parent. *Roberts* v. *Swim, supra.* We also recognize that other things being equal the law favors natural parents over others in custody cases. However, the rights of parents are not proprietary and are subject to their correlated duty to care for and protect the child; and the law secures the preferential rights of parents only so long as they discharge their obligations. Parental rights are not to be enforced to the detriment or destruction of the happiness and well being of the child. [Citation omitted.]

See also Loveless v. *May,* 278 Ark. 127, 644 S.W.2d 261 (1983); *Woodson* v. *Lee,* 221 Ark. 517, 254 S.W.2d 326 (1953).

In the case at bar, the appellant argues that his failure to communicate with his son and pay child support was justified because of the appellee's actions. The appellant testified that in December, 1978, he came to Arkansas to visit his son at Christmas. After being unable to locate his son and the appellee, the appellant spoke with his ex-wife and his ex-wife's boyfriend, Charles Elliot. Mr. Elliot told the appellant that the appellee had moved and he thought that she was in Missouri visiting relatives. In September, 1979, the appellant again came to Arkansas to try and find his son and the appellee, but he was unsuccessful in locating them.

The appellant argues that his failure to pay child support payments between February, 1979 and December, 1980 was due to the fact that he was unable to locate the appellee. The appellant testified that he had received one letter back from the Post Office because it was not the correct address, but had not brought the returned letter with him to court. The address on the letter was the one the clerk's office had on its records. The appellant testified that he did not begin payments again until after the second adoption

petition was filed because it was only then that he knew where his son and the appellee were living. All of the payments received after the filing of the adoption petition were refused by the appellee, although the appellee has allowed the appellant to see his son.

The appellant also testified that during 1979 and 1980 he encountered financial difficulties. Although the evidence indicated that he was employed for the majority of this period, the appellant testified that in the construction business, work is not always steady. As a result, the appellant argued that he could not come back to Arkansas from Arizona or Alaska as often as he preferred from 1979 through 1981.

The appellee testified that after her husband died in August, 1978, she moved from Manila to Blytheville. Although she moved in October, 1978, she was not in her new home until November, 1978, because she took a trip to Chicago for a few weeks. In May, 1979, the appellee moved to Walnut Ridge and has remained at that address since that time. The appellee admitted that she did not tell the appellant where she was moving, but claimed that she failed to do so because she did not know the appellant's whereabouts. The appellee testified that the court always knew where she lived and that her mail was forwarded from her old address each time she moved. The court clerk's records show that a change of address to Walnut Ridge was not made until December 23, 1980. The appellant's ex-wife testified that the appellant knew where she was living and could have contacted her concerning where their son and the appellee were living but failed to do so.

In adoption proceedings, this Court reviews the record *de novo,* but we will not reverse the probate judge's decision unless it is clearly erroneous or against a preponderance of the evidence, after giving due regard to his opportunity to determine the credibility of the witnesses. *Henson* v. *Money, supra. See also Loveless* v. *May, supra.* After reviewing the evidence as required, we cannot find that the probate judge's decision was clearly erroneous. Even assuming, *arguendo,* that we were to determine that the appellant had justifiable

excuse for not communicating with his son, we could not make the same finding concerning the appellant's failure to pay child support. In *Henson* v. *Money, supra,* the Arkansas Supreme Court, in granting the adoption over the objection of the father, stated that "[t]he duty to pay child support is independent of the duty of the custodial parent to allow visitation, as both may be enforced by the courts." In the case at bar, the appellant had previously agreed, when physical custody was given to the appellee, to support his son by payments to be made through the registry of the court. The court clerk's records indicate that no payments were received from February 1979 through December, 1980. Additionally, it appears from the record that the only time the appellant demonstrated any interest in his son was when adoption petitions were filed by the appellee. In *Pender* v. *McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979), the Arkansas Supreme Court, noting that the majority of the contributions made by the father appeared to have been made because of some form of compulsion or because of the pendency of the adoption proceeding, stated:

> The parent must furnish the support and maintenance himself and the duty is a personal one, and he may not rely upon assurance that someone else is properly supporting and maintaining the child to avoid the impact of the statute's providing for adoption of his child without his consent because of his failure to support the child. . . . The father's duty to support his minor child cannot be excused on the basis of the conduct of others, unless that conduct prevents him from performing his duty.

Since we do not find justifiable cause for the appellant's failure to meet his obligations to his son by making payments through the registry of the court, we affirm the probate judge's decision to grant the appellee's petition for adoption.

Affirmed.

GLAZE, J., dissents.

TOM GLAZE, Judge, dissenting. I dissent. The facts and holding in this case merely reemphasize what I had to say in my dissent in *Dodson* v. *Donaldson,* 10 Ark. App. 64, 661 S.W.2d 425 (1983). As in *Dodson,* this adoption proceeding emanates from a divorce action, but the instant case differs in that it involves a dispute between the maternal grandmother and the child's father instead of a direct confrontation between ex-spouses. In Affirming the trial court's decision, I quickly note the majority relies on *Henson* v. *Money,* 273 Ark. 203, 617 S.W.2d 367 (1981), and *Pender* v. *McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979), but fails to mention *Harper* v. *Caskin,* 265 Ark. 558, 580 S.W.2d 176 (1979). In my dissent in *Dodson* v. *Donaldson, supra,* I dealt with the significance of choosing between these cases when arguing adoption cases. Thus, I will not belabor that point again.

The facts in this case depict better than I ever could the reason why Ark. Stat. Ann. § 56-207 (a) (2) of our 1977 Adoption Act should be at least modified — if not repealed — by our General Assembly. Instead of warring parents, we have an added ingredient to this adoption proceeding — a warring grandmother (the appellee) pitted against a former son-in-law (the appellant).

The appellant had no sooner divorced his wife (December 14, 1976) than appellee filed her first petition for adoption (January 14, 1977). Appellant was residing and working in Alaska when the divorce decree was entered and the adoption petition was filed; nevertheless, he promptly filed his objection to any adoption of his child, and the appellee voluntarily dismissed her adoption action. After the divorce and adoption proceedings, appellant's relationship with the appellee and his former wife continued to deteriorate. In fact, appellant had to return to Arkansas on two separate occasions to file contempt petitions against appellee to enforce his court-ordered visitation privileges. His second contempt petition was filed on June 1, 1978, and it resulted in his seeing his son for the last time. Interestingly enough, the appellee, during this particular dispute between the parties, charged that appellant was not the child's father. Furthermore, she requested the court to order that appellant be subjected to tests to determine paternity.

Appellee subsequently withdrew her request, and appellant was given visitation with his son; but afterwards, appellee began to move, living in at least four different municipalities between October, 1978, and May, 1979. Appellant testified that during this period he could not find appellee or his son. In fact, he stated that he did not learn of appellee's whereabouts until after this adoption action was filed on November 3, 1980. *Appellee admitted that she never advised appellant of these moves nor of her addresses.* She also conceded that she did not notify the court clerk's office — to which support payments were sent — of any of her moves or address changes until December 23, 1980. Thus, it was after she filed this adoption action and nineteen months after her last move before she informed the court where she was living. One must remember that the trial court and this Court's majority, in dispensing with appellant's consent to the adoption of his son, rely on the period from February, 1979, through December, 1980, finding that during that time appellant failed to support or communicate with his child. I must say that if appellee's acts do not justify appellant's failure to support or contact his child, few cases will present facts that offer justification.

In conclusion, I again register my dissatisfaction with our appellate courts' treating adoption cases as though they were custody actions. I will be the first to admit that appellant might not fit the role of a model parent. However, our courts in post-decretal actions (and I believe rightfully so) have taken a dim view of fathers or mothers who fail to support and care for their children; accordingly, they have granted judgments for support arrearages, and have incarcerated parents who fail to fulfill their legal responsibilities to their offspring. In taking such actions, courts have recognized a parent's right to visitation with his or her child as being independent of a duty to support the child.

Adoption actions should be viewed differently. After all, in divorce cases, courts enforce support and visitation orders, recognizing the importance of the family relationship. In contrast, courts in adoption cases sever family ties —an action that should be taken only when the evidence clearly reflects that a parent has abdicated his or her

responsibility to a child. Unless such abdication is shown, I intend to dissent from any decision that upholds the severance of a family relationship, especially so long as § 56-207 (a) (2) remains a part of our Adoption Code and is construed in the manner it has been construed by our appellate courts.

Edna E. DANGELO *v.* Ernest Ray NEIL and Joann NEIL, His Wife

CA 82-459 661 S.W.2d 448

Court of Appeals of Arkansas
En Banc
Opinion delivered December 7, 1983

Wilson, McNee & Vaughan, P.A., by: *Keith Vaughan,* for appellant.

Robert M. Abney, for appellees.

LAWSON CLONINGER, Judge. The issue on this appeal is whether the trial court erred by ruling that the consent of appellant, Edna Dangelo, the natural mother of Justin Dangelo, was not required for the adoption of Justin by appellees, Ernest Ray and Joann Neil. The court granted appellees' petition for adoption after finding that appellant's consent was not required, in that appellant had failed significantly, without justifiable cause, to communicate with or provide care and support for Justin for a period of over one year. We affirm the judgment of the trial court.

Under normal circumstances the consent of the natural mother of a child is required before that child may be adopted, but Ark. Stat. Ann. § 56-207 (Supp. 1983) provides for those instances when the consent of the natural parent is

not required. Section 56-207 provides in pertinent part as follows:

> (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 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.

Appellees had the burden of showing by clear and convincing evidence that appellant had failed significantly to support her son, without justifiable cause, for any consecutive period constituting a total of one year. *Pender* v. *McKee,* 266 Ark. 18, 582 S.W.2d 929 (1979).

The child, then two years old, came to appellees' home on February 10, 1979, and on May 5, 1981, appellant filed her petition for a writ of habeas corpus. The child lived with appellees continuously during that 51-month period except for a few weekends spent with appellant during the first year. The longest period of visitation with the mother was one six-day period. During the first year, the mother made occasional visits to the child, but there was no communication at all between the mother and child from April, 1980 to May, 1981. During the first fourteen months the child was with appellees, the appellant contributed less than $100 for the care and support of her son. For the period between April, 1980 and May, 1981 she made no contribution.

There is ample evidence to support a finding that appellant had no communication with her son for a period in excess of one year, and that she made no significant contribution toward the care and support of the child for a period in excess of two years. The troublesome question is whether appellant's failure was without justifiable cause.

There is evidence that appellees gave appellant cause to believe that no contribution was expected from her. Soon after the child was taken into appellees' home, appellee Joann Neil told appellant that "You owe me. If you take a

notion to take out on the truck and leave with your boyfriend, call us and bring him to us." On another occasion, appellees returned a $30 contribution to appellant because they thought appellant needed the money to attend her brother's funeral. Whether appellees expected or requested contributions from appellant is not the determining factor. A parent has the obligation to support a minor child, and no request is necessary. Ark. Stat. Ann. § 57-633 (Repl. 1971). It was also appellant's legal obligation independent of statute. *Brown* v. *Brown,* 233 Ark. 422, 345 S.W.2d 27 (1961).

Appellees caused appellant to be arrested in April, 1980, for taking the child, and appellant testified that she was apprehensive about visiting the child because of appellees' attitude. However, appellant was never denied permission to visit with her son at any time during the 51-month period. In any event, in April of 1980 more than a year had already passed without significant contribution by appellant for the care and support of her son. "Failed significantly" certainly does not mean "failed totally." It only means that the failure to communicate or support must be significant, as contrasted with an insignificant failure. It denotes a failure that is meaningful or important. *Pender* v. *McKee, supra.*

Appellant testified that she did not communicate with her son during the period from April, 1980 to May, 1981 because her attorney had told her that all communication between the parties should be made through the attorneys. The trial judge rejected this assertion, stating that it was hard for him to believe that an interested mother would not try to get in touch with her child for a year. We agree. There was evidence that appellant had the custody of her other three children during a portion of 1981, and there is evidence that she was employed and could have made some contributions toward the support of Justin.

Appellant contends that the phrase "in the custody of another," as used in Ark. Stat. Ann. § 56-207 (a) (2), *supra,* means lawful custody. Appellant is correct in her contention that there was no valid court order awarding custody of the child to appellees, but appellant cites no authority for the

proposition that there can be no lawful custody without a court order. We are not persuaded by her argument. The evidence indicates that the child was in the custody of appellees for many months with the consent of appellant, and that appellant formally withdrew that consent only shortly before appellees filed their petition for adoption. Appellees had custody of the child lawfully, in the sense that the custody was not unlawful.

Rule 52 (a) 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 judge to judge the credibility of the witnesses. Under this rule and under the evidence in this case, the findings of the trial judge are not clearly against the preponderance of the evidence.

Judgment affirmed.

GLAZE, J., dissents.

RIVER LAND COMPANY, INC. *v.* James McALEXANDER et al

CA 83-7 661 S.W.2d 451

Court of Appeals of Arkansas
Division II
Opinion delivered December 7, 1983

Drew & Mazzanti, by: *W. H. Drew,* for appellant.

Glankler, Brown, Gilliland, Chase, Robinson & Raines, Memphis, Tenn., and *Charles B. Roscopf, P.A.,* for appellees.

LAWSON CLONINGER, Judge. This is an appeal from a decree of the chancellor, denying appellant's quiet title action to a certain tract of land in an area known as Island 66. Appellant, River Land Company, alleged in its complaint that the disputed area was accretions to the State of Arkansas

since the original survey of the government land office and the admission of the State of Arkansas to the union. Hence, when appellant acquired deeds from the state pursuant to Ark. Stat. Ann. §§ 10-206 — 207 it acquired title to all of the disputed property.

To this complaint, appellees filed their answer and counterclaim, praying that their title to the property under consideration be quieted and that the deeds of conveyance under which appellant claimed be cancelled. Appellees contended that the lands originated as accretions to the Arkansas shore and that appellees' predecessors in title were the sole riparian landowners and acquired any additions to the property.

Appellant, at trial, also claimed that its predecessor in title, Beulah Sherman, was also a riparian landowner and further, that part of the disputed property originated by reason of an avulsion rather than an accretion. The chancellor found that the lands under consideration were formed as accretions to the Arkansas shore and quieted title in appellees. It is from this decision that appellant brings this appeal.

Appellant's first point for reversal is that the trial court erred in finding that appellees had paid taxes on the land in this litigation. No authority is cited for this point, but it is merely argued that there is no indication on the tax books that any taxes were paid on the section of property in question.

It is a well settled rule that payment of taxes on original lands amounts to payment of taxes on the accretions. See *Bryant* v. *Chicago Mill,* 120 F. Supp. 463 (E.D. Ark. 1954), *affirmed,* 216 F.2d 727 (8th Cir. 1954). If the chancellor's decision is correct that appellees acquired the property through accretions as riparian landowners, then it follows that payment of taxes on the property also amounted to payment of taxes on the accretions to the property.

Appellant's second, third, and fifth points for reversal can be condensed into one broad issue: namely, whether the

chancellor's finding that appellees were the sole riparian landowners and that they acquired all of the disputed property through the process of accretions was clearly against a preponderance of the evidence. The chancellor based his decision in part on the fact that appellee and a non-party were the only owners of the island until Mrs. Beulah Sherman, appellant's predecessor in title, acquired 335 acres from Chicago Mill by adverse possession. See *Sherman* v. *Chicago Mill & Lumber co.*, 233 Ark. 277, 344 S.W.2d 345 (1961). In *Sherman, supra,* the Supreme Court, in a judgment on mandate, described her east and south boundary as the right descending high bank of Sherman Chute. Beulah Sherman has never had title south of the high bank of Sherman Chute.

The chancellor found that in 1940 a man-made avulsion known as the Sunflower Cut-off occurred upstream. Prior to that time the erosion had been southward and eastward into the State of Mississippi. The left descending bank of the Mississippi was caving into the river and consequently, the river progressively eroded and destroyed lands in the bend and formed accretions to the east end of the Island 66 peninsula. This finding was supported by maps, charts and the expert testimony of Austin Smith, an employee of the U.S. Corps of Engineers. Mr. Smith testified unequivocally that the lands under consideration were accretions to Sections 7, 18 and 19, Township 6 South, Range 3 East, Phillips County, Arkansas. We hold that there is ample testimony and evidence in the record to support the finding of the chancellor and would affirm the chancellor's decision on this issue.

Further, there is ample evidence in the record to support the chancellor's finding that appellant was not a riparian landowner. Appellant's predecessor in title acquired her property through adverse possession, and the description of the property included a water line named as a boundary; to wit, the right descending bank of Sherman Chute. That line remains the boundary, no matter how it shifts. Therefore, the boundaries of the land remain at the water line and do not include any accretions which occur on the other side of the watercourse. *Perry* v. *Sadler,* 76 Ark. 43 (1905). See also 93

C.J.S. 376, *Waters* (1956); *Sibley* v. *Eagle Marines Industries,* 607 S.W.2d 431 (Mo. 1980); *Dudeck* v. *Ellis,* 399 S.W.2d 80 (Mo. 1966); *Crandall* v. *Smith,* 36 S.W. 612 (Mo. 1896). It follows that appellant cannot be considered a riparian landowner since all accretions were on the opposite side of Sherman Chute. Hence, appellee is the sole riparian landowner and is entitled to all accretions thereto.

Appellant finally argues that its predecessor in title was a riparian landowner on the basis of deeds obtained from the state land commissioner pursuant to Act 103 of 1945 and Act 126 of 1953 [codified as Ark. Stat. Ann. §§ 10-204, 10-207 (Repl. 1976)]. However, these acts provide only a means of confirming title in the adjacent riparian landowner of accretions to his or her property. Appellant must first prove its status as a riparian landowner before the deed is valid. See *Gill* v. *Porter,* 248 Ark. 140, 450 S.W.2d 306 (1970). Since we hold that the chancellor's decision that appellant was not a riparian landowner is not against a preponderance of the evidence, it follows that the deeds which the state land commissioner gave to appellant's predecessor in title were invalid.

We find there is ample testimony and evidence in the record to support the finding of the chancellor and his decision is affirmed in all respects.

MAYFIELD, C.J., and CORBIN, J., agree.

Bob LINDSEY and Margaret LINDSEY *v.*
Julie KETCHUM et al

CA 83-28 661 S.W.2d 453

Court of Appeals of Arkansas
Division II
Opinion delivered December 7, 1983

[redacted]

Sanford, Pate & Marschewski, by: *Jon R. Sanford,* for appellants.

Jon A. Williams, Western Arkansas Legal Services, for appellee.

DONALD L. CORBIN, Judge. Appellants, Bob and Margaret Lindsey, sought to adopt Brandy Ketchum, a minor female child, pursuant to Ark. Stat. Ann. § 56-220 (c) (2) and (3) (Supp. 1983). The natural parents defaulted in responding to appellants' petition for adoption; however, the natural mother, Julie Williams, a/k/a Julie Ketchum, appeared and testified in the adoption proceedings. The probate judge denied appellants' petition for adoption. However, as the chancellor in the companion custody case, the trial court continued custody in appellants and denied the natural parents any visitation privileges with the minor child. We reverse and remand.

We review probate proceedings *de novo* on the record. It is well-settled that the decision of a probate judge will not be disturbed unless clearly erroneous (clearly against the preponderance of the evidence), giving due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. A.R.Cr.P. Rule 52 (a); *Henson* v. *Money,* 1 Ark. App. 97, 613 S.W.2d 123 (1981).

Appellants urge us to reverse on the basis that the decision is unsupported by the evidence. In their petition for adoption, appellants relied upon Ark. Stat. Ann. § 56-220 (c) (2) and (3) (Supp. 1983), which provide for the relinquishment of the rights of a parent and the termination of the parent and child relationship under certain circumstances as follows:

> (c) In addition to any other proceeding provided by law, the relationship of parent and child may be terminated by a court's order issued in connection with an adoption proceeding under this Act [§§ 56-201 — 56-221] on any ground provided by other law for termination of the relationship, and in any event on the ground (2) that by reason of the misconduct, faults, or habits of the parent or the repeated and continuous neglect or refusal of the parent, the minor is without proper parental care and control, or subsistence, education, or other care or control necessary for his physical, mental, or emotional health or morals, or, by reason of physical or mental incapacity the parent is

> unable to provide necessary parental care for the minor, and the court finds that the conditions and causes of the behavior, neglect, or incapacity are irremediable or will not be remedied by the parent, and that by reason thereof the minor is suffering or probably will suffer serious physical, mental, moral, or emotional harm, or (3) that in the case of a parent not having custody of a minor, his consent is being unreasonably withheld contrary to the best interest of the minor.

The natural relationship between parent and child is subject to absolute severance in an adoption proceeding. The courts are inclined to favor the maintaining of the natural relationship when the adoption is sought without the consent of a parent and against his or her protest. *Harper* v. *Caskin,* 265 Ark. 558, 580 S.W.2d 176 (1979). In *Huey* v. *Lente,* 85 N.M. 597, 514 P.2d 1093 (1973), a case construing a New Mexico statute similar to Ark. Stat. Ann. § 56-220, it was stated that actions for termination of parental rights require clear and convincing proof.

Our research of the law in Arkansas leads us to the conclusion that Ark. Stat. Ann. § 56-220 (c) (2) and (3) (Supp. 1983), have not been construed by our appellate courts to date with the exception of the Arkansas Supreme Court's recent decision in *Wineman* v. *Brewer,* 280 Ark. 527, 660 S.W.2d 648 (1983). In *Wineman, supra,* one of the arguments on appeal was that the evidence did not support the probate judge's finding that appellant unreasonably withheld his consent to the adoption contrary to the child's best interest. In affirming the adoption below, the Court relied upon the extensive findings of fact supporting the decision of the trial court. Those findings included appellant's employment history, his struggles with alcohol, his living arrangement at the time of the hearing and the fact that the child's mother had already consented to the adoption.

Subsection (c) (3), the provision upon which we reverse, provides a procedure for terminating a parent-child relationship without the consent of the natural parent. It does not require a separate petition for termination of parental rights but allows the parental relationship to be terminated

by a court order in connection with an adoption proceeding if the requisite grounds are satisfied.

Montana, New Mexico, North Dakota, Ohio and Oklahoma have also adopted the Uniform Adoption Act with some variations. Ark. Stat. Ann. § 56-221 (Supp. 1983), provides that:

> This Act [§§ 56-201 — 56-221] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

For instructive purposes, we turn to those jurisdictions who have statutes similar to ours for guidance. The North Dakota Supreme Court's decision in *Kottsick* v. *Carlson,* 241 N.W.2d 842 (1976), provides some assistance in its application of N.D. Cent. Code § 14-15-19 (3) (c), a provision worded exactly the same as the one at issue in the case at bar. There, a divorced wife and her new husband instituted proceedings to adopt the minor children of the wife and her former husband without his consent. Custody of the children had been awarded to appellant/wife pursuant to a divorce decree with visiting rights to appellee and requiring him to pay child support. Upon trial, the court issued a judgment denying the petition of appellants. On appeal appellants contended the trial court erred in its application and interpretation of N.D. Cent. Code § 14-15-19(3)(c), and asked that the judgment be reversed or that the matter be returned to the trial court with directions to apply the correct interpretation and concepts of law. Following its recitation of the pertinent statutory provisions, the court noted that there was no claim or evidence that appellee had been guilty of any of the conduct described in subsection (a) or (b) of the statute, nor of any conduct which would constitute grounds for termination of his parental right. Appellants argued that (c) applied and that under the facts of the case the court could terminate appellee's parental rights and permit the adoption of his sons. Appellants contended that appellee was a "parent not having custody of a minor" and that appellants merely had to show that appellee was unreasonably withholding consent to the adoption, contrary to the best interest of the children. Following a lengthy discussion of the legal

meaning of the word "custody," the court considered decisions from other jurisdictions that allow termination of the natural parents' rights without their consent where it is found to be in the best interest of the child. One such jurisdiction was Maryland and its statute (Md. Code Ann. Art. 16 § 74, Repl. Vol. 1973), provides that the court may grant a petition for adoption without consent if it finds that such consent is being withheld contrary to the best interests of the child. The *Kottsick* court cited *Logan* v. *Coup*, 238 Md. 253, 208 A.2d 694, 696 (1965), wherein the Maryland court found no voluntary relinquishment or abandonment of the child and had to determine where the best interests of the child lay. The court quoted from an earlier Maryland case, *Shetler* v. *Fink*, 231 Md. 302, 190 A.2d 76 as follows:

> While all the facts and circumstances in a case must be considered, the cases, which reached this Court on the merits of the question whether or not adoption should be granted, seem to indicate that willful abandonment, failure to contribute to support, neglect to see or visit, and unfitness of a natural parent, are some of the important factors to be considered in determining whether consent has been injustifiably [sic] withheld; and that station in life and financial and religious considerations are of secondary importance. On the other hand, the natural rights of a natural parent that have not been lost or forfeited by his or her acts or conduct must be carefully weighed and considered in deciding the question.

After reviewing the basis for the caselaw as it had been developed over the years, the *Kottsick* court stated as follows:

> . . . [i]t appears that the grounds for termination of parental rights must rest upon the attitude, conduct, ability, and such other matters relating to the parent's duties, responsibilities and care for the child which may be, and frequently are, collectively referred to as "fitness." The relationship of parent and child consisting of a bundle of essential human rights necessary for the preservation of society must be carefully balanced and jealously guarded. There is a vast difference

> between the granting of "custody" in a divorce action and the "termination of parental rights." The terms "custody" and "best interests of the child" have become terms of art which reflect and convey certain meanings in divorce proceedings. "The best interests of the child" in termination of parental rights, in connection with adoption, takes on another meaning which includes, among other things, the total relationship between the child and parent pertaining to and involving heterogeneous values, rights, duties and concepts. In sequence, the termination question should be resolved first, and the adoption thereafter. But this does not mean two separate proceedings. If followed in such sequence the two issues would remain more identifiable. In parental rights termination matters the "faults," if any, of the parent are considered, which in no way can be considered "faults" of the child who is the innocent party or "victim of circumstances."

Appellant petitioned for a rehearing for clarification as to what would be admissible on the rehearing on the matter of fitness to which the court responded: "Any evidence having probative value to a court of equity as to the present and prospective fitness of the parent is admissible."

The testimony and evidence in the case at bar reveals that the natural mother/appellee had left school and home and started drinking at age fifteen, became pregnant while in a foster home and gave that child to her own mother to raise, became involved in both using and selling drugs, lived with a total of six men, one of whom was the child's father, bore the child in question and finally married the father. The natural parents manufactured, bought, sold and used drugs continuously as money would allow and drank constantly. Brandy was subjected continuously to almost every abuse known: physical abuse and in having human feces rubbed in her face, being forced to stay in bed without exercise so continuously that she was in very poor physical condition, beaten on the head and face in lieu of conventional spankings, permitted to masturbate until her vaginal area was raw, and deprived of balanced meals. The mental abuse consisted of being dropped into

bed to scare her, left in the house alone, and being referred to by obscene names. Emotional and moral abuse consisted of her father's fondling her genitals and permitting other men to do so, of being exposed to her father in the nude, being exposed to adults engaging in sexual intercourse, voyeurism and masturbation, and in being exposed to the drunken conduct of her parents, including beating and physical violence, and being taken to entertainment totally unfit for a child.

On July 13, 1980, appellee voluntarily placed her four-year-old child with appellants to enter a drug and alcohol rehabilitation program for a period of 28 days. Appellants obtained legal custody of Brandy on July 17, 1980. Appellee executed a waiver of notice and hearing and consent to the appointment. Appellee did not communicate with her child while in the rehabilitation program and made infrequent visits prior to appellants' filing their petition for adoption on August 19, 1981. Thereafter, appellants refused one request for visitation with the child by appellee. At the time of trial, appellants had had continuous custody of Brandy for 26 months.

Appellant Margaret Lee Lindsey testified that when Brandy first came to their home, she would sit and rock herself into complete withdrawal. Appellant stated that Brandy's eyes rolled back in her head and she would chant. Brandy did not react to voices and would sleep for exceptionally long periods of time. Appellant testified as to Brandy's extreme violence with her dolls and the long periods of time between bowel movements and urination. Upon hearing from her older sister, father or mother, Brandy would resort to violence to her dolls. Appellant stated that initially Brandy's emotional condition was such that she would not let her out of her sight for any reason. Appellant often slept in the same room with Brandy. Following any visitation with her mother, Brandy would revert to total withdrawal and begin to chant. This behavior would generally last for up to a week after the visits with her mother. Appellants began therapy with Brandy in February, 1981. Brandy met with her therapist, Jon Lundquist, on a

once-a-week basis and later switched to once every other week for a total period of one year.

Jon Lundquist, a psychiatric social worker, testified that he counseled Brandy who was brought to him by appellants with two disturbing problems. The problems included compulsive masturbation and behavior resembling autistic regression. He testified that he completed his work with Brandy approximately six or eight months before trial. Lundquist stated that appellant Margaret Lindsey had very natural, positive mothering abilities and she followed his instructions well. Much of his information came from Mrs. Lindsey which Brandy corroborated on her own initiative. He recommended that visitation with the natural mother be stopped as he would see Brandy regressing to her autistic patterns and there would also be an increase in masturbation. Lundquist testified that Brandy regressed to a two-year-old, turning inward as a functional protection. Finally, he stated that since visits with Brandy's natural mother had been terminated, there had been no periodic regressive behavior and that if she were permitted contact with appellee, it would send her back into the regressive behavior pattern. It was Lundquist's opinion that appellants had been excellent parents to Brandy, that it would not be in Brandy's best interest to be moved from the home they had provided and that it was not reasonable for appellee to continue to withhold her consent to the adoption.

Dr. Glenn Lowitz, a clinical psychologist employed by Arkansas Children's Hospital, became involved in the case at the request of appellee's attorney and was engaged to observe Brandy and appellee to determine if the inappropriate behavior surrounding Brandy's contacts with her mother were true. He testified that he administered several tests and visited with both Brandy and her mother. Dr. Lowitz interviewed appellee and he testified that her response to his questions as to her immediate and future plans for Brandy focused on her difficult labor and delivery of Brandy and whether or not Brandy still remembered her. He explained that he did not get the kind of information he was looking for in terms of planning for herself, either with or without Brandy nor could he evaluate her responses as

beneficial to future plans which might get appellee in a position where she could take the child. Dr. Lowitz stated that appellee's four attempts at rehabilitation which had failed suggested that her risks of reverting to alcohol in the future were enhanced. He concluded by testifying that he did not think it would be in Brandy's best interests to start to build a relationship with appellee and that it was in Brandy's best interests to have the issue of the direction of her life settled promptly.

Christene Swartz, the maternal grandmother, testified as to appellee's emotional and drug problems. She felt that Brandy had a wonderful home with appellants and that it was best for Brandy to have the adoption go through.

Appellee admitted at trial that she was an alcoholic and a "pillhead." She stated that she had not had a drink in six months and 28 days. Her sole means of support consisted of social security disability income amounting to $274.30 per month and that the housing authority paid half of her rent. Appellee objected to the adoption but did not ask the court to place Brandy with her at that time as she did not have the financial capability to support her. We find the following testimony pertinent:

> Q. You don't feel you are in a position to take the child into your home at this time?
>
> A. Financially I'm broke. But I am happy. Happy broke.
>
> Q. Why do you say you are happy broke?
>
> A. Well the feelings you get inside. You know. Having cigarettes, having food, you know. That is all that is important to me. Having clean clothes, you know, right now.

The trial court heard testimony from people well-acquainted with appellants and who had been in their home. Each testified as to the Lindsey's strong marriage, the

fact that they had successfully raised two daughters to maturity, and their love for Brandy.

From a *de novo* review of the record before us, we find that appellants established by clear and convincing evidence that appellee unreasonably withheld her consent to the adoption contrary to Brandy's best interest. The evidence was overwhelming in this regard and there was absolutely no testimony to support any other conclusion. Each of the expert witnesses stated that it was contrary to Brandy's best interest to not have the issue settled and that it was emotionally devastating for Brandy to be in her mother's presence for any period of time. Furthermore, the issue of appellee's fitness, ability and desire to maintain a parental relationship with Brandy was fully developed at trial. While the primary consideration in the case at bar is the welfare of the child, this does not mean that courts can sever the parental rights of nonconsenting parents and order adoption merely because the adoptive parents might be able to provide a better home. Here, however, appellants made a proper showing of appellee's neglect and unfitness as a parent amounting to an unreasonable withholding of appellee's consent to the adoption. Brandy, through appellants' love, support and devotion, has been able to overcome the horrors she was forced to live with for the first four years of her life and it is in her best interest that the petition for adoption be granted. We hold that the probate judge's decision in denying appellants' petition for adoption is clearly erroneous.

Accordingly, we reverse and remand. The trial court is to enter a decree allowing the adoption of Brandy by appellants.

Reversed and remanded.

MAYFIELD, C.J., and CLONINGER, J., agree.

Jack FOUCH *v.* STATE of Arkansas, Alcoholic Beverage Control Division

CA 83-38 662 S.W.2d 181

Court of Appeals of Arkansas
Division II
Opinion delivered December 7, 1983
[Rehearing denied January 11, 1984.]

Judith C. Strother, for appellant.

Treeca J. Dyer, for appellee.

TOM GLAZE, Judge. This appeal is from the circuit court's affirmance of the Alcoholic Beverage Control (ABC) Board's denial of appellant's application for a retail liquor permit to operate a package store in Mountain Home,

Arkansas. The appellant, Jack Fouch, applied for a permit on June 13, 1981. The administrator denied the application on July 29, 1981. Fouch appealed to the ABC Board; hearings were held before the Board on September 17 and October 21, 1981. Pursuant to Ark. Stat. Ann. § 5-713 (Supp. 1981), Fouch appealed to the Pulaski County Circuit Court, alleging the Board's decision was not suported by substantial evidence. On September 28, 1982, the circuit court ruled in favor of the ABC Board. Fouch appeals that decision and raises three points for reversal:

> 1. The circuit court erred in finding that the ABC Board's denial of the retail liquor permit was related to "public convenience and advantage."
>
> 2. The circuit court erred in finding substantial evidence in the record of the proceedings of the ABC Board to support its denial of the applied for permit.
>
> 3. The circuit court erred in finding that the decision was not affected by errors of law and that the decision was not made upon unlawful procedures.

We find merit in appellant's first two points; therefore, we need not reach the third.

The rules governing judicial review of decisions of administrative agencies are settled and are the same for both the circuit and appellate courts. This review is limited in scope; such decisions will be upheld if supported by substantial evidence and not arbitrary, capricious or characterized by an abuse of discretion. *Carder* v. *Hemstock,* 5 Ark. App. 115, 633 S.W.2d 384 (1982). The substantial evidence rule applicable to these cases requires a review of the entire record and not merely the evidence which supports the Board's decision. *Id.; Snyder* v. *Alcoholic Beverage Control Board,* 1 Ark. App. 92, 613 S.W.2d 126 (1981). Substantial evidence is more than a mere scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Carder* v. *Hemstock, 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. *Id.*

The jurisdiction of the court and the standard of review are set out in the Administrative Procedure Act, at Ark. Stat. Ann. § 5-713 (h) (Supp. 1981), under which this court may reverse or modify an agency decision if substantial rights of the petitioner have been prejudiced because the administrative findings are not supported by substantial evidence. The Administrative Procedure Act also requires that an agency set out in writing or state in the record its final decision or order. In addition, the Act provides:

> A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings . . . .

Ark. Stat. Ann. § 5-710 (Repl. 1976).

We have reviewed the extensive record in this case, which includes the transcripts of two hearings before the ABC Board with numerous exhibits submitted by Fouch, the Board, and intervenor Kaut White. We have considered each of the Board's eight findings in light of the evidence and cannot conscientiously find from our review that the evidence is substantial to deny appellant's application for a license. The eight findings of the Board are set out below.

> 1. That there are presently sixteen (16) liquor outlets in Baxter County, and testimony taken at the hearing indicated that eight (8) of those outlets were in the Mountain Home area.

The Board's first finding is misleading and erroneous. The Board's figures do not accurately reflect the number of licensees in the area appellant applied to serve. Fouch applied for a license to operate a package store in an existing

building on Highway 62 East in Mountain Home. The evidence shows that Mountain Home presently has only two *retail* outlets, Fiesta Liquor and 62 East Package Store. Of the remaining six in the Mountain Home area, only one is a retail outlet, Warehouse Liquors. The others are clubs or restaurants licensed to sell beer and/or wine. The evidence reflected that Fiesta Liquor is poorly stocked, with an inventory of only about $10,000, that Warehouse Liquor sells primarily to clubs and restaurants and that 62 East Package Store, owned by intervenor Kaut White, does the bulk of the business in the area. By White's own testimony, he sells from $700,000 to $1,000,000 in merchandise each year.

> 2. That there are approximately 20,000 residents in the Mountain Home area, and the existing eight (8) retail liquor outlets are sufficient to serve the needs of that area.

The evidence showed that, although the official population of Mountain Home is only 8,020, the city has 20,000 residents year-round and greater numbers of visitors on a continuous basis. The city is a major tourist area for the state and a regional shopping area for north Arkansas. Testimony indicated the three major motels have 130,000 customers a year and significant numbers of visitors travel to Mountain Home on holiday weekends. Mayor Ron Pierce testified that Mountain Home has 40,000 to 50,000 residents four or five months a year and that float trips are now a year-round, rather than a seasonal business.

As we have already pointed out, the record does not reflect eight *retail* liquor outlets in the Mountain Home area. Several people testified they are unable to purchase a variety of wines and other alcoholic items in the liquor stores in town. Witnesses, as well as appellant, named specific brands the appellant had stocked in his Missouri store and plans to stock in his Mountain Home store which are not available presently in either store in town.

The only evidence to support the Board's finding that the present outlets are sufficient to serve the needs of the area

came from James Dollins, a liquor salesman and former ABC enforcement officer. Dollins opined that Mountain Home is "pretty well supplied" with liquor stores. He called both Warehouse Liquor and 62 East Liquor Store "heavily stocked" and Fiesta "medium, if even medium." We cannot find that Dollins' testimony alone is substantial evidence to support the Board's Finding #2. Dollins' remarks were conclusory; he gave no basis for his comparisons, nor did he indicate what he meant by the use of such terms as "pretty well supplied," "heavily stocked," or "medium, if even medium."

The appellant subpoenaed the owners of the other liquor stores in town and requested that their inventory records be admitted into evidence, but the Board found the inventories irrelevant to the granting or denial of appellant's license. Of course, such inventory records would have shown how well the liquor stores in the area were stocked and would bear on the question of whether these stores sufficiently served the area's needs. Even without this information, appellant offered evidence indicating the existing stores are *not* serving the needs of the area because they do not stock items in quantity or quality that the citizens desire. This evidence was unrebutted except for Dollins' unsupported conclusions. The record simply does not support that (1) there are eight retail outlets in the area, and (2) that existing outlets are sufficient to meet the needs of the area.

> 3. That the site of the proposed outlet is at the intersection of Highway 62 East and Cardinal Street in Mountain Home, which is a heavily travelled intersection which has no street lights and a retail liquor outlet at that location would greatly increase an existing traffic problem.

We do not agree with this finding. Again, the Board has stated a conclusion without facts to substantiate it. We do agree that the evidence indicated the intersection is heavily travelled. In fact, one of appellant's strongest contentions is that his proposed store will serve the public convenience and advantage *because* of its location. We are unable to find any

testimony relating to street lights; the evidence is contrary to the Board's finding because street lights are obvious in the photographs of the proposed site which are a part of the record.

The fact that "a retail liquor outlet at that location would greatly increase an existing traffic problem" is a conclusion that is not substantiated by the record. Police Chief Doak testified a liquor store at that intersection would not create any more of a traffic problem than a restaurant or anything else would cause. Mayor Pierce testified that *all* of Highway 62 — including that part which runs in front of the 62 East Package Store — creates traffic problems, because it is the center of business in the town. He opined that appellant's would be the best liquor store location in town. He pointed out the building is away from churches and is in a high-density, highly-travelled area. He pointed out that the location has ample parking and has exits onto both Highway 62 and Cardinal Drive.

Only two witnesses testified in support of the Board's finding of an existing traffic problem. Representative Ed Gilbert opposed Fouch's application based, in part, upon the fact that Highway 62, a two-lane highway, is overloaded with businesses and traffic. He could not testify to a personal knowledge of any accidents at that location, but he stated that the "possibilities" for having accidents there certainly exist. Sheriff Joe Edmonds testified that the location was at a bad intersection with a large amount of traffic and a high rate of accidents. He noted *one occasion* when his Department had been summoned to assist the City police when a van overturned near that intersection. On the traffic issue, we find Gilbert's and Edmonds' testimonies largely speculative and uncompelling when compared with the overwhelming evidence to the contrary.

A number of witnesses testified that the location would be ideal. Mr. Bill Waters, Councilman, called the traffic "the finest in the area." Mrs. Fran Lowery, owner of a resort on the White River, testified that she made three to four trips a day to the shopping center and had never seen an accident there. The ABC Enforcement Officer who inspected the site

found no traffic hazard. Mrs. Fouch, the applicant's wife, researched files for accidents in Mountain Home for the one-year period prior to the hearing, and she found that no accidents had occurred at that shopping center.

> 4. That testimony at the hearing indicated that two (2) or three (3) of the existing retail liquor outlets in the Mountain Home area are having problems producing enough income to remain open and that another liquor outlet in the area would have an adverse economic impact on the marginal outlets that are presently operating.

This finding is irrelevant to the granting or denial of additional licenses. In the first place, the Board provided no basis for its finding by naming particular businesses or by showing its source for this information. Secondly, the statute provides for the ABC Board to promote *public* convenience and advantage in issuing permits, not to protect the interests of the owners who are presently licensed.

Even if the financial status of existing stores was a relevant factor for the Board to consider in granting or denying new permits, they apparently did not consider it relevant here. Appellant subpoenaed the other two store owners in Mountain Home and requested that they provide him with records of their inventories. The owners did not produce the requested records. Kaut White testified at the hearing before the ABC Board that his records were his private business which he would not produce. The ABC Board refused to enforce the subpoenas and ruled that the information in the inventories was irrelevant.

> 5. That another retail outlet in the Mountain Home area would tend to create additional law enforcement problems for the Mountain Home City Police and the Baxter County Sheriff's Department, as indicated by their testimony and letters in opposition, and would possibly force existing outlets, who would undoubtedly lose business, to resort to illegal sales in order to remain in business.

The first part of this finding which relates to law enforcement problems is certainly relevant to the Board's determination. However, the evidence does not bear out that portion of the finding. Police Chief Paul Doak testified by deposition and wrote letters which were included in the record. Although he has been the primary law enforcement officer for Mountain Home for about six years, he did not even allude to additional law enforcement problems resulting from granting appellant's application. He discussed only a potential for additional traffic problems, but stated that a liquor store at that location would create no more traffic hazard than a restaurant or any other business would create.

Sheriff Joe Edmonds testified by deposition that he and his department would experience an "additional hardship . . . as far as enforcement goes" if appellant's license were granted, but he gave no basis for his conclusion. He also expressed his belief that too many liquor stores would force some smaller stores out of business and result in sales of intoxicants to minors as the owners competed for business. This testimony is apparently the basis for the latter part of the Board's Finding #5, but such conjecture does not in any way factually support the finding as required by § 5-710, *supra.*

Mayor Pierce testified that he believed problems in Mountain Home resulted, not from liquor purchased in local stores, but from liquor brought into Mountain Home from elsewhere.

> 6. That the voters of Baxter County continue to be closely divided as to whether they are for or against the sale of alcoholic beverages in the County, as indicated by petitions and letters, both for and against this application, and another retail liquor outlet in Mountain Home, which would certainly create more law enforcement problems in the area, would have impact on the wet/dry issue in Baxter County.

First, we question the relevancy of this finding as it bears on whether or not appellant should be granted a

permit. Even assuming that the finding is relevant, it simply is not supported by the evidence. Evidence was presented to indicate that the voters of Baxter County do not remain "closely divided" on the wet/dry issue. Appellant submitted results of the 1978 vote in two townships when the county voted to sell alcoholic beverages; the vote was 533 for wet and 723 for dry. When the same two townships voted again in 1980, 1,034 voted to stay wet and 657 voted to go dry. According to appellant, these two townships were major dry strongholds in Baxter County, yet the wet vote doubled while the dry vote decreased slightly.

Mayor Pierce testified that in his opinion the citizens of Mountain Home had come to accept the sale of liquor in their community. Both Sheriff Edmonds and Representative Gilbert testified that it was possible that additional retail liquor outlets would have an impact on the wet/dry issue in the next general election, but again neither offered a basis for his speculation.

> 7. That the ABC Division has been mandated by the State Legislature in Arkansas Statutes Annotated, § 48-301, to restrict the number of liquor permits in the State of Arkansas and is further empowered to determine whether the public convenience and advantage would be promoted by issuing any such permit.

In *Syder* v. *Alcoholic Beverage Control Board, supra* at 96, 613 S.W.2d at 128, we said:

> 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.

The statute does not provide a guide for determining whether the public convenience and advantage will be served by granting or denying a license. The Board must

"look at factors which directly weigh on the public convenience and advantage." *Id.*

In the case at bar, the Board set out no findings which related directly to the public convenience and advantage in denying the permit. The Board merely stated a conclusion. On the other hand, appellant presented evidence that the public convenience and advantage would be served by his being granted a permit. For example, appellant testified that he had written his master's thesis in business administration on market survey for a new product. He introduced a market survey which he had prepared to determine the feasibility of his operating a liquor store in Mountain Home at the location in question. His survey showed that Mountain Home serves as a shopping area for much of north Arkansas. In addition, the locale attracts tourists the year-round. The area is growing — the population increased 103 percent from 1970 to 1980, according to the 1980 census. Baxter County was the fastest growing county in the state from 1960 to 1975. Its projected population for 1990 is 45,508, according to a June, 1978 *Arkansas Newsletter.* A recent issue of *Consumer's Digest* names Mountain Home as first on a list of "Ten Best Places to Retire." These figures tend to indicate that the potential exists for Mountain Home to continue its already-expanding growth. None of appellant's evidence was rebutted.

Fouch outlined in detail how he had determined that the liquor stores in Mountain Home do not provide the area with the quantity or quality of alcoholic items available to best serve the public. A number of witnesses testified that they were unable to find the items they wanted in Mountain Home or to find the items that appellant had carried in his store in Missouri. Fouch pointed out the convenience to be derived from his locating in the shopping center. He stated an intent to staff his store to cater to women. Fouch contended that his primary source of business would be those purchasers who continue to drive to the Missouri line to make their purchases.

8. That testimony of opposition [sic] as to particular brands of alcoholic beverages that could not be found

> in Mountain Home outlets has no bearing on the issue of whether the public is being adequately served, since there was no showing that the particular brands mentioned were registered for sale within the State by brand registration with the Alcoholic Beverage Control Division; that it appears to be sound business practice that a retailer would stock all brands that were justified by sales volume; that it would be impossible for any one retail liquor outlet in the State to stock even a small percentage of the thousands of different brands and variations of liquor and beer that are registered and authorized for sale in the State.

The availability or nonavailability of items which members of the community desire to purchase could have a bearing on whether the public is being served adequately. Although it may be true from a business standpoint that a retailer will stock all brands justified by sales volume, we find no basis in the record for the Board's conclusion.

Appellee argues that substantial evidence exists to support the action of the Board in denying the appellant's license; yet appellee fails to set out in its brief the facts it claims support the Board's findings. However, appellee does argue that appellant demonstrated a complete disregard for authority (1) by evading service of process when the sheriff's department attempted to serve him with interrogatories and requests for admission at the behest of intervenor Kaut White prior to the hearing below; and (2) by breaking the law when he operated a liquor store in Missouri.

Although it is undisputed that service on Mr. Fouch was not had, Fouch's testimony that he was on a fishing trip in Missouri at the times the deputy attempted to serve him is equally undisputed. The deputy sheriff testified that he "assumed" appellant remained away from home to evade service, but he gave no evidence to support his speculation. Simply put, no evidence supports appellee's assertion that appellant "has no respect for local law enforcement" or that he "attempt[ed] to evade service of process by a Sheriff's deputy in Baxter County."

Appellee also contends that appellant violated the law in two respects when he operated a liquor store on the Missouri side of the Arkansas-Missouri state line. First, appellee argues that appellant admitted that while he operated a liquor store in Missouri, he knowingly sold alcoholic beverages to Arkansas residents who then brought their untaxed liquor back into Arkansas for consumption. Although purchasers who bring untaxed liquor from Missouri into Arkansas violate the laws of this State, appellee cites us to no law appellant violated by his selling it to Arkansas residents.

Second, appellee alleged that appellant's Missouri liquor license had been suspended for unlawful advertising, which would mean that appellant falsely stated on his application for an Arkansas license that he has never been convicted of a violation of any state's laws relating to alcoholic liquors. Appellant was not convicted — nor even charged — with violating Missouri law. David Gohn, President of West Plains (Missouri) Bank, wrote a letter highly recommending Fouch to the ABC Board. Gohn related that because of misrepresentations made to Fouch by his precedessor-in-title of the liquor store, Fouch was in a bad situation with his Missouri store from the very beginning. According to Gohn, the situation degenerated to a point that the bank had to step in to protect its own position as mortgagee. Through foreclosure, the bank took over the store on October 1, 1980, and closed the store on December 6, 1980. On December 22, 1980, the bank received notice of a three-day suspension of the license because of unlawful advertising. By that time, Fouch was not the license-holder at all. Throughout his letter, Gohn was highly complimentary of appellant and the manner in which he operated his business. In addition, Gohn expressed the bank's gratitude to appellant because, after the foreclosure, Fouch protected and liquidated a $65,000 inventory so that the bank experienced no loss. All of the evidence is contrary to the appellee's allegations that appellant is or was a lawbreaker.

In the instant case, the reasons the opponents stated for opposing Fouch's application, and hence the reasons stated

by the ABC Board for denying the application, have no basis in fact, and we find no substantial evidence to support the Board's findings. Therefore, we reverse the decision of the ABC Board and order that Fouch's application for a permit be granted. As we previously indicated, we need not get into questions concerning the procedural and due process problems which appellant raised in his third point for reversal. In finding it unnecessary to discuss those numerous issues, we do not mean to infer that none of them has merit.

Reversed and remanded.

MAYFIELD, C.J., and COOPER, J., agree.

OZARK GAS TRANSMISSION SYSTEMS, A Partnership, By OZARK GAS PIPELINE, General Partner *v.* Carroll BARCLAY and Janet M. BARCLAY

CA 83-45 662 S.W.2d 188

Court of Appeals of Arkansas
Division I
Opinion delivered December 14, 1983
[Rehearing denied January 18, 1984.]

Gordon & Gordon, P.A., by: *Ben Caruth,* for appellant.

Clark, McNeil & Adkisson, by: *William M. Clark,* for appellees.

GEORGE K. CRACRAFT, Judge. Ozark Gas Transmission Systems appeals from a judgment entered in the Circuit Court of Faulkner County on a jury verdict which awarded Carroll Barclay and his wife Janet the sum of $30,700 as compensation for their lands taken by eminent domain for a pipeline easement. Three points of error are advanced by appellant, all of which involve objections to appellee's expert witness's testimony.

Carroll Barclay was fifty-six years of age and had been born and raised on a family fruit farm in New Jersey. After his marriage he continued to operate the family farm and purchased several others. In the earlier years his operation was primarily in the wholesale market. This business grew until he was handling over 150,000 bushels of fruit a year in his own business and was on the board of directors of a cooperative which handled in excess of a million bushels.

In 1958 due to higher taxes and rising wage rates he started a direct marketing operation he referred to as a "you

pick them" retail sale where the customer picked his own fruit in the orchard. This undertaking continued to grow and he established several other such orchards in different commercial areas. In 1977 he determined to established another orchard and began to look for a location in the Carolinas, Oklahoma and Arkansas. At that time the appellee was a member of the Board of Trustees and President of the New Jersey Apple Council which was involved with the promotion of apples and research work for improved production techniques. He was also President of the Board of Managers of Rutgers University at its experiment station.

In 1979 appellee found what he considered the ideal topographic location for the establishment of a peach and apple orchard near Guy, Arkansas and purchased a 120 acre tract. At the time of purchase this was raw, overgrown land which had not been cultivated since the 1930's. He cleared it, built ponds for irrigation, put down wells, subsoiled, tilled and fertilized the land and placed six tons of lime per acre on the orchard areas. He planted 2500 peach trees and 2000 apple trees on the property. The irrigation system provided a nozzle at the base of each tree for watering during dry spells and drainage was provided from each tree to avoid what he called "wet feet" in wet periods. An expert agricultural economist from the University of Arkansas Cooperative Extension Service described the appellee's orchard as one in which he had put together "the most recent technology that we had in planning and beginning the production of fruit." He referred to appellee as "the best [horticulturist] I've ever seen," and stated that all of appellee's employees possessed similar expertise.

In 1981 the peach orchard produced its first peaches which were described as "exceeding our highest expectations." The apple orchard produced no fruit because the trees were not mature enough. In the fall of 1981 appellant took a strip of land 70 feet in width and consisting of 3.12 acres for an underground pipeline. This strip included a small area of woodland but took 2.17 acres of the orchard. It was stipulated that the highest and best use to which this property could be put was as a peach and apple orchard.

The appellee's expert appraiser Mr. Collins testified that he could not, in reaching his market value before and after the taking, utilize the market value approach because there was only one other orchard in Faulkner County and none had ever been sold. Nor could he utilize sales of comparably sized properties in the vicinity by making necessary adjustments for best use because the differences in use were so great the adjustments would be meaningless. He stated that it would be like comparing a $10,000 piece of property to a $1,000,000 one. Under this approach the witness capitalized the anticipated income from each acre of orchard over the recognized life expectancy of the trees. These figures were utilized to establish the market value attributable to the orchard. He appraised those lands not in orchard on an entirely different basis, and added the two arriving at his opinion of the market value of the property before the taking. Capitalization of income approach was also used in determining the value of the lands actually taken.

The appellant first contends that profits from a business enterprise may not be used as a factor in assessing damages for the taking of land relying on *Ark. State Hwy. Comm.* v. *Carpenter,* 237 Ark. 46, 371 S.W.2d 535 (1963); *Ark. State Hwy. Comm.* v. *Wilmans,* 236 Ark. 945, 370 S.W.2d 802 (1963); *Ark. State Hwy. Comm.* v. *Addy,* 227 Ark. 768, 318 S.W.2d 595 (1958); *Hot Spring County* v. *Crawford,* 229 Ark. 518, 316 S.W.2d 834 (1958). We agree that although this is a correct general statement of the law applicable to the consideration of profits of a business conducted on the premises it has no application to the facts in this case.

Our courts have recognized a distinction in this regard between opinion testimony based on profits derived from a business enterprise conducted on the condemned lands and those derived from the land itself. The so called "business profits rule" excludes evidence only as to profits from the former. In *Ark. State Hwy. Comm.* v. *Wilmans, supra,* the court excluded capitalization of profits derived from a tavern operated on the condemned land. In *Hot Spring County* v. *Crawford, supra,* and *Ark. State Hwy. Comm.* v. *Addy, supra,* evidence of the profits derived from a truck stop and a

race track conducted on the premises was excluded for that same reason.

Housing Authority of Little Rock v. *Rochelle,* 249 Ark. 524, 459 S.W.2d 794 (1970) and *North Little Rock Urban Renewal* v. *Van Bibber,* 252 Ark. 1248, 483 S.W.2d 223 (1972) recognize an exception to the rule which permits capitalization of income in arriving at fair market value of income producing rental property. The distinction was clearly pointed out in *Ark. State Hwy. Comm.* v. *Lone Star, Inc.,* 4 Ark. App. 103, 628 S.W.2d 23 (1982) where it was declared permissible to capitalize the value of the leasehold interest in a store located on the condemned property but not the profits derived from its operation.

In *Ark. State Hwy. Comm.* v. *Dupree,* 228 Ark. 1032, 311 S.W.2d 791 (1958), *Ark. State Hwy. Comm.* v. *Addy, supra,* and *Ark. State Hwy. Comm.* v. *Ormond,* 247 Ark. 867, 448 S.W.2d 354 (1969) our court recognized the general rule that this exception extended to capitalization of profits derived from the land when used for agricultural purposes.

We conclude from a review of these cases that capitalization of income is a recognized method of arriving at the fair market value of real estate where the income is derived from the land itself rather than from a business operated upon the land. The reason for this distinction is that there can be no compensation for the loss to a business being operated on the property because it would permit consideration of too many intangibles, such as the extent to which the owner could have transferred his business to a new location and the relative degree of commercial skills. *Ark. State Hwy. Comm.* v. *Wilmans, supra.* In the case of farming operations or rental property, however, the prospective revenue is derived from the use of the property itself and the anticipated profits are matters that a willing buyer would consider in estimating the market value of the property. *Housing Authority of Little Rock* v. *Rochelle, supra.* We find no error in permitting the capitalization of income approach in arriving at fair market value in this case.

The appellant next argues that the appellee's expert's testimony should have been stricken because the expected profits testified to had no relation to the land in question, which had produced only one peach crop, and were too speculative to be admissible and because they were based on fruit farming as a whole. *Ark. State Hwy. Comm.* v. *Ormond, supra.* We see a distinction between the factual situation here and that in *Ormond.* There the landowner who was a realtor and farmer testified that the highest and best use of his land was for catfish farming and based his opinion as to the market value on capitalization of income. The landowner testified that his opinion was based entirely on "income he had anticipated upon the basis of his own estimates of market prices, yields and costs." The court noted that the landowner had no experience in this business or anything relating to it, that there was "no reasonable basis for Ormond's opinion as to the value of the entire tract before the taking," and stated:

> Even if we should consider that evidence of income and production from commercial catfish farming is admissible under the recognized exception in cases of agricultural property, as appellees urge, there is no exception which permits such values to be based on pure speculation, as must be the case when the testimony is given by one without experience or expertise in the undertaking about which he testifies, when there is no history as to the particular land upon which to base anticipated income or production.

In the case at bar even though this was a new orchard with no income history the appraiser had a reliable and trustworthy basis for his estimates of anticipated annual income. Some of his information was derived from appellee, whose expertise in fruit farming was established. Primary reliance, however, was placed on an exhaustive study made by the University of Arkansas Cooperative Extension Service in which anticipated profits for peach and apple orchards were determined on an annual basis during the life expectancy of the trees. These figures were determined by comparison of income over a period of years with varying locations in Arkansas, weather conditions, insect infesta-

tions and other factors affecting production. There was evidence that these figures also took into consideration the cost of production and marketing and relative skills of the individual farmers. Adjustments were made for all of those factors affecting income in order that the figures projected would reflect the estimate of anticipated annual income of the average orchard during its expected life. There was evidence that both appellee's orchard and his skill were far above average. It was testified that these studies were applicable to appellee's location. We conclude that there was a reasonable basis for the expert's opinion and there was no error in refusing to strike his testimony. Appellant's objection goes merely to the weight of it and not to its admissibility.

Appellant next contends that the trial court erred in refusing to strike the testimony of the expert witness as to the damage resulting to the remainder of the tract by the taking. We do not agree. Mr. Collins, after determining the value of the fee simple title of the acreage actually taken in the amount of $23,821.00, determined that the value of the remaining lands was reduced as a result of the easement by an additional $42,316.00. The witness testified on cross-examination that if there were two farms identical in every respect except that one had a pipeline running through it and the other did not, that an unobligated buyer would purchase the one without the pipeline because its existence diminished the value of the other property. He was asked if he had ever been involved with a buyer in that situation or to state an instance in his experience where a pipeline crossed on a piece of property and had depreciated its value. He answered that he could not — that he had never seen an instance where he had two identical farms, one with a pipeline and one without. Appellant argues that because the witness had no comparable sales his opinion was without reasonable basis. He stated, however, that his opinion was based upon his expertise and knowledge that the farm with a pipeline was not as attractive as one without from an economic point of view.

It has been the rule for many years that the testimony of an expert witness should not be stricken unless it is

demonstrated that he has no reasonable basis for the opinion and that opinion testimony of an expert witness can be considered even though not based entirely on comparable transactions. *Fulmer* v. *Southwestern Bell Tel. Co.,* 9 Ark. App. 92, 654 S.W.2d 603 (1983); *Ark. State Hwy. Comm.* v. *Russell,* 240 Ark. 21, 398 S.W.2d 201 (1966). In his testimony he said that he determined the effect on the remaining lands of the removal of the 70 foot strip by considering the increased production expenses on the remaining orchard occasioned by the gap. Irrigation pipes would have to cross the areas with no trees to irrigate, spray rigs which cannot be turned off for a 70 foot gap would use chemicals and fuel in crossing the area, and other time and expense would be wasted in other horticultural practices required to be done on a row basis. He further testified that these additional agricultural expenses occasioned by the existence of the pipeline would cause a willing buyer to stop and consider that these extra costs could be avoided by purchase of the other land. It was his view that a reduction of probable income occasioned by the extra expenses resulting from the gap between the orchards as a result of the taking were matters which would be fully considered by a prospective purchaser in determining the market value and the price he would be willing to pay for the property. The appellee also testified without objection to these same additional expenses and some others which would be occasioned by the taking and agreed that they would cause a purchaser to ponder. We cannot say that Mr. Collins did not give a fair and reasonable basis for his opinion that creating a gap between the orchards would affect the market value of the remaining acreage. Again we think appellant's argument goes more to the weight to be given this testimony than to its admissibility.

Appellant finally contends that the trial court erred in instructing the jury that damages were recoverable for the full market value of the lands taken for the easement without regard to the permissive use of the surface by the condemnee since the condemnor acquires the right to make use of the right-of-way as future needs may require for the purposes for which the right-of-way was acquired. Appellant recognizes that this is a well settled rule establishing the measure of

damages for the taking of easements. *Baucum* v. *Ark. Power & Light Co.*, 179 Ark. 154, 15 S.W.2d 399 (1929). It argues, however, that it took the easement under a "Certificate of Public Convenience and Necessity" created by an act of Congress which conferred on it the right of eminent domain and, therefore, the measure of damages for the taking of easements applied in federal courts (which he argues differs from our own) should apply. We do not agree.

15 U.S.C. § 717f(h) (1976) provides that when the holder of such a certificate cannot acquire the easement by agreement, it may acquire it by the exercise of the right of eminent domain in the United States District Court for the district in which the land lies or in the state courts. It further provides that where the proceedings are instituted in the United States courts, "The practice and procedure . . . shall conform as nearly as may be with the practice and procedure in similar action or proceeding in courts of the State where the property is situated." We find nothing in the language of this enactment which requires in either court the application of rules of substantive law differing from those applicable in similar proceedings under State law. We find no error.

Affirmed.

CORBIN and CLONINGER, JJ., agree.

Chester INMAN *v.* STATE of Arkansas

CA CR 83-80 661 S.W.2d 459

Court of Appeals of Arkansas
Division II
Opinion delivered December 14, 1983

Norman M. Smith, for appellant.

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

JAMES R. COOPER, Judge. In this criminal case, a jury convicted the appellant of burglary and sentenced him to 5 years in the Arkansas Department of Correction. From that conviction, comes this appeal.

On appeal, the appellant argues that he was denied his right to counsel, a right guaranteed him under the Sixth Amendment to the United States Constitution. The appellant was charged by information with committing a bur-

glary on September 5, 1981. He was arraigned on October 6, 1981, before the Honorable Randall Williams, Circuit Judge for the Eleventh Judicial Circuit. At his arraignment, the appellant was advised of his right to have an attorney represent him and of his right to have court appointed counsel should he not be able to afford one. Judge Williams noted on the court's docket sheet that the case was "passed to November 3, 1981 at 9:30 to get an attorney." The record also reflects that the defendant appeared before Judge Williams on October 6, 1981 and stated that he would get an attorney. Also, the appellant posted a bond at that time and remained at liberty until his trial.

On February 14, 1982, the day before trial, the appellant appeared before the Honorable Russell Rogers, Circuit Judge for the newly created Eleventh Judicial Circuit-East, and requested that the charges against him be dropped on the ground that he was denied a speedy trial. Judge Rogers found the appellant was being tried within the third term of the court since his being charged, and therefore he was not denied a speedy trial.

Next, the appellant requested the court appoint an attorney to represent him as he was an indigent. Apparently no record was made of the appellant's conversation with the trial judge. On the morning of trial, the trial judge dictated into the record a summary of the previous day's proceedings. Essentially, the trial court made four findings: First, that the appellant had not filed a written request asking that an attorney be appointed for him; second, that, based on the record, the trial court assumed that the appellant had earlier been found not to be an indigent; third, that the appellant was a relatively educated and intelligent 30 year old male who understood the consequences of not having an attorney and who possessed a skilled trade; and fourth, that the appellant had knowingly waived his right to an attorney either by his actions or inactions.

The main thrust of the appellant's argument on appeal is that he was not required to file a written petition seeking counsel and that his oral request for an attorney was sufficient. The appellant's counsel does not mention Rule

18 of the Chancery and Circuit Court Rules, Ark. Stat. Ann. Vol. 3A, which clearly requires a written petition asserting indigency and a supporting affidavit. The appellant has not filed such a petition and affidavit, and therefore we affirm the trial court's refusal to appoint counsel. To this day, there is not a scintilla of evidence in the record which supports the appellant's claim (at the trial court level) that he was indigent. Further, on appeal, the appellant does not assert that he was an indigent and therefore entitled to appointed counsel at his trial. Finally, we note that, within 30 days following his conviction, the appellant obtained counsel to perfect this appeal. By a motion for a new trial, accompanied by an affidavit of indigency and the required affidavit, the trial court could have been afforded the opportunity to correct the situation (which we do not concede constituted error) caused by the appellant's belated claim of indigency.

The appellant correctly states that the right to counsel is guaranteed by the Sixth Amendment to the United States Constitution. We do not believe that Rule 18 of the Chancery and Circuit Court Rules conflicts with the Sixth Amendment, and the appellant's counsel does not argue that it does.

Affirmed.

MAYFIELD, C.J., and GLAZE, J., concur.

Myrna M. WALKER *v.* Michael C. HUCKABEE and HOMEFINDERS REAL ESTATE, INC.

CA 83-35 661 S.W.2d 460

Court of Appeals of Arkansas
Division I
Opinion delivered December 14, 1983

Shackleford, Shackleford & Phillips, P.A., for appellant.

J. S. Brooks, for appellee Huckabee.

Compton, Prewett, Thomas & Hickey, P.A., by: *Robert Compton,* for appellee Homefinders Real Estate, Inc.

LAWSON CLONINGER, Judge. Appellee, Michael C. Huckabee, filed a complaint in chancery seeking specific performance by appellant, Myrna M. Walker, of an alleged contract for the sale of 35 acres of land located in Union County, Arkansas. Appellant denied the existence of a contract, and asserted a counterclaim for unlawful detainer. Appellee, Homefinders Real Estate, Inc., intervened in an attempt to collect a commission from appellant on the sale of the property.

The trial court found that although appellant rejected Huckabee's original offer, Huckabee accepted appellant's counter offer. Huckabee was held entitled to specific performance and Homefinders was held entitled to a 10% commission from appellant.

For reversal, appellant contends that no contract was formed; that Huckabee's acceptance of appellant's counter offer was never communicated to appellant, and that Homefinders was not the agent of appellant with authority to receive notice of the acceptance. When we view the evidence in the light most favorable to the appellees, as we must, we hold that the findings of the chancellor are not clearly against the preponderance of the evidence.

Appellant lives in Tempe, Arizona, and inherited the 35-acre tract. In 1977 appellant listed the tract with Homefinders, but no sale was made and the listing expired. Appellant also listed a 55-acre tract with Homefinders in 1978, but that listing also expired without a sale.

In July, 1981, Dorothy Craig, a representative of Homefinders, called appellant and asked appellant if she was still interested in selling the 35-acre tract. Appellant set a price of $800 an acre. The call by Dorothy Craig was prompted by an expressed interest in land in the area by Huckabee. Huckabee made an offer of $17,000 for the tract through Dorothy

Craig, which was rejected by appellant. Huckabee then raised his offer to $24,500, or $700 an acre. The offer was signed by Huckabee on a standard offer and acceptance form and addressed to Homefinders Real Estate, Agent. Homefinders subsequently mailed the document to appellant. The offer and acceptance was modified by appellant in three details not vital to the issues here, and, as modified, signed by appellant and returned to Homefinders. Appellant instructed Homefinders to deliver the necessary papers to an El Dorado, Arkansas, attorney, who had once represented appellant. The offer and acceptance, as modified, was accepted by Huckabee, who made the down payment to Homefinders, and the instrument was delivered to the attorney as directed by appellant. Huckabee then moved onto the property with the permission of Homefinders. Homefinders attempted to contact appellant to inform her of what had been done, but appellant, who was visiting relatives while en route to Arkansas, could not be reached. When appellant arrived in Arkansas she then discovered for the first time that Huckabee had accepted her counter offer and was in possession of the property. At that time appellant repudiated the sale and ordered Huckabee off the property.

The chancellor found that the offer and acceptance, as modified by appellant, was a binding contract between the parties; that the evidence, although conflicting, indicated that appellant became displeased with the price she had agreed to accept and for that reason repudiated the contract; that appellant requested that the offer and acceptance be taken to a designated attorney only for the purpose of preparing the necessary papers to close the sale.

Appellant does not contend that Huckabee did not accept her counter offer, but she does urge that Homefinders was not her agent for receiving Huckabee's acceptance and that she withdrew her offer before Huckabee's acceptance was communicated to her.

The evidence failed to establish that Homefinders had authority to grant Huckabee permission to enter the land, but evidence was presented from which the chancellor could find that Homefinders was the agent of appellant for the

limited purpose of conveying appellant's counter offer to Huckabee and receiving Huckabee's acceptance of that counter offer. The trial court could find, and did find, that appellant made a specific counter offer and instructed Homefinders to deliver that offer, if accepted by Huckabee, to appellant's attorney for closing.

An owner must say or do something tending to prove that he accepted the broker as his agent; mere selling to the party whom the broker procured is insufficient proof. *Shuffield* v. *Hunter,* 268 Ark. 1003, 597 S.W.2d 852 (Ark. App. 1980). Circumstantial evidence may be sufficient to establish agency, and the allegations of the purported agent may be used to corroborate other evidence of the agency. *Hawthorne* v. *Davis,* 268 Ark. 131, 594 S.W.2d 844 (1980). There is ample evidence to indicate that Homefinders was appellant's agent for the purpose of consummating the sale and that appellant agreed to pay Homefinders a commission; the previous relationship between appellant and Homefinders; appellant's signing of the counter offer with instructions to deliver it to an attorney for closing; and an agreement contained in the offer and acceptance whereby appellant agreed to pay Homefinders a commission of 10%. A further indication that appellant was aware that she was promising to pay Homefinders a commission is the fact that when appellant signed the offer and acceptance, as modified, she added a typed supplement which provided that one-half of the agent's commission was payable at the closing of sale and one-half in one year without interest.

The judgment of the trial court is affirmed.

CRACRAFT and CORBIN, JJ., agree.

MAYBELLINE COMPANY *v.* Dewey STILES, Director of Labor, and Corlis TATE

E 83-80 661 S.W.2d 462

Court of Appeals of Arkansas
Division II
Opinion delivered December 14, 1983

Jack Stewart, Memphis, Tennessee, and *Rose Law Firm,* by: *Jim Hunter Birch,* for appellant.

Allan Pruitt, for appellees.

TOM GLAZE, Judge. This is an appeal from a decision of the Board of Review awarding benefits to the claimant after finding that she was dismissed from her job for reasons other than misconduct in connection with the work. The appellant/employer raises two points for reversal:

> A. The Board of Review acted in a manner contrary to law by failing to order a hearing to receive new evidence offered by Maybelline.
>
> B. The Board's decision is not supported by the evidence and is contrary to law.

We cannot say that the Board erred as a matter of law in not awarding a second hearing at the employer's request, and we find substantial evidence in the record to support the Board's decision. Therefore, we affirm.

The claimant was a factory line employee who was discharged October 23, 1982. The claimant filed for un-

employment benefits and stated on her application that she had been dismissed for "going to the bathroom without permission." The employer responded that the reason for claimant's separation from employment was for "violation of company rules." The Agency found the claimant eligible for benefits and the employer appealed.

A hearing was conducted before an appeals referee; the claimant appeared in her own behalf and three representatives appeared for the employer: the personnel manager, the claimant's supervisor, and the assistant production manager. The claimant testified that she was discharged for going to the restroom without permission; she admitted that she had been warned on prior occasions not to leave the line without permission for any reason. The claimant testified also that when the line was "down" — not operating for maintenance or repair — the employees were permitted to leave without permission. She testified that the line was down at the time she left her post on October 23, and that it was still down when she returned. The claimant also testified that she had had surgery in September, 1982, which had increased the frequency and urgency of her need to urinate.

Of the three witnesses who appeared for the employer, Mr. Acre, the Personnel Manager, did most of the talking. Acre denied any knowledge on the part of the company that the claimant had a medical problem which necessitated her going to the restroom frequently. He testified:

> [W]e were never informed . . . that she had a physical condition initiated by surgery that required frequent urination and thus leaving the line, we were not aware of that. Additionally, there is [sic] several questions in my mind regarding her leaving the line, the line being down and so on. I would just say we would have taken that fact into consideration had we known about it. However, we would have still required her to follow the same procedures of notifying the service worker or clerk or supervisor. When a production line is down, that is it's not functioning because it's broken down under mechanical repair or something of that effect, the

> operators aren't working the line isn't running, and there is the possibility that the operators can go to the restroom without seeking permission during those times. We would not let an entire line leave and go to the restroom, but employees can, electing among themselves, to go to restroom while the machine is broken down. When the machine is running, that is not the procedure. Our employees are aware of this . . . . They are informed of it when they are employed, they are informed the first night they're working on the job of the basic procedure for leaving the line for whatever reasons.

The referee affirmed the Agency's decision that the claimant was eligible for benefits. The employer appealed that decision to the Board of Review and submitted additional evidence to show that on the day the claimant was dismissed, the line was *not* down as the claimant had testified. The Board affirmed the decision of the referee awarding benefits to the claimant, stating in its decision that, pursuant to *Mark Smith* v. *Everett,* 6 Ark. App. 337, 642 S.W.2d 320 (1982), it had not considered the evidence submitted by the employer with its letter of appeal to the Board.

In its first point for reversal, the appellant alleges the Board acted in a manner contrary to law by failing to order a hearing to receive new evidence proffered by the employer when it filed its appeal with the Board. Appellant relies upon previous cases decided by this Court which have "zealously protected the right of each party to the proceedings to notice of the other party's evidence and a fair opportunity to rebut the evidence of the other party," citing *Mark Smith* v. *Everett, supra; Clay* v. *Everett,* 4 Ark. App. 122, 628 S.W.2d 339 (1982); *Ireland* v. *Daniels,* 2 Ark. App. 44, 616 S.W.2d 33 (1981); and *Brown Jordan* v. *Dukes,* 269 Ark. 581, 600 S.W.2d 21 (Ark. App. 1980). However, these cases are distinguishable because the appellants were denied the *opportunity* to cross-examine witnesses or to rebut evidence against them because the adverse witnesses did not appear at the hearings.

In *Mark Smith* v. *Everett, supra,* the claimant appeared at the hearing. The employer was not represented, but presented testimony by affidavit. This Court reversed a decision adverse to the claimant and remanded to give the claimant an opportunity to submit evidence to rebut that contained in his employer's affidavit.

In *Clay* v. *Everett, supra,* the claimant appeared at a hearing at which the employer was not represented and testified, without prior notice to the employer, that she had quit her job because of her supervisor's sexual advances and harassment. The Appeal Tribunal awarded benefits to the claimant based upon that testimony. The employer wrote a letter to the Board of Review appealing the decision, and the Board relied upon that letter to reverse the Appeal Tribunal and deny benefits. This Court remanded to the Board and ordered that further evidence be taken because the employer had no notice that the claimant would allege sexual harassment and the claimant had no opportunity to cross-examine the employer based upon the letter he submitted to the Board.

In *Ireland* v. *Daniels, supra,* the employee's claim was denied because the Agency found that she had quit her job because of illness without attempting to preserve her job rights. The claimant testified at the hearing that she had not quit her job, at all, but had been terminated while she was recuperating from a heart attack. The claimant asked the referee to contact her employer to verify that she had been discharged, but the referee refused. This Court reversed and ordered that the claimant be awarded benefits because all evidence was that she had been discharged.

In *Brown Jordan* v. *Dukes, supra,* the claimant was denied benefits for alleged misconduct in connection with the work. At the hearing, the claimant appeared along with other employees who testified that the claimant had not committed the act for which he was fired. Although his supervisor's written statement was introduced into evidence, the supervisor did not appear. The Appeal Tribunal found the claimant ineligible for benefits. He submitted to the Board of Review a written statement from another employee

who was allegedly a party to the misconduct, absolving the claimant of any wrong-doing. That statement apparently was the basis for the Board's reversing the Appeal Tribunal and awarding the claimant benefits. This court reversed and remanded for additional evidence.

The instant case presents a very different set of facts than the cases on which appellant relies because here, the employer was represented at the hearing and had ample opportunity to cross-examine the claimant and to rebut her testimony. In fact, the appellant had three representatives at the hearing, each with a personal knowledge of the claimant and of the circumstances surrounding her dismissal. None of the employer's representatives refuted the claimant's statements or asked the referee for additional time either to check their records or to submit their records to the referee. The appellant offered no additional evidence until it appealed the adverse decision to the Board of Review. Although it is within the discretion of the Board of Review to direct that additional evidence be taken, Ark. Stat. Ann. § 81-1107 (d) (3) (Supp. 1983), nothing in the law requires a second hearing so long as each side has notice of and a fair *opportunity* to rebut the evidence of the other party. *See Brown Jordan v. Dukes, supra. See also Mark Smith* v. *Everett, supra.*

For its second point for reversal, appellant contends the decision of the Board is not supported by substantial evidence and must therefore be reversed. Appellant contends that the testimony was undisputed that the claimant was discharged for misconduct in connection with the work within § 5 (b) (1), and that as a consequence, she is ineligible for benefits. The testimony *was* undisputed that the claimant left her post without permission in order to go to the restroom. The claimant submitted medical evidence at the hearing that surgery which had been performed on her could result in her having to urinate more frequently than usual. The claimant testified that she was physically unable to take the time to get permission to leave her line. She also testified that she had been warned about leaving without permission, that the line was down when she left, and that when the line was down, the employees were free to leave their places

without permission. All of that testimony was unchallenged by the three employer representatives who attended the hearing. Although Acre elaborated on the precise rule, he admitted that when the line was down, the employees could work out among themselves a schedule for going to the restroom or getting drinks of water.

Whether the findings of the Board of Review are supported by substantial evidence is a question of law; this Court will reverse when the Board's findings are not supported by substantial evidence. *St. Vincent Infirmary* v. *Arkansas Employment Security Division,* 271 Ark. 654, 609 S.W.2d 675 (Ark. App. 1980). Whether an employee's actions constitute misconduct in connection with the work sufficient to deny unemployment benefits is a question of fact for the Board of Review. *Olson* v. *Everett,* 8 Ark. App. 230, 650 S.W.2d 247 (1983); *Arlington Hotel* v. *Employment Security Division,* 3 Ark. App. 281, 625 S.W.2d 551 (1981). This Court will determine whether the Board could reasonably reach its results upon the evidence before it, but will not replace its judgment for that of the Board even though the Court might have reached a different conclusion based upon the same evidence the Board considered. *Harris* v. *Daniels,* 263 Ark. 897, 567 S.W.2d 943 (1978).

We find that substantial evidence supports the Board's finding that the claimant was discharged for reasons other than misconduct in connection with the work and the Board's award of benefits. We affirm.

Affirmed.

COOPER, J., agrees.

MAYFIELD, C.J., concurs.

Charles "Tubby" WILSON *v.* STATE of Arkansas

CA CR 83-70 662 S.W.2d 204

Court of Appeals of Arkansas
Division II
Opinion delivered December 21, 1983
[Rehearing denied January 18, 1984.]

Felver A. Rowell, Jr., for appellant.

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

MELVIN MAYFIELD, Chief Judge. In investigating a number of thefts, deputies of the Pope County Sheriff's Office were told that the thieves had traded much of the stolen merchandise to the appellant for marijuana. The officers obtained a search warrant based on the affidavit of one of the admitted thieves, searched appellant's home, and found numerous items that were listed in the warrant. During the search they noticed other items they remembered had been reported as stolen. They then obtained another warrant and seized these additional items. Appellant was arrested on February 9, 1981, and on October 26, 1982, was convicted of theft by receiving.

On appeal it is argued that the first search warrant was illegally obtained because the affidavit was not sworn to under oath. The affidavit states on its face that it was subscribed and sworn to before Municipal Judge Richard Peel, and the judge testified that he questioned the witness, Terry Pratt, about the content of the affidavit, asked if the statements therein were true, and had Pratt sign in his presence. He admitted, however, that he probably did not require the witness to raise his right hand and state orally that the statements in the affidavit were "the truth, the whole truth, and nothing but the truth, so help me God." We do not think this was necessary.

In *Cox* v. *State*, 164 Ark. 126, 261 S.W. 303 (1924), the appellant was convicted of making a false affidavit. The trial court had refused to instruct the jury in regard to the manner of administering oaths as set out in what is now Ark. Stat. Ann. §§ 40-101 & 102 (Repl. 1962). Those sections provide that one may swear by uplifted hand or by laying a hand on and kissing the Gospels, but the court held that these were not the only methods by which oaths could be administered. The court said:

> So here we think if appellant signed the affidavit for the purpose of swearing to it, knowing that the clerk regarded his act of signing the affidavit as a method of making affirmation, the jury was warranted in finding that appellant was sworn. *Fortenheim* v. *Claflin, Allen & Co.*, 47 Ark. 53.

Cox v. *State* was quoted with approval in *A and B* v. *C and D,* 239 Ark. 406, 390 S.W.2d 116 (1965). In addition, Ark. Stat. Ann. § 41-2601 (3) (Repl. 1977), reads as follows:

> "Oath" means swearing, affirming and every other mode authorized by law of attesting to the truth of that which is stated. Written statements shall be treated as if made under oath if:
>
> . . . .
>
> (b) the statement recites that it was made under oath, and the declarant was aware of such recitation at the time he signed the statement and intended that the statement should be considered a sworn statement; . . . .

Pratt admitted he signed the affidavit in the presence of the municipal judge, and the affidavit states "I, Terry Pratt, being duly sworn on oath, do solemnly swear . . . " Although it is the state's burden to establish that the warrant was issued in compliance with the law, *Lunsford* v. *State,* 262 Ark. 1, 552 S.W.2d 646 (1977), when we review the trial court's ruling we make an independent determination based upon a totality of the circumstances, and do not reverse the trial court's finding unless it is clearly against the preponderance of the evidence. *Grant* v. *State,* 267 Ark. 50, 57, 589 S.W.2d 11 (1979). While a more formal procedure of administering the oath might be more appropriate, considering the evidence and law set out above, we find no reversible error in the trial court's ruling as far as the making of the affidavit under oath is concerned.

Likewise, we find no reversible error, individually or collectively, in the other attacks made upon the search warrant. We do not agree that the affidavit merely stated conclusions; and in view of the fact that the warrant described appellant's house as the Charles "Tubby" Wilson residence, *Gatlin* v. *State,* 262 Ark. 485, 559 S.W.2d 12 (1977), and the more particularized description in the affidavit, *Baxter* v. *State,* 262 Ark. 303, 311, 556 S.W.2d 428 (1977), we do not agree that the description of the premises to be searched was inadequate.

Appellant says there was no finding of probable cause to issue the warrant, but the warrant states on its face that the magistrate found probable cause. Moreover, it has been held that the magistrate's actual issuance of the search warrant established his finding of probable cause even more positively than the insertion of a conclusory finding to that effect would have, *Harris* v. *State,* 262 Ark. 506, 558 S.W.2d 143 (1977).

It is also argued that we should invalidate the warrant because there was no return on the face of it. The return, however, was attached to the warrant and we know no rule or reason that would prevent the return being made on a separate, attached document. Appellant also says the officer did not swear to the contents of the return, but his signature appears under the statement, "I swear that this inventory is a true and detailed account of all the property taken by me" and it is signed by the municipal judge under the line that states, "Subscribed and sworn to before me . . . . " Again, there was no formal oath-taking and the return probably was not signed in the judge's presence, but substantial compliance with the requirement of A.R.Cr.P. Rule 13.4 (b) that a "verified" return be made was all that was necessary, *Shackleford* v. *State,* 261 Ark. 721, 551 S.W.2d 205 (1977), and we cannot say that the trial court erred in holding against appellant on this point.

Appellant next says the testimony of Pratt differed at the suppression hearing from what was in his affidavit. In *Franks* v. *Delaware,* 438 U.S. 154 (1978), the United States Supreme Court said:

> [W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence,

> and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

The holding in *Franks* v. *Delaware* was applied by the Arkansas Supreme Court in *Brown* v. *State,* 264 Ark. 248, 570 S.W.2d 251 (1978). In the instant case, Pratt's testimony at the suppression hearing was certainly ambiguous and contradictory. In his affidavit he said the property described was stolen by him and personally delivered to the appellant's home and was still there the last time he was there. At the suppression hearing, he agreed with both prosecuting attorney and defense counsel and vacillated between confirming and rejecting the facts set out in his affidavit. We must defer to the superior position of the trial court to pass upon the credibility of witnesses, *Grant* v. *State, supra,* therefore, it was up to that court to decide which version of Pratt's testimony should be believed. Applying *Franks* v. *Delaware* to this situation, we think the appellant has failed to establish by a preponderance of the evidence that the affidavit contained a false statement knowingly and intentionally made or made with reckless disregard for the truth.

Appellant also says the affidavit signed by Pratt was prepared for the signature of Pratt's accomplice in the theft of the stolen property. There were actually two affidavits prepared — one for each man to sign — and the warrant was prepared to be based upon the affidavits of both of them. Judge Peel testified, however, that he removed the other name from the warrant and that it was based solely on the affidavit signed by Pratt. The United States Supreme Court has said that affidavits for search warrants must be tested in a commonsense and realistic fashion. *United States* v. *Ventresca,* 380 U.S. 102 (1965). We find no error in the issuance of the warrant based upon the affidavit signed by Pratt.

The second point urged for reversal is that the trial court erred in refusing to dismiss the information because the defendant was not brought to trial within 18 months as

required by A.R.Cr.P. Rule 28.1 (c), Ark. Stat. Ann. Vol. 4A (Supp. 1983). The information charging appellant was filed on February 6, 1981, but appellant was not arrested until February 9, 1981, and under A.R.Cr.P. Rule 28.2 (a), the 18 months started running on the day the charge was filed. He was tried on October 26, 1982, so the time from the date he was charged to date of trial is less than 21 months. Under A.R.Cr.P. Rule 28.3 certain periods are excluded in computing the time for trial. Thus, if as much as 3 months was excludable, appellant was brought to trial within the 18-month period.

The state has the burden of proving good cause for any delay in the trial or that the delay was legally justified. *Williams* v. *State,* 275 Ark. 8, 627 S.W.2d 4 (1982). Several reasons are argued by the state to show good cause for the delay in this case, but we need consider only one of them.

From the record the trial court could have found that the appellant, who was on bond, disappeared prior to November 25, 1981. His case was set for trial on November 16, 1981, and his attorney testified that he wrote appellant on October 28, 1981, advising him of the trial date, but appellant did not respond to the letter. Approximately two days before trial date, the attorney was advised by appellant's wife that she did not know where the appellant was. The case was then passed to November 25, 1981. On that date the appellant did not appear and his attorney informed the court that he could not be located. The suppression hearing was held that day and the trial was passed. In February of 1982, appellant's bond was forfeited. Eventually, it was learned that appellant was in the State of Washington and extradition documents were executed in July of 1982. The deputy prosecuting attorney testified that appellant fought extradition and was finally brought back to Arkansas on September 28, 1982.

The period of delay resulting from the absence of a defendant is excludable under A.R.Cr.P. Rule 28.3 (e). *See also, Williams* v. *State, supra;* and *Faulk* v. *State,* 261 Ark. 543, 551 S.W.2d 194 (1977), *appeal dismissed,* 434 U.S. 804 (1977). From November 25, 1981, to September 28, 1982, is

over 10 months. Clearly, the trial which was held within 21 months of the date on which he was charged, was held within the required 18 months when appellant's 10-month absence is excluded.

As his final argument for reversal, appellant contends that the trial court erred in failing to direct a verdict in his favor with reference to a stereo and two speakers and some bedroom furniture. A directed verdict is proper only when no fact issue exists, and on appeal we view the evidence in the light most favorable to the appellee and affirm if there is substantial evidence to support the jury's verdict. *Harris* v. *State,* 262 Ark. 680, 561 S.W.2d 69 (1978); *Balentine* v. *State,* 259 Ark. 590, 535 S.W.2d 221 (1976).

The possession of recently stolen property, if not satisfactorily explained to the jury, is sufficient to sustain a conviction of theft by receiving. *Patterson* v. *State,* 253 Ark. 393, 486 S.W.2d 19 (1972); *Riley* v. *State,* 267 Ark. 916, 593 S.W.2d 45 (Ark. App. 1979). There was testimony from the admitted burglars that among the things they had stolen and taken to appellant were a stereo and two speakers, and that he had given them marijuana in exchange for some of the merchandise they took him. A man from whom a stereo and two speakers had been stolen testified that the items found at appellant's house looked like the ones stolen from him. From these circumstances, the jury could have found that the appellant had good reason to believe that the stereo and speakers were stolen. *Fioranelli* v. *State,* 270 Ark. 470, 605 S.W.2d 13 (1980).

Appellant says he received the bedroom furniture from a couple in exchange for a car he had for sale and asserts he had no reason to suspect it was stolen. He also questions its identification. The bedroom furniture consisted of a vanity-type dresser with stool, cedar chest, and a chest of drawers. It was antique with a distinctive pattern. Officer Taylor testified that he had seen the matching headboard when the rest of the set was first reported stolen and he recognized the same pattern on the furniture in appellant's home. He also testified that he was somewhat of an antique buff and had never seen the same pattern in any antique store. A witness

identified the furniture from photographs taken by the police as being identical to certain furniture stolen from his deceased aunt's home shortly after her death. He was the administrator of her estate and was familiar with the furniture. We think the identification of this furniture was adequate to establish that it had been stolen from the home of the witness's aunt. The appellant's possession was circumstantial evidence but that does not render it insubstantial as the law makes no distinction between direct evidence of a fact and circumstances from which a fact may be inferred, *Cooper* v. *State,* 275 Ark. 207, 628 S.W.2d 324 (1982), and the jury was not required to believe the appellant's explanation that he traded a car for the furniture.

The stereo, speakers, and furniture were only a portion of the items which appellant was charged with receiving in violation of the law. Only one information was filed as to all the items. We find the case was properly submitted to the jury on all the items set out in the information and that there is substantial evidence to support the jury's verdict.

Affirmed.

COOPER and GLAZE, JJ., agree.

J. I. CASE COMPANY, d/b/a CASE POWER & EQUIPMENT COMPANY *v.* Charles SEABAUGH

CA 83-56 662 S.W.2d 193

Court of Appeals of Arkansas
Division I
Opinion delivered December 21, 1983

Elledge & Martin, by: *Steven W. Elledge* and *John W. Martin,* for appellant.

Carl J. Madsen, P.A., for appellee.

GEORGE K. CRACRAFT, Judge. J.I. Case Company d/b/a Case Power & Equipment Company appeals from a judgment entered against it in favor of Charles Seabaugh in the amount of $12,726.11, contending that the trial court erred in denying its motion for judgment notwithstanding the verdict because the verdict was against both the law and the evidence. We find no error in the action of the trial court and affirm the judgment.

In January 1980 Seabaugh disputed the amount of a bill for $2,547.79 presented to him by the appellant for repairs to his Model 450 tractor. When appellee refused to pay the bill the appellant claimed the right to retain possession of the machine under the Artisan's Lien Statute [Ark. Stat. Ann. § 51-404 (Repl. 1971)] and subsequently brought this action

to recover the amount of its bill. The appellee protested that the appellant had undertaken to repair this same machine a short time before this second bill was incurred and that the second repair was occasioned by appellant's failure to repair it properly the first time. He contended the parties had therefore agreed that he pay only a portion of actual cost of the second repair. By counterclaim appellee also prayed judgment for the loss of use of the machine over a period of fourteen months during which it had been in the possession of appellant.

The appellant offered evidence of the reasonable cost of repair and denied any agreement to reduce the bill below its customary charge for that service. The appellee offered evidence both that the parties agreed to "split" the repair bill and of the amount to reasonably compensate him for his loss of use of the machine while it was retained by appellant. The jury was instructed that should they find the question of liability in favor of appellant they must determine the amount of money which would reasonably and fairly compensate it for its services. If they found for the appellee they must determine the amount of money which would reasonably compensate him for loss of use of his machine for the fourteen month period during which it was withheld from him by the appellant. They were properly instructed on the factors which they might consider in determining the reasonable compensation for loss of use. At appellant's request the jury was instructed on the right of an artisan to claim a lien for materials and labor furnished in the repair of implements and machines and its right to retain possession of the machine until the lien is satisfied. They were instructed that whether appellant had rightfully retained possession of the machine was a question of fact for them to determine.

The jury was also instructed that the rights of the parties were separate and distinct and, although decided on the same evidence, the claims of the parties should be treated as separate suits. The jury was furnished two general verdict forms — one for use in the event they found for the appellant and the other if they found for the appellee. They were

instructed by the court that they should complete "one or the other."

After the jury retired they returned to inquire whether they must return only one verdict or could make an award on each. They were told that it was possible for them to make two awards. After the jury had again retired the trial judge stated to counsel that he wanted "a thorough understanding from you gentlemen that this is correct. Do you understand and agree?" Both counsel stated that they did agree. The trial judge then asked counsel if they understood that in the event two verdicts were returned, one verdict would offset the other. Both agreed that this might be done.

The jury thereafter returned both verdict forms. They found for the appellant "in the amount of $1273.89" and for the appellee "in the amount of $14,000." The trial court then polled the jury to make certain that by two verdicts they intended that the appellee recover the sum of $14,000 less $1273.89. The jury agreed that this was the intent of their verdict and the court thereupon directed counsel to prepare a judgment against the appellant in the amount of $12,746.11.

The appellant moved for a judgment notwithstanding the verdict contending that the finding of the jury that the appellant was entitled to be paid the sum of $1273.89 for repairing the tractor necessarily included a finding that it had a right to possession of the property under the Artisan's Lien Statute. The jury could not therefore return a verdict against appellant based upon a wrongful loss of use of the tractor. The trial court denied the motion on the grounds that he had initially given the jury two verdict forms and told them to come back with only one. After the jury asked if they could possible render a verdict on both forms they were instructed that they might, and at that time both parties agreed that the instruction was correct.

We do not reach the merit of appellant's argument that the verdict was tantamount to a finding that appellant has a right to a possessory lien and therefore damages for wrongful loss could not be awarded. At the time the jury was instructed that they might return two verdicts both parties

consented to the giving of that instruction and agreed that it was a correct one. Even if the instructions given the jury were incorrect ones it is well settled that under the doctrine of invited error appellant may not complain on appeal of an erroneous action of a trial court if he had induced or acquiesced in that action. *Missouri-Pacific Railroad Co.* v. *Gilbert,* 206 Ark. 683, 178 S.W.2d 73 (1944); *Kansas City Southern Railroad Co.* v. *Burton,* 122 Ark. 297, 183 S.W.2d 189 (1916).

We do not address the issue of whether the Artisans' Lien Act is violative of due process requirements. Not only was there no cross-appeal but the issue was not raised in the trial court and will not therefore be considered by us for the first time on appeal. *Williams* v. *Edmondson & Ward,* 257 Ark. 837, 250 S.W.2d 260 (1975); *Gregory* v. *Walker,* 239 Ark. 415, 389 S.W.2d 892 (1965).

Affirmed.

CORBIN and CLONINGER, JJ., agree.

Billy WALKER *v.* STATE of Arkansas

CA CR 83-118 662 S.W.2d 196

Court of Appeals of Arkansas
Division II
Opinion delivered December 21, 1983

F. James Jefferson, for appellant.

Steve Clark, Atty. Gen., by: *Marci L. Talbot,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was convicted by a jury of making and uttering a hot check and sentenced as an habitual offender to a term of three years in the Arkansas Department of Correction and a fine of $1,200.00. From that conviction, comes this appeal.

For reversal, the appellant contends the verdict of the jury was contrary to the law, inasmuch as Ark. Stat. Ann. § 67-720 requires intent to defraud as an element of the offense with which the appellant was charged and the appellant produced sufficient evidence to negate such intent. We disagree.

On July 19, 1982, the appellant, who was the owner of K-City Furniture Mart, purchased 12 china cabinets from Ruff and Parkhill Mfg. of Harrison. The appellant had been a regular customer of Ruff & Parkhill's. He testified that at the time he purchased these cabinets and paid for them with a check drawn on the account of K-City Furniture Mart for $1,200.00, he informed Mr. David Ruff, a partner in Ruff & Parkhill, that he would take the cabinets to Texarkana where he had a buyer and, upon selling the cabinets, return and deposit the funds from the sale into the account upon which the $1,200.00 check was drawn in order for there to be sufficient funds in his account for the check to clear. Mr. Ruff would neither confirm or deny the appellant's

claim that he stated that his account had insufficient funds in it at the time of the sale, but both Mr. Ruff and his partner, Mr. Parkhill, confirmed the appellant's testimony that he told them he had a buyer in Texarkana. The appellant's buyer in Texarkana refused to purchase the cabinets, but the appellant was able to sell the cabinets and he made a deposit into his account of $1,220.00. Despite this effort, there were insufficient funds in the appellant's account to cover the check to Ruff & Parkhill allegedly due to the fact a check for $925.25 deposited by the appellant into his account was returned to the appellant because it was drawn on an account that had been closed, and this amount ($925.25) was debited against the appellant's account. The appellant claimed to have made arrangements to pay the check off, and it was paid a few days before trial.

The appellant contends that the fact that he told Ruff & Parkhill that his check was no good and requested that they refrain from depositing his check until he could sell the cabinets and that he made arrangements to pay off the check negates any guilty intent that is required by Ark. Stat. Ann. § 67-720, which provides:

> It shall be unlawful for any person to procure any article or thing of value, or to secure possession of any personal property to which a lien has attached or to make payment of any taxes, licenses or fees, or for any other purpose to make or draw or utter or deliver, with intent to defraud, any check, draft or order, for the payment of money, upon any in-state or out-of-state bank, person, firm or corporation, knowing at the time of such making, drawing, or uttering or delivering, that the maker, or drawer has not sufficient funds in, or on deposit with, such bank, person, firm or corporation for the payment of such check, draft or order, in full, and all other checks, drafts or orders upon such funds then outstanding. [Acts 1959, No. 241, § 2, p. 1204; 1977, No. 155, § 1, p. 167; 1981, No. 899, § 1, p. 2112.]

According to Ark. Stat. Ann. § 67-722, a prima facie case of intent to defraud is made when a check is introduced into

evidence with an endorsement showing it was unpaid because of insufficient funds. *Rice* v. *State,* 240 Ark. 674, 401 S.W.2d 562 (1966). That the check was so returned is uncontroverted. In order to rebut this inference, the accused must put on evidence which demonstrates the lack of intent to defraud. *Id.*

The appellant testified that Ruff and Parkhill knew his check was no good when he delivered it to them and that he made arrangements with David Ruff to hold the check until he returned from the sale of the cabinets and deposited the proceeds from this sale into his account. Mr. Ruff would not confirm that allegation and Mr. Parkhill denied it. The appellant testified that he was aware at the time the check was written that there were not sufficient funds in his account to cover the check. His acts and assertions tend to support his claim that he had no intent to defraud. Also, the evidence that a check deposited by him into his account was returned because the account upon which it was drawn was closed tends to support his version of the transaction. However, whether the appellant's testimony was sufficient to overcome the state's prima facie case was for the jury. *Id.* Since intent is a state of mind which must of necessity be inferred, *Chaviers* v. *State,* 267 Ark. 6, 588 S.W.2d 434 (1979), the real qustion is whether there was sufficient evidence introduced by the state so as to present a fact question for the jury. Clearly, there was. The conflicts in the testimony were for the jury to reconcile. *Jones* v. *State,* 269 Ark. 119, 598 S.W.2d 748 (1980).

Although we recognize that the jury could easily have reached the opposite result, we cannot say that there is no substantial evidence to support the appellant's conviction.

Affirmed.

MAYFIELD, C.J., agrees. GLAZE, J., concurs.

TOM GLAZE, Judge, concurring. I concur, but I would quickly decide to reverse if plain error were recognized in this State. Unfortunately, the fundamental error to which I make reference was not raised below, nor is it argued in this

appeal. Because such an egregious error occurred, it should not go unmentioned.

The error — which I believe would normally be reversible — involves the prosecutor's participation and conduct in appellant's trial before a jury. A review of the record reflects that the prosecutor filed the charges with which appellant was convicted, testified against the appellant and cross-examined defense witnesses called on behalf of appellant. The record omits the *voir dire* and jury selection proceedings as well as the opening arguments; but it reveals the prosecutor participated in the closing argument, and there is a fair implication that he was actively involved in the jury selection.

One need only read the majority opinion to discover that this is what might be called a "close case." In fact, appellant's conviction in large part has been affirmed because the State made its *prima facie* case pursuant to Ark. Stat. Ann. § 67-722 (Supp. 1981). Section 67-722 provides that a *prima facie* case of intent to defraud is made when a check is introduced into evidence with an endorsement showing it was unpaid because of insufficient funds. After the State proved that appellant's check was insufficient, it became appellant's burden to demonstrate he intended no fraud. On this point, I agree that there was sufficient evidence for a jury to find fraud on appellant's part, but the question was undoubtedly a close one. Even if the evidence against appellant had been stronger, the prosecutor should never have testified and participated as an attorney in this case.

Called as a witness by his deputy, the prosecutor related the procedure he follows in cases in which a check is returned either because an account is closed or insufficient funds are in the account. He stated:

> We feel the crime was committed when the goods were delivered and the check was delivered for insufficient funds and therefore no payment received and that is why we take the position that once we reach the point where we actually have to file on a check, then we are

going to treat it as a criminal matter and proceed through the court.

The prosecutor related that appellant's check to Ruff and Parkhill had been returned as insufficient, and that by letter, he notified appellant that he could avoid prosecution if he would "pay off the check directly to the payee." The prosecutor further testified that the letter he mailed appellant was never returned, so he assumed appellant had received it; thus, the prosecutor filed charges.

The prosecutor further testified that after charges were filed, appellant called him at his office. He said that appellant wanted to discuss the check, but the prosecutor indicated he preferred to talk to appellant's attorney. Because appellant insisted that they talk, the prosecutor said that he gave appellant his rights "in a fairly informal fashion." The prosecutor testified the appellant acknowledged that he had received the prosecutor's letter notifying him to pay the insufficient check. To summarize the prosecutor's testimony, (1) appellant wrote an insufficient check; (2) he was notified to make the check good or criminal charges would be filed; (3) he failed to pay Ruff and Parkhill; and (4) because appellant did not pay, the prosecutor treated the case as a criminal matter and filed charges.

Before the prosecutor departed from the witness stand to participate again as the State's attorney, his deputy asked whether the prosecutor had any more insufficient checks made by the appellant. The prosecutor answered, "yes," at which time appellant's counsel objected to the question. The deputy prosecutor argued the other insufficient checks should be admitted to show absence of mistake, intent, plan or motive by the appellant in the instant case. The court sustained appellant's objection, indicating the State might retender such evidence on rebuttal. It appears from the record that this colloquy between the court and attorneys was in open court. After the prosecutor ended his testimony, he once again commenced assisting in the prosecution of the case.

In *Ford* v. *State,* 4 Ark. App. 135, 628 S.W.2d 340 (1982),

this Court indicated that under certain circumstances, a prosecuting attorney could testify. However, the majority Court in *Ford* stressed that the prosecuting attorney was not acting as an advocate in the case nor was there any evidence that he had participated in filing the criminal charges, preparing the case, appearing at pre-trial matters, or acting as the State's attorney at trial. Here, the prosecutor did all of these things. Judge Corbin and I dissented in *Ford,* and for the reasons given there as well as those I list above, I believe the prosecutor should not have participated in this case in the manner he did.

Della S. RUCKS *v.* Martha Kaye TAYLOR, Executrix of the Estate of Floyd Lester RUCKS, Deceased

CA 83-55 662 S.W.2d 199

Court of Appeals of Arkansas
Division II
Opinion delivered December 21, 1983

Honey & Rodgers, by: *Danny P. Rodgers,* for appellant.

Eilbott, Smith, Eilbott & Humphries, by: *Zachary Taylor,* for appellee.

TOM GLAZE, Judge. This appeal arises from the trial court's decision to enforce a separation and property settlement agreement. The court found the parties had agreed that their property, held by the entirety, should be converted to a tenancy in common and sold, with the proceeds to be divided equally between them. Relying on *Killgo* v. *James,* 236 Ark. 537, 367 S.W.2d 228 (1963), appellant argues that she and her husband, Floyd Rucks, never intended by their property settlement agreement to terminate immediately their estate by the entirety. Because Mr. Rucks died only eighteen days after he and the appellant consummated their agreement, his estate is represented in this cause by his daughter, appellee Martha Taylor. Mr. Rucks died before he and appellant were divorced and before their property, the subject of the agreement, was sold. Consequently, appellant contends she is the sole owner of the property by virtue of surviving Mr. Rucks, who predeceased her while they were still lawfully married. Appellee, of course, seeks affirmation of the trial court's decision that the subject property be sold and the net proceeds divided between appellant and Mr. Ruck's estate.

Because appellant's contention is based on *Killgo* v.

James, id., we first review the facts and holding in that case. In 1949, the Killgos bought a home as tenants by the entirety; in 1954, they divorced, and the court approved a property settlement by which the parties agreed to sell the home later on and divide the proceeds. Four years later, and before the parties' home was sold, Mr. Killgo died. Mr. Killgo's heirs brought suit against his former wife, claiming that the properly settlement agreement converted the estate by entirety into a tenancy in common and arguing further that they owned a one-half interest in the property. The trial court held that the estate by the entirety continued after the Killgos' agreement, and title vested by survivorship in the former wife. The Supreme Court affirmed the lower court on this point, stating that whether the estate changed into a tenancy in common turned upon the construction of the language in the settlement agreement. That agreement, signed by both parties, was a part of Mr. Killgo's appearance and waiver entered in the parties' pending divorce action; it provided as follows:

> It is understood that the decree to be entered herein is to provide that Charlie C. Killgo is to have possession, use and control of the [home] . . . together with the furniture therein, until such time as the parties to this case may agree on a sales price for such, at which time, on such agreement, the proceeds are first to be used to reimburse Charlie C. Killgo for all monies he has paid or will pay on the mortgage on same after date of August 1953, after which the balance of the proceeds is to be divided between the parties hereto equally.

Id. at 541, 367 S.W.2d at 230-31.

In holding that the above language failed to change the parties' estate into a tenancy in common, the Supreme Court stated:

> We cannot find one sentence or even one word, in the agreement or in the decree, to support the conclusion that the parties had an affirmative intention to bring about an immediate termination of the tenancy by the entirety. It is desirable that titles to real property rest in

> certainty and stability. For a couple to declare that they will sell a piece of property at some future date and divide the proceeds is not even a roundabout way of saying that they will also become tenants in common at once. The language that the Killgos selected, with the advice of counsel, is perfectly consistent with a desire on their part to leave the estate untouched until a sale should be completed.

Id. at 539, 367 S.W.2d at 230.

In the instant case, appellee extracts the following provision from the Rucks' separation and property agreement and, citing *Killgo* as controlling, argues the language in the provision manifests no intent by the parties to change their estate into one in common:

> That the residence of the parties hereinafter more completely described, should be sold at fair market value, and following the deduction of all reasonable costs from the sale, the proceeds be divided equally between the parties.

In comparing the foregoing provision with the agreement in *Killgo,* we note three significant differences: (1) the Killgos provided that Mr. Killgo would retain possession, use and control of their home, together with the furniture therein, until the home was sold; on the other hand, the Rucks failed to provide that either of them would remain in possession of their home; (2) the Killgos, contemplating Mr. Killgo's continued possession of the home, provided he would be reimbursed for all monies paid on the mortgage; the Rucks' agreement had no provision for possession or reimbursement to the party in possession; and (3) the Killgos agreed to sell their property at such time as the parties "may agree on a sales price"; whereas the Rucks agreed to sell at fair market value. These differences underscore one important point, *viz.,* the Rucks — in contrast to the Killgos — did not provide for either spouse to continue in possession of their home, and consequently, they deemed a reimbursement provision unnecessary. Although no sale date was specified in their agreement, the Rucks provided the home

would be sold at fair market value, which presumably could have been accomplished within a reasonable time from when they executed their settlement. Thus, the situation is distinguishable from the one in *Killgo;* we believe the trial court correctly construed the agreement in finding the Rucks intended the instrument to have an immediate effect. Furthermore, we find sufficient evidence to support the trial court's conclusion that the parties intended to convert their estate to a tenancy in common.

In considering whether the Rucks intended to change their estate to a tenancy in common, we must refer to other pertinent provisions contained in their agreement.[1] Before doing so, however, we briefly note that since *Killgo* was decided, a significant statutory change has occurred involving the dissolution of estates by the entirety in divorce actions. At the time *Killgo* was decided, the trial court was required specifically to dissolve an estate by entirety in its decree in order for the parties to be treated as tenants in common after their divorce; if such action was not requested or ordered, they continued holding their property be the entirety. *See* Ark. Stat. Ann. § 34-1215 (Repl. 1962). In 1975, the Arkansas General Assembly enacted Act 457 [now compiled as Ark. Stat. Ann. § 34-1215 (Supp. 1983)], which provided that unless the court's decree provided otherwise, property held by the entirety was automatically dissolved at divorce, and the parties would be treated thereafter as tenants in common. Again, we are faced with a meaningful distinction — this time in the law — between the *Killgo* decision and the one which we must make here. As the court stated in *Killgo,* "the language the Killgos selected, with the advice of counsel, is perfectly consistent with a desire on their part to leave the estate untouched until a sale should be completed." *Id.* at 539-40. Of course, in the instant case, a divorce proceeding was pending between the Rucks, and upon the rendition of a divorce in that action, their estate by the entirety would have dissolved automatically because they had not provided in the agreement for their estate to be treated otherwise. Thus, consistent with the language the

[1]In *Killgo,* the entire agreement is that which is set out in this opinion.

Rucks selected, they would have become tenants in common when their divorce was granted.

As noted earlier, other provisions in the Rucks' agreement support the conclusion that they intended to be treated as tenants in common. For example, the parties expressed that *all* rights, interests, liabilities and relations with respect to property and financial matters would be finally and conclusively fixed and determined by their agreement. Additionally, the Rucks provided (a) their agreement would be incorporated in any decree granted in any subsequent divorce action, and (b) they would execute all instruments necessary to "effectuate the provisions of the agreement." Obviously, these requirements are consistent with the parties' intent to hold their property in common, especially when viewed in light of their further stipulation that all of the provisions of their agreement "shall be binding upon their respective heirs, next of kin, executors and assigns." To state the obvious, an estate held by entirety cannot be an estate of inheritance. *Roulston* v. *Hall,* 66 Ark. 305, 50 S.W. 690 (1899). Thus, to give meaning to the provision employed by the parties to bind their personal representatives and assigns, we must assume — at least as the agreement pertains to the subject property — that they intended to hold their property in common — not by the entirety — after the agreement was consummated.

In sum, we believe the trial court construed the parties' agreement correctly and the findings made by it are not clearly erroneous. Therefore, we affirm.

Affirmed.

MAYFIELD, C.J., and COOPER, J., agree.

Mae Lillian SMITH et al *v.* Jethral STEWART et al

CA 83-110 662 S.W.2d 202

Court of Appeals of Arkansas
Division II
Opinion delivered December 21, 1983

John W. Walker, P.A., for appellants.

Graves & Graves, by: *John Robert Graves,* for appellees.

TOM GLAZE, Judge. In this chancery court case, appellants filed suit seeking a mandatory injunction requiring appellees to remove a brick house which they mistakenly constructed on appellants' land. In the alternative, appellants requested confirmation of title to the house or damages for the unauthorized taking of 1.86 acres upon which the structure and improvements were built plus damages to appellants' remaining acreage. Appellees counterclaimed

seeking damages under the Arkansas Betterment Statutes and under the theory of unjust enrichment. The trial court rendered alternative judgments: First, appellants were given the option to pay $43,180 to appellee for the house; second, upon appellants' failure to exercise such option, appellants were entitled to a deed to the subject 1.86 acres upon the prompt payment of $1,875 for the land taken plus $1,650 to the remaining acreage. Furthermore, appellants were awarded $1,000 damages to a roadway on their property, $1,000 sentimental and/or distress damages and $1,000 attorneys' fees and costs. Appellants appeal, contending the court's holding is contrary to the law. Appellees cross-appeal, challenging the validity of the roadway and sentimental damages awarded by the court. The trial judge, applying equitable principles, attempted to resolve the parties' unfortunate predicament, but in doing so, we believe he erred.

The relevant facts are virtually undisputed. Appellants live in California, and the appellees reside in Chicago, but both sets of parties own adjoining land in Arkansas. In 1975, the appellees employed a surveyor, Charles Webb, to survey their acreage. Webb completed a survey in November, 1975, but that survey was inaccurate because it was based on misinformation given him by appellees' cousin, a Mr. Johnson. As a result of this erroneous survey, appellees' south line of their land extended onto 1.86 acres owned by appellants. Webb discovered this error, and in December, 1975, he correctly resurveyed the land. However, one of his original stakes fixed during the first erroneous survey remained in place, and that stake apparently was the point of reference from which appellees mistakenly constructed a brick veneer house on appellants' land. Upon learning of the construction of appellees' house, appellants brought this action.

At the conclusion of the trial, the trial judge took the case under submission and subsequently rendered a memorandum opinion setting forth his findings of fact and conclusions of law. In reaching his decision, the trial judge found that appellants were not negligent in looking after their property or in failing to warn appellees against

starting — or stopping — the construction of the house. Also, he found that, while they may have been careless to some extent, appellees built the house in good faith. The judge also determined that the appellees' house could not be moved without completely destroying it. Finally, the chancellor determined the Arkansas Betterment Statutes were not in issue because the appellees concededly lacked color of title in the property on which they built their house. *See* Ark. Stat. Ann. §§ 34-1423 *et seq.* (Repl. 1962).

In their arguments on appeal, appellees recognize the established line of cases wherein Arkansas courts have issued or directed mandatory injunctions requiring the removal of improvements placed upon the land of another. *Dendy* v. *Greater Damascus Baptist Church,* 247 Ark. 6, 444 S.W.2d 71 (1969) (a small church was mistakenly built upon adjoining landowner's unfenced, wooded acre); *McLendon* v. *Johnston,* 243 Ark. 218, 419 S.W.2d 309 (1967) (a newly constructed house encroached a distance of 3.4 feet onto the adjoining landowner's property); *Beaty* v. *Gordon,* 236 Ark. 50, 364 S.W.2d 311 (1963) (the eaves of a newly built house extended over the property line of the adjoining landowner); *Fulks* v. *Fredeman,* 224 Ark. 413, 273 S.W.2d 528 (1954) (a brick wall leaned over adjoining landowner's property line); and *Leffingwell* v. *Glendenning,* 218 Ark. 767, 238 S.W.2d 942 (1951) (a stone and cement wall encroached upon a twenty-six foot strip owned by the adjoining landowner). Appellees argue these prior cases are factually distinguishable from the situation presented herein because the removal of appellees' house would destroy it; they contend the application of the rule requiring the removal of the house as an encroachment is too harsh and inequitable. In support of appellees' position, they cite two Michigan Supreme Court cases, *Hardy* v. *Burroughs,* 251 Mich. 578, 232 N.W. 200 (1930), and *Rzeppa* v. *Seymour,* 230 Mich. 439, 203 N.W. 62 (1925). The simple answer to appellees' argument is that the rule applied by the Arkansas Supreme Court in such encroachment matters differs from the more lenient rule adopted by the Michigan court.

Under the strict common-law rule, a permanent improvement placed upon another's land by mistake became a

part of the realty and could not be removed. In 1921, our Legislature attempted to temper the harshness of the common-law rule by providing that the person who erroneously places an improvement on another's land shall have twelve months' time from the date of the discovery of the erroneous placing to remove it. *See* Ark. Stat. Ann. § 50-103 (Repl. 1971). Interestingly, this 1921 enactment, § 50-103, was not cited in any cases until *Dendy* v. *Greater Damascus Baptist Church, supra,* in 1969 and again in *Hughey* v. *Bennett,* 264 Ark. 64, 568 S.W.2d 46 (1978). The Supreme Court decided *Shick* v. *Dearmore,* 246 Ark. 1209, 442 S.W.2d 198 (1969), shortly before its decision in *Dendy,* but apparently § 50-103 was not brought to the Court's attention. The Court, in *Shick,* to ease the harshness of the common-law rule, adopted the slightly more equitable principle of allowing the removal of the improvements in an equitable proceeding whenever that course can be followed *without substantial damage* to the land.[1] *See also* Justice Fogleman's concurring opinion in *Dendy* v. *Greater Damascus Baptist Church, supra.* Shick was a well driller who mistakenly drilled a water well on Dearmore's property. Although the Supreme Court indicated Shick should be allowed to remove his well's casing and restore the land to its original condition, it remanded the case for further proceedings to determine if the removal could be accomplished without damage to the land that might fairly be considered substantial when compared to the pecuniary loss that Shick would otherwise sustain. *Id.* at 1214, 442 S.W.2d at 200-01.

About two months after *Shick,* the Supreme Court decided *Dendy* wherein the Court, finding the church building erroneously built on Dendy's land should be removed, remanded the case for the chancellor to consider the court's decision in *Shick* and the possible application of § 50-103.[2] The Court further instructed the chancellor to fix

[1]Chief Justice Harris and Justice Fogleman dissented, stating that the majority decision overruled a long-standing rule of property, *i.e.,* that permanent fixtures become part of the realty and belong to the owner thereof.

[2]In his concurring opinion in *Dendy,* Justice Fogleman suggested the second paragraph of § 50-103 is unconstitutional under Article 2, § 13 of the Arkansas Constitution.

the amount of any damages that Dendy may have suffered by the removal of timber from his land.

We believe the Court's instructions to the chancellor in *Dendy* are applicable here, and accordingly, we remand this cause with directions to vacate the trial court's decree for further proceedings consistent with this opinion. On remand, the trial court, when considering the damage issues, may also reconsider its award to appellants for damages to their roadway.

Reversed and remanded.

MAYFIELD, C.J., and COOPER, J., agree.

Walter N. GOODWIN, Jr. and Betty GOODWIN *v.* Carolyn LOFTON

CA 83-70 662 S.W.2d 215

Court of Appeals of Arkansas
Division I
Opinion delivered January 4, 1984

Law Offices of Worth Camp, Jr., by: *Worth Camp, Jr.*, for appellants.

Guthrie Burbank & Dodson, by: *Don B. Dodson*, for appellee.

LAWSON CLONINGER, Judge. This is an appeal from a decree holding that a deed of easement granted to the predecessor in title of appellee, Carolyn Lofton, by the predecessors in title of appellants, Walter N. Goodwin and Betty Goodwin, remains in full force and effect and constitutes the valid right-of-way across lands of appellants. Appellee owns a 70.75 acre tract of land lying immediately west of a 48.25 acre tract owned by appellants. The easement was granted in 1966 and described a permanent and perpetual easement and right-of-way not to exceed 25 feet in width across the property of appellants to provide access from state Highway 7 to the lands of appellee. Subsequent to the granting of the easement, appellant's husband commenced preparations for the construction of a road utilizing the easement as granted, but the husband became ill and died in 1972. Thereafter, appellee admittedly did nothing to utilize the easement until she made a decision in 1981 to move her residence to the 70.75 acre tract.

For reversal, appellants contend that the court erred by failing to find that the easement instrument was an indenture contract and invalid for failure of consideration; that the court's finding that there was no expressed or implied intention to abandon the easement granted is not supported by a preponderance of the evidence; and that the court erred by failing to find that appellee is estopped or prevented by laches from enforcing the easement. We find no error in the trial court and we must affirm.

An indenture is defined as a deed to which two or more parties enter into reciprocal and corresponding obligations toward each other. See Black's Law Dictionary 693 (5th ed. 1979). Failure of consideration may result not only from complete default but also from a protracted delay in performance. In chancery, the amount of delay that will be

condoned varies with the equities of the case. *Henslee* v. *Boyd,* 235 Ark. 369, 360 S.W.2d 505 (1962). However, a present grant, absent fraud, mistake or undue influence, which is delivered, accepted and recorded, is valid without consideration. See *Cannon* v. *Owens,* 224 Ark. 614, 275 S.W.2d 445 (1955); *Parkey* v. *Baker,* 254 Ark. 283, 492 S.W.2d 891 (1973); *Millwee* v. *Wilburn,* 6 Ark. App. 280, 640 S.W.2d 813 (1982). Further, it is to be noted that a deed is to be construed most strongly against the grantor. *Marshall* v. *Marshall,* 227 Ark. 582, 300 S.W.2d 933 (1957).

The pertinent portion of the deed of grant provides as follows:

> As a further consideration for this grant, GRANTORS reserve the right to themselves, their heirs and assigns, to the use of any road to be constructed hereunder by GRANTEES for any needed use by GRANTORS.

Appellant contends that a failure of consideration occurred because the grantees in the deed of easement were obligated to construct a road within a reasonable time. However, there is no evidence to support a finding that this was an indenture, because there is no reciprocal or corresponding obligation. In fact, there is no affirmative duty on the part of appellee to do anything; the easement deed merely gave the grantors the right to use any road constructed by the grantees.

The rule is recognized in Arkansas that an easement may be lost by abandonment. *Drainage District No. 16* v. *Holly and Roach,* 213 Ark. 889, 214 S.W.2d 224 (1948). Whether an abandonment exists in any given case depends on the particular circumstances of the case. While non-use does not alone constitute an abandonment, it is some evidence of it, and when, in addition to such non-use, facts are proved and circumstances and testimony evincing that intention are offered, then the abandonment is established. In *Drainage District No. 16, supra,* the evidence showing abandonment of right-of-way of an old levee included: (a) The 1915 right-of-way was for a levee only, and in 1938 the

district acquired by grant a right-of-way for a new levee, which was erected on the new location; (b) the district entirely destroyed the old levee by removing an earthen embankment to the location of the new levee; (c) the district exercised no control over the right-of-way of the old levee from 1939 until shortly before the filing of the lawsuit; (d) the district suffered the appellees to erect buildings of a permanent nature on the old right-of-way. The court went on to say that abandonment of an easement will be presented where the owner of the right does or commits to be done any act inconsistent with its future enjoyment. Recognizing that there was other evidence of abandonment, the court affirmed the chancellor's decision that the district had abandoned its old right-of-way.

The rule was again stated that an easement acquired by grant or prescription cannot be lost by mere non-use for any length of time, no matter how great; the non-use must be accompanied by an express or implied intention to abandon. *State Highway Commission* v. *Hampton,* 244 Ark. 49, 423 S.W.2d 567 (1968).

In this case, appellee's husband was in the process of building a road across the easement when he died in 1972. The road was not completed when he died, and appellee made no effort to finish the work done or showed any interest in completing the road until shortly before this lawsuit. However, non-use alone is not enough to show abandonment of an easement. It must be accompanied by an express or implied intention to abandon, and there was no showing of such an intention to abandon by this appellee. There was sufficient evidence to support the chancellor's decision that appellee had neither expressly nor impliedly intended to abandon her easement.

In discussing the doctrine of laches, the case of *Rice* v. *McKinley,* 267 Ark. 659, 590 S.W.2d 305 (1979), defined the term as an unreasonable delay by the party seeking relief under such circumstances as to make it unjust or inequitable to the other party to enforce the agreement. Appellants offered evidence that they had erected chicken houses on their property, and that the noise of traffic near the chicken houses would disturb and panic the chickens. However, in

the chancellor's decree, appellee was specifically directed to build her road so as not to interfere with the permanent improvements which appellants have placed on their property.

Appellant also argues that the doctrine of estoppel is applicable in this case, and cites the rule that equity will lend its aid only to those who are vigilant in asserting their rights. See *Hamilton* v. *Smith,* 212 Ark. 893, 208 S.W.2d 425 (1948). Appellant is correct in his claim that appellee stood by and permitted appellants to erect permanent structures and make other improvements to their farm, but the easement was not described in the deed; it merely granted a right-of-way, and the decree provided that appellee "be reasonable with respect to the rights of defendants in locating the right-of-way . . . and place such right-of-way so as not to interfere with the permanent improvements defendants have placed on their land or the defendants' use thereof." We see no basis for an estoppel argument in this case.

The decision of the trial court is affirmed.

CRACRAFT and CORBIN, JJ., agree.

OZARK GAS TRANSMISSION SYSTEM, A Partnership, by OZARK GAS PIPELINE CORPORATION, A General Partner *v.* Tommy E. McCORMICK and Anita McCORMICK, Husband and Wife

CA 83-71 662 S.W.2d 210

Court of Appeals of Arkansas
Division I
Opinion delivered January 4, 1984

Laws & Swain, P.A., by: *Ike Allen Laws, Jr.* and *William S. Swain,* for appellant.

Turner, Mainard & Whitehead, by: *Roy Whitehead, Jr.,* for appellees.

DONALD L. CORBIN, Judge. This is an eminent domain case. Appellant, Ozark Gas Transmission System, appeals a jury verdict which awarded appellees, Tommy E. McCormick and wife, Anita McCormick, a judgment in the amount of $14,425.00. Of this figure, $510.00 was apparently awarded for the loss of a cow and $140.00 for the loss of a calf. The damages for the property actually taken was apparently $13,775.00. We affirm.

Appellees owned a 39-acre tract of property in Franklin County. Appellant installed an underground pipeline

across appellees' land in a north/south direction dividing the 39-acre tract into two parts, one 23-acre tract east of the pipeline and the other 14-acre tract west of the pipeline. The total amount of land taken for the pipeline itself consisted of a fifty-foot strip equaling approximately 1.03 acres. This case grew out of a disagreement over the amount of compensation appellees were due for the loss of their 1.03 acres and for the reduction in value (if any) of the 14-acre tract west of the pipeline.

Appellant argues that the court erred in refusing to strike the testimony of appellees' expert witness, Eddie Anderson, because his testimony was speculative. It is well settled that opinion testimony by either the landowner or his value witness may be stricken on motion if there is no fair or logical basis for its support. Once the landowner or his qualified expert witness has expressed his opinion as to fair market values, the burden shifts to the condemnor to establish by cross-examination that the landowner or expert witness has no logical basis to support his opinion before such testimony is subject to being stricken from the record on motion. If the condemnor is unable on cross-examination to draw more than a weak or questionable basis for the opinion, that fact has a bearing on the weight to be given the testimony by the jury, and the testimony should not be stricken on motion. *Ark. State Hwy. Comm'n* v. *Jones,* 256 Ark. 40, 505 S.W.2d 210 (1974); *Ark. State Hwy. Comm'n* v. *Roetzel,* 271 Ark. 278, 608 S.W.2d 38 (Ark. App. 1980). After reviewing the record before us, there appeas to be adequate testimony for the jury to have concluded that witness Anderson had substantial reasons for finding the property's highest and best use was for industrial purposes. Testimony was presented at trial by appellees' expert witness that he determined fair market value of the property before taking by considering the whole 39 acres as a potential industrial site. In determining the value of appellees' property after taking, Anderson testified that he assessed severance damages to the 14-acre tract because of the restrictions inherent in having to cross appellant's high-pressure gas pipeline in order to reach the highway, waterline, utilities and railroad spur. To support his testimony that industrial use was the land's highest and best use, Anderson cited two comparable

sales; the 90-acre Great Carbon Lakes plant located directly across the road from appellees' property with a date of sale of February, 1979, and the 2-acre Cargill feed mill site located within two miles of the property in dispute with no date of sale provided. Anderson also testified to the 1981 sale of 6 acres located four miles from appellees' property which sold for $3,000.00 per acre. He testified to the proximity of these parcels to appellees' property and also to their similarity in topographical features and access to amenities necessary for industrial development.

In *Arkansas Power & Light Co.* v. *Haskins,* 258 Ark. 698, 528 S.W.2d 407 (1975), the Arkansas Supreme Court stated that in eminent domain proceedings, land is evaluated on the basis of the most valuable use to which it can be put, comprehending any use to which it is clearly suitable. The Court also stated that the pattern of land development in close proximity to the condemned land is a reasonable basis for determining the land's best use. In *Ark. State Hwy. Comm'n* v. *Pearrow,* 1 Ark. App. 289, 614 S.W.2d 695 (1981), the Court of Appeals restated the above rule saying that the law was well-settled that the measure of compensation is the land's market value at the time of taking for all purposes, comprehending the land's availability for any use for which it is plainly adapted, as well as the most valuable purpose for which it can be used and will bring the most in the market.

In the instant case, there seems to be ample testimony from which the jury could have determined that the land's highest and best use was for industrial purposes without having to resort to any sort of speculation or conjecture. Accordingly, the trial court properly ruled that Anderson's opinion in this regard would go to his credibility and expertise in the eyes of the jury and that the testimony should not be stricken.

Appellant also argues that there was no basis for appellees' expert witness's testimony concerning severance damages. We have long recognized that one approach to determination of just compensation is a formula consisting basically of two elements, i.e., (1) value of the lands taken and (2) damage resulting to the remainder of the tract,

usually referred to as severance damages. Furthermore, it has been said that in partial taking cases the testimony should be first directed to the value of the lands taken and then to the damage resulting to the remainder of the tract. *Ark. State Hwy. Comm'n* v. *McAlister,* 247 Ark. 757, 447 S.W.2d 649 (1969). It has always been recognized in this state that a landowner from whose lands a right-of-way easement has been taken has the right to continue using the surface of the right-of-way for farming or other purposes not inconsistent with the use of the easement after the improvement is constructed. *Davis* v. *Ark. La. Gas Co.,* 248 Ark. 881, 454 S.W.2d 331 (1970).

In the case at bar, the testimony by appellees' expert is somewhat confusing in one portion of the transcript. The expert Anderson testified that he thought that appellant's taking resulted in appellant's permissive control of the use of the 14-acre tract as well as control of the 50-foot strip on which the pipeline was actually located. While Anderson's interpretation of the law on this point is in error. his erroneous belief did not negate the fact that there was some severance of the back 14 acres since all ingress and egress to the 14 acres was across appellant's pipeline and appellant did control that portion. Anderson based his diminution in value of the 14 acres on the fact that any use of the 14 acres would necessitate crossing a high-pressure gas pipeline owned and controlled by appellant. However, the fact that appellees still had limited use of appellant's strip and full use of the 14 acres beyond the strip was clearly made to the jury by appellant's counsel. The jury had ample evidence from which to decide a severance still remained because of the limited uses the owners could make of the 14 acres since all ingress and egress was across the high-pressure gas pipeline. The testimony made it clear that appellant would not allow anything to be built across the pipeline which might detrimentally affect its access to the pipeline. Contrary to Anderson's confusion as to the law, it is obvious that some severance remained and that it may have been substantial. Anderson testified that severance from 23 acres was what he based the reduced value of the 14 acres upon. Counsel for both parties stipulated that appellees would not have been allowed to build a building across the gas

pipeline. There was some evidence that there would be restrictions on appellees' future use of the property.

We disagree with appellant's contention that there was no basis for Anderson's testimony concerning severance damages.

Affirmed.

CLONINGER and CRACRAFT, JJ., agree.

Virgil Hayden BOOTH, Jr. *v.* STATE of Arkansas

CA CR 83-126 662 S.W.2d 213

Court of Appeals of Arkansas
Division I
Opinion delivered January 4, 1984

Andrew Fulkerson, P.A., by: *Andrew Fulkerson,* for appellant.

Steve Clark, Atty. Gen., by: *Velda P. West,* Asst. Atty. Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant, Virgil Hayden Booth, Jr., was convicted by an Arkansas County jury of possession of a controlled substance with intent to deliver and sentenced to a term of seven years and fined $9,000.00. We reverse.

Appellant was a passenger in a car operated by Vangilder. Police officers stopped the car about 2 a.m. because the car had no brake lights and an inoperative tail light. Vangilder got out of the car to speak with the police officers and when told of the defective lights, voluntarily opened the trunk of the car to repair the lights. While the trunk was open, one of the officers saw an unzipped bag lying in the trunk in which there were some plastic bags that appeared to contain marijuana. Upon closer examination of the plastic bags, the officers charged Vangilder and appellant with possession of a controlled substance and intent to deliver.

Appellant remained in the car until he was arrested. A search of appellant, Vangilder and the car turned up no further evidence of marijuana. Vangilder, but not appellant, had a sweet smell on his person when arrested but the officers could not identify the odor. The officers thought appellant may have been drinking prior to the arrest.

Appellant and Vangilder were tried together. Appellant asked for a directed verdict at the close of the prosecution's case, which was denied. The defense rested without putting on further evidence at which time appellant renewed his

motion for a directed verdict which was denied. Both appellant and Vangilder were convicted of possession of a controlled substance with intent to deliver.

Appellant appeals the trial court's refusal to grant a directed verdict for the reason that there was insufficient evidence to sustain a conviction. Appellant contends that there was no evidence presented at trial linking him to the marijuana upon which the jury could have based its verdict.

Where the sufficiency of the evidence is challenged on appeal, the evidence must be viewed in the light most favorable to the appellee and affirmed if there is any evidence to support it. *Harmon* v. *State,* 260 Ark. 665, 543 S.W.2d 43 (1976). If a jury could have reached its conclusion without resorting to speculation or conjecture, its verdict must be upheld. *Montgomery* v. *State,* 277 Ark. 95, 640 S.W.2d 108 (1982). However, if, when viewed in the light most favorable to the appellee, the evidence is such that a reasonably-minded juror would have a reasonable doubt as to the existence of any of the essential elements of the crime charged, the jury's verdict must be set aside. *U.S.* v. *Brim,* 630 F.2d 1307 (8th Cir. 1980), *cert. denied,* 452 U.S. 966 (1981).

In the instant case, appellee argues that there was sufficient testimony presented at trial to infer that appellant shared possession of the marijuana with Vangilder, since appellant and Vangilder were riding together in the vehicle. We disagree.

We recognize the principle of joint possession or joint occupancy of a place where contraband is discovered. *Cary* v. *State,* 259 Ark. 510, 534 S.W.2d 230 (1976). But, when joint occupancy is the sole evidence against the defendant, there must be some additional link between the defendant and the contraband. See, *Cary* v. *State, supra; Ravellette* v. *State,* 264 Ark. 344, 571 S.W.2d 433 (1978). Another more recent case in point, cited by appellant, is *Osborne* v. *State,* 278 Ark. 45, 643 S.W.2d 251 (1982). In that case, the defendant was convicted of possession of cocaine and possession of other controlled substances with intent to deliver. The cocaine was found on

the defendant's person, and the other drugs were found in various places within the defendant's residence which he shared with his wife and three other persons. The Arkansas Supreme Court, in reversing that portion of his conviction relating to other drugs found in the residence, explained the joint occupancy rule as follows:

> Constructive possession can be implied when the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control, or to the control of the accused and another, but neither actual nor exclusive possession of the contraband is necessary to sustain a charge of possession. (cite omitted) However, we have also held that joint occupancy of premises alone will not be sufficient to establish possession or joint possession unless there are additional factors from which the jury can infer possession. (cites omitted)

In arguing that appellant's presence in the vehicle containing the marijuana was sufficient evidence to support the jury's conclusion, the State in the case at bar relies upon an Arkansas Court of Appeals case, *Llewellyn* v. *State,* 4 Ark. App. 326, 630 S.W.2d 555 (1982). There, a shared vehicle was involved. However, we believe the case is distinguishable. The vehicle in which the drugs were found was a van, and the drugs were in the passenger compartment. Also, there was other evidence linking the defendant to the drugs. The defendant in *Llewellyn* was present when the drug deal was negotiated as well as when the drugs were delivered, thus supplying the necessary added links to the contraband.

In this case, there was no evidence linking appellant to the marijuana found in the trunk. There was no evidence of any prior involvement by appellant; there was nothing suspicious about his person or his actions; there was no evidence that he had keys to the car or its trunk when arrested; and there was no proof as to his relationship with the driver or the length of time they had been together.

Other than the fact that appellant was riding in the car, there was no evidence presented which would link him with

the marijuana locked in the trunk. In the absence of such evidence from which the jury could infer possession by appellant, we find the *Osborne* case controlling. Accordingly, we reverse, finding that the jury could have reached its conclusion only by speculation or conjecture and that the trial court incorrectly denied appellant's motion for a directed verdict.

Reversed and dismissed.

CLONINGER and CRACRAFT, JJ., agree.

Sidney FREEMAN *v.* R. George KING, et al

CA 83-92 662 S.W.2d 479

Court of Appeals of Arkansas
Division II
Opinion delivered January 11, 1984

Hardin, Jesson & Dawson, for appellant.

Pryor, Robinson & Barry, by: *Thomas B. Pryor,* for appellees.

MELVIN MAYFIELD, Chief Judge. The appellant, Sidney Freeman, appeals from the granting of appellees' motion for summary judgment.

The appellees are George King and various corporations used by him to operate an industrial laundry business in the Fort Smith area. In 1967 Freeman was employed to manage this business under an agreement which provided for a salary and profit-sharing arrangement. In December of 1981, Freeman resigned because he believed he was not receiving the agreed share of profits, and in February of 1982, he filed this suit seeking an accounting and judgment for the profits he contends are due him.

Answers were filed for the appellees and after the depositions of Freeman and King had been taken the appellees filed a motion for summary judgment. The motion was submitted upon the pleadings and depositions, from which the court found "the following material facts to be undisputed."

1. There was an oral employment contract.

2. An unsigned memorandum of some of the terms of the employment agreement was prepared.

3. The oral agreement was modified numerous times over the 14 years it was in effect.

4. Approximately ten years ago King stopped showing Freeman the books despite Freeman's requests to see them.

5. For six to ten years Freeman suspected King was not paying his bonus in accordance with the agreement.

6. For the past six to ten years Freeman did not controvert King's unilateral right to determine such bonus as King deemed reasonable without accounting to Freeman for the method by which such bonus was computed.

7. During the past decade King and Freeman agreed upon various increased benefits to Freeman's advantage in addition to those provided in the August 21, 1967 document, including a substantially increased salary — the most recent salary increase, $1,200.00 per week or $62,400.00 per year, being four times the maximum provided in the agreement regardless of the amount of the profits.

Next, the court's judgment states "there being no genuine issue as to the above material facts, the court finds that the defendants are entitled to judgment as a matter of law." The court's reasoning is then set out as follows:

> Freeman with knowledge (constructive if not actual) that King was not strictly complying with the bonus formula, and while acquiescing in modifications of the original agreement substantially to his advantage, remained silent and failed to assert any right he might have had to an accounting based upon the August 21, 1967 document for a period of at least six and perhaps as many as ten years. The voluntary relinquishment of rights by Freeman (waiver), the detrimental reliance by King (estoppel), and the unreasonable delay in the enforcement of any right Freeman might have had to demand an accounting or to enforce the other rights claimed herein (laches) entitle the defendants, and all of them, to judgment as a matter of law.

Motions for summary judgment are governed by some well-established principles of law. In *Walker* v. *Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981), we said:

> On such motions the moving party has the burden of demonstrating that there is no genuine issue of fact for trial and any evidence submitted in support of the motion must be viewed most favorably to the party against whom the relief is sought. Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable men might differ. *Hendricks* v. *Burton,* 1 Ark. App. 159, 613 S.W.2d 609 (1981); *Dodrill* v. *Arkansas Democrat Co.,* 265 Ark. 628, 590 S.W.2d 840 (1979); *Braswell* v. *Gehl,* 263 Ark. 706, 567 S.W.2d 113 (1978). The object of summary judgment proceedings is not to try the issues, but to determine if there are any issues to be tried, and if there is any doubt whatsoever the motion should be denied. *Trace X Chemical, Inc.* v. *Highland Resources, Inc.,* 265 Ark. 468, 579 S.W.2d 89 (1979); *Ashley* v. *Eisele,* 247 Ark. 281, 445 S.W.2d 76 (1969). A motion for summary judgment cannot be used to submit a disputed question of fact to a trial judge. *Griffin* v. *Monsanto Co.,* 240 Ark. 420, 400 S.W.2d 492 (1966).

The parties do not really disagree as to what the real issue is in this appeal. The appellant says regardless of whether the facts listed in the trial court's judgment are disputed, reasonable minds could differ as to the inferences to be drawn from those facts and summary judgment was therefore inappropriate. On the other hand, the appellees say that reasonable minds could *not* differ and it would be a fruitless exercise to spend two or three days trying the case. It is our view that summary judgment should not have been granted and we reverse and remand the case for further proceedings.

The first ground upon which the court based its decision is waiver. That term was defined in the case of *Ray Dodge, Inc.* v. *Moore,* 251 Ark. 1036, 479 S.W.2d 518 (1972), as follows:

> Waiver is the voluntary abandonment or surrender by a capable person of a right known by him to exist,

> with the intent that he shall forever be deprived of its benefits. It may occur when one, with full knowledge of the material facts, does something which is inconsistent with the right or his intention to rely upon it.

Freeman's testimony was that in the early years of their agreement he was shown financial statements and had no reason to question the amount of profits which he shared. Later, however, he suspected his share should have been more, but when he asked to see the information upon which it was calculated he was told the books were at the accountant's and a financial statement was not available. He said he asked for this information several times through the years and received the same response. He testified that in 1979 he was told his share of the profits for 1978 was about $20,000.00 although during the summer of 1977 he had been told by King that within two years he would be making $100,000.00, and although he knew 1978 had been an extremely profitable year.

At about the same time King opened a quarter horse ranch in which he began to invest large sums of money. So, in August of 1979, when Freeman tried to find out what the profits were for 1978, and was again told that the books were at the accountant's, he became convinced he was being cheated. He said he actually prepared a resignation dated August 29, 1979, but did not turn it in and worked on until the end of 1981, at which time he did resign.

The appellees point to this evidence and say because for several years Freeman accepted the profit share as fixed by King even though he did not believe it was for the correct amount, and also accepted increases in both salary and expense allowances, it must be said that he waived any right to insist upon a strict compliance with the 1967 profit sharing arrangement. We do not agree.

First, we note that the trial court's finding No. 7, explicitly states that Freeman's increased benefits were *in addition* to those provided in the 1967 agreement. Certainly his salary and other benefits *could* be increased without a waiver of his profit-sharing agreement, and

apparently the court found this *did* occur. Also, the receipt of a portion of what is due does not necessarily mean that there is a waiver of the additional amount due. In most cases the question of waiver is one of fact, *Moore Ford Co.* v. *Smith,* 270 Ark. 340, 604 S.W.2d 943 (1980), and we think it is a question of fact in this case — especially since the evidence in support of a motion for summary judgment must be viewed most favorably to the opposing party, and if there is any doubt, the motion must be denied. *Walker* v. *Stephens, supra.*

The trial court's second ground for granting summary judgment is estoppel. Again, we do not believe that reasonable minds could find only one way. In *Bethell* v. *Bethell,* 268 Ark. 409, 424, 597 S.W. 2d 576 (1980), the court stated the rule with respect to estoppel as follows:

> A party who by his acts, declarations or admissions, or by his failure to act or speak under circumstances where he should do so, either with design or willful disregard of others, induces or misleads another to conduct or dealings which he would not have entered upon, but for such misleading influence, will not be allowed, because of estoppel, afterward to assert his right to the detriment of the person so misled.

It is not clear that Freeman induced or misled King to do something he would not have otherwise done. King argues that if Freeman had not silently accepted the increased salary and expense benefits but had said he was going to insist also upon strict compliance with the 1967 agreement, he could have been fired or, we suppose, the increases in salary and expenses could have been less or even not granted in any amount. The problem is, King did not testify to that effect and we have to engage in speculation to accept that scenario. And if we speculate, it might be that Freeman's expressed intention would have changed nothing, or that his profit share would have been correctly determined from that date forward in keeping with the agreement. After all, King admitted that Freeman was a good manager, that the volume of business went from $7,500.00 to $38,000.00 per week while he was there, and that

King had used the 1967 agreement as a guideline only, and actually paid whatever "bonus" he thought should be paid. Appellees argue that Freeman said King would have fired him, but this is still speculation and when considered with all the evidence, is not enough for us to hold that reasonable men could draw only one inference therefrom.

Additionally, *Bethell* says "the whole principle of equitable estoppel" is based upon a man's deliberately doing an act or saying a thing, and another, *who has a right to do so,* relying upon that act or word. 268 Ark. at 424. Considering all the evidence in this case, not only is there a genuine issue of fact as to whether King relied upon Freeman's conduct, but we see no way to hold that reasonable men *must* conclude that King *had a right* to rely upon Freeman's acceptance of the increases in salary and expenses as meaning that he would not insist upon his share of the profits as provided for in the 1967 agreement.

Neither can we find estoppel as a matter of law in the fact that Freeman accepted the "bonus" paid him each year without voicing an objection as to its amount. In addition to the reasons already given, we think reasonable men could find that Freeman's silent acceptance of the "bonus," salary, and expenses did not induce King to change his position for the worse in such manner that it would operate as a "virtual fraud" upon King to allow Freeman to assert the right to recover in this case. See, *Lee* v. *Doe,* 274 Ark. 467, 472, 626 S.W.2d 353 (1981).

The third ground used as a basis for the trial court's decision is laches, which the court found resulted from "the unreasonable delay in the enforcement of any right Freeman might have had to demand an accounting or to enforce the other rights claimed herein."

It is quite apparent that what constitutes unreasonable delay would ordinarily involve questions of fact. The first question here is the date from which we start our measurement. The appellees contend that we should start from the date Freeman had constructive knowledge of the facts entitling him to bring suit, and they cite *Schultz & Watkins*

v. *Rector-Phillips-Morse,* 261 Ark. 769, 552 S.W.2d 4 (1977), in support of that contention. They then argue that Freeman had this constructive knowledge around 1970-71, when King ceased letting him see the financial records, or around 1972 to 1974 which was when Freeman said he first suspected he was not being paid his proper share of the profits. Freeman contends, however, that we should start with the summer of 1979 when he was told that his share of the profits for 1978 was only about $20,000.00 and when he became convinced he was being cheated and when he actually prepared a resignation but did not turn it in.

We think these contentions show that whether there was an unreasonable delay presented a genuine issue of fact upon which reasonable minds could differ, and that summary judgment was not the proper procedure for its resolution.

Moreover, if the summer of 1979 is used, this suit was filed within the three-year statute of limitations applicable to oral contracts, Ark. Stat. Ann. § 37-206 (Repl. 1962). Therefore, this claim would not be barred unless there is evidence from which it could be found that three years is an unreasonable period of time. See, *Moore* v. *City of Blytheville,* 1 Ark. App. 35, 41, 612 S.W.2d 327 (1981). In that event, there is a question of fact; and if we start with some point prior to the summer of 1979, there is still a question of fact as to whether Freeman unreasonably delayed a direct confrontation and whether this caused King to change his position to his detriment so that it would be inequitable to allow Freeman to bring this suit. See, *Padgett* v. *Bank of Eureka Springs,* 279 Ark. 367, 372, 651 S.W.2d 460 (1983).

We have tried only to explain our rationale for holding that this case presented factual issues that should not have been decided on motion for summary judgment. While chancery appeals are before us for trial de novo, we do not make any factual determination in this case, but exercise our discretionary power to remand for further proceedings. See, *Ferguson* v. *Green,* 266 Ark. 556, 587 S.W.2d 18 (1979).

Reversed and remanded.

COOPER and GLAZE, JJ., agree.

Charles BULL *v.* Robert BRANTNER et ux

CA 83-69 662 S.W.2d 476

Court of Appeals of Arkansas
Division I
Opinion delivered January 11, 1984

Taylor, Vandergriff & Morris, by: *William T. Morris,* for appellant.

Jack Skinner, for appellees.

TOM GLAZE, Judge. This appeal arises from a jury verdict of $10,000 in appellees' action for breach of an implied warranty of fitness and habitability on appellees' home. The appellant builder raises three issues.

Appellant first contends appellees did not give adequate notice of all of the claimed defects. We considered this same issue in *Pickler* v. *Fisher,* 7 Ark. App. 125, 644 S.W.2d 644 (1983), and we find that case dispositive here. The Picklers constructed a home which they sold to the Fishers. The Fishers first complained orally to the Picklers about alleged defects in the home; they next sent a letter setting out eight specific defects; they then filed an action listing nineteen defects in the complaint. At trial, over the Picklers' objections, the Fishers presented proof on thirty-six defects. The jury gave a verdict for the Fishers. The Picklers contended on appeal to this Court that in an action based upon an implied warranty on the sale of new housing, the purchaser is required to give timely notice of each and every claimed defect and that failure to do so results in a waiver of any defects not contained in a timely written notice. We said:

> We do declare that in such cases the buyer is not required to list each and every objection that he would rely on as constituting the breach. Notification in such cases need only be with sufficient clarity to apprise the vendor-builder that a breach of implied warranty is being asserted and to give him sufficient opportunity to

> inspect the premises and to correct the defects. The sufficiency of the notice and whether it was given within a reasonable time are ordinarily questions for a jury to determine.

Id. at 129, 644 S.W.2d at 646.

In the case at bar, the appellees testified that they personally apprised the appellant that defects existed from the time they moved into the house in July, 1979, until the appellant stopped taking or returning their phone calls. By letter dated January 4, 1980, appellees' attorney set out the appellees' complaints about defects in the siding on the house. Appellant admittedly did not respond to that letter. Appellees filed a complaint on May 8, 1981, in which they listed nine specific defects "plus other numerous defects or damages resulting from said defects." Whether the appellees' notice to appellant was sufficient and was given within a reasonable time were questions for the jury to determine. The jury decided those questions against the appellant, and we find substantial evidence to support the jury's decision.

Appellant's second point for reversal concerns the testimony of appellees' expert witness, Fred Hop. Appellant alleges the trial court erred in not striking Hop's testimony in its entirety because Hop did not testify with certainty either about which work constituted a breach or to the amount of damages.

At trial, appellant cross-examined Hop extensively regarding his value testimony, and he continues to disagree with Hop's assessment of costs here. As appellee points out in his argument, the jury did not accept Hop's total assessment of the damages since it awarded an amount different from that given by Hop. Of course, it is the province of the jury to pass on the weight of the evidence, and when the sufficiency of the evidence is challenged on appeal, we will not disturb the finding of the jury if there is any substantial evidence to support it. *Guerin Contractors, Inc.* v. *Reaves,* 270 Ark. 710, 606 S.W.2d 143 (Ark. App. 1980). In *Taylor* v. *Green Memorial Baptist Church,* 5 Ark. App. 101, 633 S.W.2d 48 (1982), we also stated that when the cause

and existence of damages have been established by the evidence, recovery will not be denied merely because the damages are difficult to ascertain. From our review of the record, we believe Hop's testimony was sufficient with respect to defects and repair costs to enable the jury to establish the amount of damages.

Appellant's counsel initially objected to the qualifications of Hop as an expert because he had not constructed houses of the type in question. After appellant's counsel was permitted to *voir dire* Hop, the judge ruled that Hop was qualified, finding that the weight and credibility of his testimony would be left to the jury to determine. In this appeal, appellant does not challenge the judge's ruling on Hop's qualifications. Thus, once the trial court determined Hop qualified as an expert, he was entitled to testify in the form of an opinion or otherwise. Unif. R. Evid. 702; *Hay* v. *Scott,* 276 Ark. 46, 631 S.W.2d 841 (1982). Furthermore, as an expert, Hop was permitted to testify in terms of opinion or inference, giving his reasons without prior disclosure of underlying facts or data; he was required, however, to disclose the underlying facts or data on cross-examination. That is exactly what occurred at trial. Hop testified at length to the numerous, specific defects he found in the construction of appellant's house, and he stated how each defect should be repaired, assigning an estimated cost for the repair.

In his third point, appellant, citing Arkansas Rule of Civil Procedure 26(e), asserts that appellee knowingly concealed certain defects and costs information by failing to amend his prior responses to interrogatories propounded by appellant. In examining the record, we fail to find where appellant raised any issue concerning a knowing concealment by appellee, and we do not consider assignments of error raised for the first time on appeal. *McIlroy Bank & Trust* v. *Seven Day Builders of Arkansas, Inc.,* 1 Ark. App. 121, 613 S.W. 2d 837 (1981). At one point in the trial, appellant's counsel did object to Hop's testifying "into areas that have not been raised in the complaint nor in the interrogatories propounded." Specifically, Hop testified that appellant improperly installed an interior door located

inside the garage. Appellant objected that there was nothing in the pleadings about a door in the garage and he was "not prepared to defend against this sort of thing." Appellant's objection, as posed, actually relates to his first contention and our conclusion is the same — appellees were not required to list each and every defect and the sufficiency and timeliness in apprising appellant of the defects were questions to be decided by the jury.

Affirmed.

MAYFIELD, C.J., and COOPER, J., agree.

John STEFANOVICH *v.* STATE of Arkansas

CA CR 83-61 662 S.W.2d 476

Court of Appeals of Arkansas
January 11, 1984

Tom Donovan, for appellant.

No response.

PER CURIAM. Appellant's court appointed attorney has filed a motion asking for an attorney's fee for services rendered in the appeal of the above matter and we allow $450.00.

The decision in this case was rendered on September 21, 1983, and the motion for attorney's fee was not filed until December 27, 1983. It has been necessary for the court to find the briefs and review this matter in order to determine the fee.

In *Cristee* v. *State,* 4 Ark. App. 33, 627 S.W.2d 34 (1982), we said that motions for attorneys' fees should be filed in this court in time for them to be considered at the time the case is considered on its merits. We now point out that failure to do this could prevent the allowance of an attorney's fee.

CNA INSURANCE COMPANY *v.*
James Ralph McGINNIS and Vicky Lynn HILLS

CA 83-88 663 S.W.2d 182

Court of Appeals of Arkansas
En Banc
Opinion delivered January 18, 1984

[Rehearing denied February 8, 1984.*]

*CRACRAFT, CLONINGER and CORBIN, JJ., would grant rehearing.

Davis, Cox & Wright, for appellant.

Sexton, Nolan & Robb, P.A., and *Jones, Gilbreath & Jones,* by: *Kendall B. Jones,* for appellee.

JAMES R. COOPER, Judge. The appellant, CNA Insurance Company, filed a declaratory judgment action against the appellees, James Ralph McGinnis and Vicky Lynn Hills, seeking an adjudication that it had neither the duty to defend a federal court action pending between the appellees, nor the duty to pay any judgment which might be entered in that case. This appeal follows a decision by the trial court that the appellant was not entitled to the declaratory relief sought; that the appellee McGinnis was entitled to declaratory relief on his counterclaim; and therefore he was entitled to a defense by appellant, as well as payment of any judgment up to the policy limits, plus a 12% penalty and attorney's fees. We affirm.

The appellee Hills had filed suit against McGinnis, her step-father, in federal court, seeking $150,000.00 in damages for injuries allegedly received as a result of sexual assaults and abuse by the appellee McGinnis. The appellant refused to defend McGinnis, and then filed this action for declaratory judgment.

The appellant issued a homeowners policy to McGinnis which covered the Fort Smith residence where the alleged sexual assaults took place. The policy period was from June 29, 1978 to June 29, 1979, during which time Hills was 16 years old. The appellant contended that there was no insurance coverage under its policy of insurance for the conduct alleged by Hills and that it had no duty to defend McGinnis or to pay any judgment which might be entered by reason of both a lack of coverage and the exclusionary provisions of the policy. The pertinent exclusionary clause in the policy states as follows:

> Exclusions. There are certain instances which we do not intend to cover for liability. Under this policy,

liability to others and medical expenses do not apply to personal injury or property damage:

1. Which is expected or intended by an insured.

The appellant had the burden of establishing that the acts which allegedly caused damage or injury fall within this exclusionary clause. *Riverside Insurance Co. of America* v. *McGlothin,* 231 Ark. 764, 332 S.W.2d 486 (1960). Insurance policies must be construed liberally so as to resolve doubts in favor of the insured, both as to coverage and exclusions. *First Heritage Life Assur. Co.* v. *Butler,* 248 Ark. 1164, 455 S.W.2d 135 (1970).

On appeal, the appellant argues that the trial court erred in finding that it had a duty to defend McGinnis as well as pay any judgment entered in the federal court action pending between the appellees.

The chancellor, in a well-reasoned opinion, analyzed the law relative to an insurance carrier's duty to defend and to pay damages, as well as the law concerning the interpretation of exclusionary clauses. He then found that, regarding the exclusion from coverage of damages resulting from intentional acts, the rule in Arkansas was that recovery was not precluded where the results of intentional acts were accidental or unintended. The trial court found that while McGinnis intended to commit the acts complained of, the appellant had not met its burden of proof in establishing that he either intended or expected any injury or damage to his step-daughter. We think the chancellor correctly analyzed the evidence and the law, and that his decision was correct.

Talley v. *MFA Mutual Ins. Co.,* 273 Ark. 269, 620 S.W.2d 260 (1981) is controlling. There the Arkansas Supreme Court stated:

> We see no violation of public policy in allowing recovery in circumstances in which it is shown the results were accidental or unintended. Nor do we adopt the tort concept that one intends the natural and

> foreseeable consequences of his acts so as to bar recovery from unintended results.

In the case at bar, there was no direct evidence presented which tended to prove that McGinnis intended to inflict harm or damage upon Hills. In fact, the evidence was to the contrary. Therefore, the only way to find that he intended harm to result would be to find that harm was a natural and foreseeable consequence of his acts, and that approach was specifically rejected in *Talley*.

We find no error.

Affirmed.

MAYFIELD, C.J., and GLAZE, J., agree.

CORBIN, CLONINGER, and CRACRAFT, JJ., dissent.

DONALD L. CORBIN, Judge, dissenting. This is a case of the cart pulling the horse. It is yet another example of the unnecessary rigidity of our precedent-following system of jurisprudence.

The majority relies on *Talley* v. *M.F.A. Mutual Ins. Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981), as the controlling case law to be applicable to the facts of the case at bar. The issue presented in *Talley, supra,* was whether the liability policy provided coverage for the unintended results of an intentional act. It arose out of a shooting incident involving an altercation between three boys at a party. The trial court there granted appellee MFA's motion for summary judgment based on the pleadings and affidavits, finding appellee MFA had no liability under the terms of the policy. Exclusionary language in the homeowner's policy stated that the policy did not cover bodily injury which was either expected or intended from the standpoint of the insured. In reversing and remanding the decision of the trial court, the Supreme Court held that it did not adopt the tort concept that one intends the natural and foreseeable consequences of his acts so as to bar recovery for unintended results. It concluded by finding that a fact issue existed as to whether

appellant Davis intended to hit or injure appellants Talley and Evans and that the award of summary judgment constituted reversible error.

In *Nat'l. Inv. Life & Cas. Ins.* v. *Arrowood,* 270 Ark. 617, 606 S.W.2d 97 (Ark. App. 1980), the Arkansas Court of Appeals construed an exclusionary clause in a homeowner's insurance policy which provided:

> This policy does not apply: 1. Under Coverage E — Personal Liability . . . f. To bodily injury or property damage which is either expected or intended from the standpoint of the insured.

That case also arose from a shooting incident wherein appellee James Arrowood shot his former wife at the parties' home, the possession of which had been awarded to the wife in a divorce action. Appellants contended that appellee Sandra Arrowood's injury was intentionally caused by appellee James Arrowood and, therefore, liability coverage was excluded under the policies. The trial court found that the insurance companies had failed to meet the burden of proving that the exclusions were applicable. The Court of Appeals held that the judgment of the trial court was clearly against the preponderance of the evidence and reversed and remanded. The Court noted that although there was no authority within this jurisdiction, many cases from other jurisdictions did exist. It determined that no two cases were factually identical and it was essentially a matter of gleaning the intent behind human transactions and the outcome was dependent on the judgment of common sense and experience as applied to human behavior. However, the Court stated that it was not confronted with reconciling an intentional act with an unintended result.

I believe that the facts and evidence in the case at bar are distinguishable from those of *Talley, supra.* That case involved a shooting incident between young boys who were not of the same household and the issue was whether the resulting damages were intended or accidental because of the negligence of the perpetrator.

Appellees contend that the evidence and testimony presented in the instant case clearly shows that appellee McGinnis did not intend or expect appellee Hills to sustain injuries by virtue of his having sexual intercourse with her covering a period from the time she was six to sixteen years of age. A review of the record reveals that there was evidence at trial that appellee McGinnis also engaged in sexual relations with appellee Hills' older twin sisters and that the girls ran away from home as a result of that sexual abuse. Appellee McGinnis testified that he agreed that after he had sex with the girls, at least two of them ran away from home. He stated that he believed the girls used that as an "excuse" to run away from home. In particular, appellee McGinnis testified that when Marlene left after he attempted to have sexual intercourse with her, "It hurt her and I stopped and she ran away from home the next day or so. This was in St. Joseph and she did run away after I tried to have sex with her." Thereafter, appellee McGinnis testified that the entire family received family counseling. Appellee McGinnis and family later moved to Fort Smith, Arkansas, and it was during the period between June 29, 1978, to June 29, 1979, the effective dates of the policy, that appellee Hills claims to have been additionally sexually assaulted and abused by appellee McGinnis. Appellee McGinnis admitted to having had sexual relations with appellee Hills over a ten-year period and stated: "I had no reason to believe that there would be any harm or injury sustained by Vicky from my activities with her, based upon the fact no ill effects accrued in the other girls."

I have to agree with appellant CNA that for appellee McGinnis to engage in a continuing course of sexual assault and abuse of his step-daughter, Vicky, from the time she was six years of age until the time she was sixteen, and then to claim that he did not expect or intend to cause injury, flies in the face of all reason, common sense and human experience. I find this to be true in spite of the testimony of Dr. Douglas A. Stevens, a psychologist and witness for appellee McGinnis, to the contrary. Furthermore, a determination of insurance coverage under these facts and circumstances would constitute a manifest violation of public policy. Exclusionary clauses are designed and are approved to

protect the insurance companies from collusive claims and are generally enforced according to their terms. *State Farm Mutual Ins. Co.* v. *Cartmel,* 250 Ark. 77, 463 S.W.2d 648 (1971).

An act of sexual abuse perpetrated upon a minor child by a custodial adult is so reprehensible that we should recognize it as causing irreparable harm. Surely, it is reasonable to say that a person who performed the act intended the resulting harm as a matter of law given these facts. To say that a man who sexually assaults a minor female who is a member of his household does not intend harm, is a demonstration of our system's insensitivity to the tender psyche of that child.

We believe the facts and evidence in the case at bar are closely analagous to those of *Fireman's Fund Ins. Co.* v. *Hill,* 314 N.W.2d 834 (Minn. 1982). There, appellant brought a declaratory judgment action to determine whether sexual activities engaged in by its insured, appellee, were covered under a homeowner's policy. The trial court found that appellant was obligated to defend appellee in a civil action brought on behalf of a foster child and to pay damages for which appellee might become liable. On appeal, the Minnesota Supreme Court held that the intention to cause injury would be inferred as a matter of law when a foster custodial parent engaged in sexual activities with a minor child in his custody, thus precluding coverage under the homeowner's policy. The policy at issue there contained a provision which excluded "bodily injury or property damage which is either expected or intended from the standpoint of the insured." Appellee and his wife took foster children into their home. The Hennepin County Welfare Department received a complaint from the parents of one of the former foster children in appellee's care, alleging that appellee had molested the child. When he was confronted with the allegations, appellee denied having any sexual contact with the child. Later, a minor male child placed in his custody told authorities that during the fifteen months he was in appellee's home, appellee engaged in sexual conduct with him. Appellee contended that he did not intend to harm the boy and that his actions were the

result of his social and emotional immaturity. An action was later commenced on behalf of the boy for mental pain and anguish resulting from the assault by appellee. It was during this period of time when the boy was in the appellee's home that appellee was insured by appellant under a homeowner's policy. In reversing the decision of the trial court, the Supreme Court noted that the facts indicated that appellee intended to engage in sexual activities and that he knew that the welfare department would disapprove of his activities. Before the boy was placed in appellee's home, appellee had been confronted by the welfare department with allegations that he had sexually assaulted other foster children. Appellee knew the welfare department viewed his conduct as detrimental to the boy. The court held that those facts gave rise to an inference of intent to inflict injury and appellee's acts were excluded from coverage under the insurance policy. In reaching this conclusion, the Minnesota Supreme Court cited an earlier case, *Continental W. Ins. Co.* v. *Toal,* 309 Minn. 169, 244 N.W.2d 121 (1976), to-wit:

> In *Caspersen* v. *Webber,* 298 Minn. 93, 99, 213 N.W.2d 327, 330 (1973), we indicated that an injury is expected or intended from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury or when the character of the act is such that an intention to inflict an injury can be inferred as a matter of law.

In the instant case, appellee McGinnis admitted to his sexual abuse of both appellee Hills as well as her older sisters. Regardless of appellee McGinnis' testimony to the effect that he never intended any harm or injury, he had to have been aware of such injury in view of the fact that the entire family had previously received counseling on the matter of his sexual abuse as well as the girls' running away from home. I would find that these actions are of such a calculated nature that we can infer an intention to inflict injury as a matter of law and reverse, holding that the trial court erred in finding that appellant CNA had a duty to defend appellee McGinnis as well as pay any judgment up to its policy limits in the federal district court action, a 12% penalty and attorney's fees.

CRACRAFT and CLONINGER, JJ., join in this dissent.

David COSTON *v.* STATE of Arkansas

CA CR 83-103 663 S.W.2d 187

Court of Appeals of Arkansas
Division II
Opinion delivered January 18, 1984
[Rehearing denied February 15, 1984.]

Boswell & Smith, by: *Ted Boswell,* for appellant.

Steve Clark, Atty. Gen., by: *Michael E. Wheeler,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was convicted by a jury of first degree battery and manufacturing marijuana with intent to deliver. He was sentenced to five and ten years respectively, with the sentences to run consecutively. From that decision, comes this appeal.

On September 14, 1982, Britt Coleman received a shotgun blast to the face in rural Clark County. Coleman alleged that at the time he was shot, he and the appellant were harvesting marijuana which they had been growing. Coleman was allegedly ambushed and shot by a close friend of the appellant, Mark Kaufman, who received wounds from a shotgun and knife at the hands of Coleman. The appellant was charged as an accomplice of Coleman in the marijuana growing operation and as an accomplice of Mark Kaufman in the battery upon Coleman.

For reversal, the appellant first argues that there was insufficient evidence presented at his trial to corroborate the accomplice testimony of Britt Coleman so as to sustain his conviction for manufacturing marijuana with intent to deliver. We disagree.

Arkansas Statutes Annotated § 43-2116 (Repl. 1977) requires corroboration of accomplice testimony by other evidence which tends to connect the defendant with the commission of the offense. In *Rhodes* v. *State,* 276 Ark. 203, 634 S.W.2d 107 (1982), the Arkansas Supreme Court, referring to such corroborating testimony, stated:

> It is unnecessary that the evidence be sufficient to sustain the conviction but the evidence must, independent from that of the accomplice, tend to a substantial degree to

> connect the defendant with the commission of the crime. *King* v. *State,* 254 Ark. 509, 494 S.W.2d 476 (1973). . . .
>
> Where circumstantial evidence is utilized, all facets of the evidence can be considered to constitute a chain sufficient to present a question for the resolution by the jury as to the adequacy of the corroboration. *Klimas* v. *State,* 259 Ark. 301, 534 S.W.2d 202, cert. den. 429 U.S. 846 (1976). The court does not look to see whether every other reasonable hypothesis but that of guilt has been excluded. *Cassell* v. *State,* 273 Ark. 59, 616 S.W.2d 485 (1981).

In our review of the evidence which tends to corroborate the testimony of Britt Coleman, we find sufficient evidence to satisfy the standard enunciated above. It is significant that after contacting the Clark County Sheriff's Department in the early morning hours of September 16, 1982, in order to modify an earlier statement made to officers investigating the shooting and stabbing of Mark Kaufman, the appellant led the officers to where the marijuana was being grown. Also, the appellant testified at his trial that he and Mr. Coleman had enjoyed contacts together for sometime, that he was aware of what Coleman was doing in that area, that he was aware Coleman had grown marijuana for several years, and that he had even taken a friend, Mark Kaufman, to the area where the marijuana was being cultivated. Hence, the appellant, through his statements, acts, and subsequent testimony, supplied a large part of the corroboration necessary to sustain his conviction.

Next, the appellant argues that the admission of the hearsay statement of Mark Kaufman, as related by Officer Don Wesson, over the appellant's objection, denied him the right to confront and cross-examine witnesses against him, in violation of his Sixth and Fourteenth Amendment rights.

The appellant's trial counsel cross-examined Officer Wesson concerning a portion of his notes taken when interviewing Mark Kaufman at Ouachita Memorial Hospital in Hot Springs. On redirect, the prosecutor asked Officer Wesson to continue reading from his notes. Officer Wesson

related Kaufman's statement to the effect that the gun he had used in shooting Coleman was the appellant's and the appellant was in the woods with him at the time he shot Coleman. Trial counsel for the appellant made a rather vague objection after this testimony was elicited. No ruling on the objection was made by the trial court. No motion to strike the testimony was made.

It is well-settled that one who opens up a line of questioning or who is responsible for an error should not be heard to complain of that for which he is responsible. *Berry* v. *State,* 278 Ark. 578, 647 S.W.2d 453 (1983). Likewise, failure to timely object to a question results in a waiver of such right. *Washington* v. *State,* 276 Ark. 140, 633 S.W.2d 24 (1982). Also, the objection must be sufficiently specific as to the particular error to which the objection is made. *Crafton* v. *State,* 274 Ark. 319, 624 S.W.2d 440 (1981).

The substance of the hearsay statement of Kaufman had already been presented at the appellant's trial through the testimony of Coleman and the fact that the appellant had loaned his .16 gauge shotgun to Kaufman was later testified to by the appellant himself. The presence of the appellant's pick-up truck near the scene of the marijuana patch and shooting as well combine to make the error, if in fact one exists, harmless. Also, the failure of the appellant to specifically object to the testimony or request corrective measures, leads us to conclude no reversible error occurred.

Finally, the appellant argues there was no evidence presented from which a jury could have concluded the appellant conspired with or assisted Mark Kaufman in shooting Britt Coleman. We find that Coleman's testimony, as corroborated by the evidence set out above, is more than ample to support the appellant's conviction. In criminal cases we review the evidence in the light most favorable to the appellee and if there is substantial evidence to support the verdict, we affirm. *Phillips* v. *State,* 6 Ark. App. 380, 644 S.W.2d 288 (1982). From our review of the record we find substantial evidence to support the verdict of the jury and therefore affirm.

Affirmed.

GLAZE, J., agrees.

MAYFIELD, C.J., concurs.

MELVIN MAYFIELD, Chief Judge, concurring. I concur in the affirmance of this case, but first I want to call attention to the fact that counsel for appellant on appeal was not counsel for appellant at the trial of this case. Secondly, there are a number of matters mentioned in appellant's brief relating to the effectiveness of trial counsel which raises considerable doubt in my mind as to whether appellant received a fair trial. Most of these matters, however, are not urged as grounds for new trial, undoubtedly because present counsel knows that the Arkansas Supreme Court has "reiterated time and again that the effectiveness of counsel may not be raised for the first time on appeal." *Sumlin* v. *State,* 273 Ark. 185, 192, 617 S.W.2d 372 (1981). But aside from effectiveness of counsel, it is argued that there was a proper objection to the hearsay statement of Mark Kaufman. Moreover, appellant contends that even if there was no proper objection, this evidence violated his right of confrontation guaranteed by the Sixth Amendment to the Constitution of the United States, and that the matter comes within one of the exceptions set out in *Wicks* v. *State,* 270 Ark. 781, 606 S.W.2d 366 (1980), allowing errors to be raised for the first time on appeal.

Rule 103 of our Uniform Rules of Evidence provides that error may not be predicated upon a ruling which admits evidence unless "a timely objection or motion to strike appears of record stating the specific ground of objection, if the specific ground was not apparent from the context." Here the specific ground of objection was certainly apparent because Officer Wesson was clearly asked to read from an out-of-court statement made by Mark Kaufman. The objection, however, was not made until the officer had read the objectionable part of the statement and then there was no motion to strike. The failure to move to strike the evidence was a failure to ask the court to rule on the matter and, although it has given me much concern, I have been unable to find

sufficient reason why it should be excused under any exception set out in *Wicks* v. *State.*

I do wish to disassociate myself from any idea that my decision is persuaded by the majority's reliance on the rule that one who opens up a line of questioning or is responsible for an error should not be heard to complain of that for which he is responsible. While it is true that counsel for appellant asked Officer Wesson to read a portion of Kaufman's statement, this did not make the rest of that statement admissible. In *Henson* v. *State,* 239 Ark. 727, 732, 393 S.W.2d 856 (1965), the court said:

> The state defends the introduction of this evidence on the basis of the fact that appellant had first offered specific instances of good behavior, thus opening the door for the prosecution to offer specific instances of bad behavior as a matter of counteracting appellant's testimony. However, two wrongs do not make a right. The evidence offered by appellant was clearly inadmissible, but this did not justify the state in offering inadmissible evidence.

Arthur WILLIS et ux *v.* Robert TRIPLETT et al

CA 83-78 663 S.W.2d 201

Court of Appeals of Arkansas
Division II
Opinion delivered January 18, 1984

Honey & Rodgers, by: *Danny P. Rodgers,* for appellant.

Graves & Graves, by: *John Robert Graves,* for appellee Foster Realty Co., Inc.

Atchley, Russell, Waldrop & Hlavinka, for appellee Louis Hartsfield, d/b/a Columbia Exterminators, and David Hartsfield.

Wilson, Walker & Short, P.A., by: *Charles M. Walker,* for appellees Robert Triplett and Janet Triplett.

LAWSON CLONINGER, Judge. The only issue on this appeal is whether the trial court was in error in awarding a directed verdict in favor of all the appellees, Robert and Janet Triplett, Foster Realty Company, Inc., and Columbia Exterminators, and against appellants, Arthur and Audria L. Willis.

Appellants filed their action for damages against appellees, alleging that appellants had purchased a house located on three half lots in Hope, Arkansas, from the Tripletts, through Foster Realty, for the sum of $24,000; that Columbia Exterminators made a report that there was no structural termite damage to the house; that the house was in fact so severely damaged by termites that the cost of repairs would exceed the worth of the house after repairs; and that as a proximate result of false and fraudulent representations

made by or chargeable to each of the appellees, appellants suffered damages. Appellants prayed for $24,000 compensatory damages and $50,000 punitive damages. Appellants' request for punitive damages was not pursued and is not argued on this appeal.

At the conclusion of appellants' case, appellees moved for a directed verdict, contending that appellants had failed to establish any ascertainable measured damages, and that the jury would be required to resort to speculation and conjecture in determining damages. We reluctantly conclude that appellees were correct in their contention.

Viewing the evidence presented in this case, it cannot be determined with certainty what measure of damages appellants were asking the trial court to employ. In *Lewis* v. *Phillips,* 223 Ark. 380, 266 S.W.2d 68 (1954), the court stated:

> In *Benton Gravel Co.* v. *Wright,* 206 Ark. 930, 175 S.W.2d 208, we said: 'It is often difficult for a court to determine the true measure until all the evidence is in. . . . If there be different modes of measuring the damages, depending on the circumstances, the proper way is to hear the evidence, and to instruct the jury afterwards according to the nature of the case.'

The only evidence presented in this case regarding measure of damages was the testimony of appellant Arthur Willis and his witness, T. L. Watson, a self-employed contractor. Mr. Willis testified at one point that it would cost as much to make the repairs as he had spent on the house. Mr. Watson testified that when he initially looked at the house, which was one year after the purchase and approximately one year before the trial, he had estimated the cost of repairing the house at $10,800. He testified that he had reservations about the figure at that time, and that if the walls were as eaten up as they seemed to be, it would run a lot more than that. He had examined the house a second time the day before the trial and testified that he had determined that it would cost more to repair the house than it was worth. However, neither Mr. Willis nor Mr. Watson testified as to the value of the house alone at the time of sale

or at the time of trial. Appellants contend without citation of authority only that the evidence was sufficient to support a verdict for $24,000, the purchase price, plus closing costs.

The rule with respect to certainty of damages is stated in *Missouri and Arkansas Railway Co.* v. *Treece,* 210 Ark. 63, 194 S.W.2d 203 (1946). In that case the rule was stated that evidence must exist which affords a basis for measuring the plaintiff's loss with reasonable certainty and the evidence must be such that the jury may find the amount of the loss by reasonable inferences from established facts, and not by conjecture, speculation or surmise.

There simply is no evidece in the record that the jury could look to without resorting to speculation or conjecture. Even if it could be said that $24,000 is considered the fair market value of the property which appellant had purchased, there is no evidence presented to show what the house itself was worth. The trial court was correct in granting the motion for a directed verdict.

Affirmed.

COOPER and CORBIN, JJ., agree.

Walter W. BROWN *v.* Kathey M. BROWN

CA 83-90 663 S.W.2d 190

Court of Appeals of Arkansas
Division II
Opinion delivered January 18, 1984

Denver L. Thornton, for appellant.

David L. Staton, Legal Services of Arkansas, Inc., for appellee.

DONALD L. CORBIN, Judge. Appellant, Walter W. Brown, and appellee, Kathey M. Brown, were divorced on December 5, 1979, by decree of the chancery court of Union County, Arkansas. Custody of the minor children was awarded to appellee with certain visitation rights to appellant. On June 23, 1982, appellant filed a motion to amend child visitation. Appellee had moved to Ohio shortly after the divorce taking the children with her after posting a $1,000.00 bond. The chancellor ruled that in accordance with Ark. Stat. Ann. § 34-2703 (Supp. 1983), the chancery court of Union County, Arkansas, no longer had proper subject matter jurisdiction to hear or enter any order affecting the custody rights or visitation rights with regard to the minor children and dismissed appellant's motion. We reverse and remand.

The issue on appeal is whether the chancellor erred in dismissing appellant's motion to amend child visitation for lack of subject matter jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, Ark. Stat. Ann. § 34-2701 et seq.

Custody determination as used in the Uniform Child Custody Jurisdiction Act "means a court decision and court orders and instructions providing for the custody of a child, *including visitation rights;* it does not include a decision relating to child support or any other monetary obligation of any person." Ark. Stat. Ann. § 34-2702(2) (Supp. 1983) (emphasis ours). In the case at bar appellant seeks a modification of his visitation rights which determination is governed by our Uniform Child Custody Jurisdiction Act. The original decree of divorce awarded appellant reasonable visitation which included one week during Christmas and Christmas Day, reasonable weekend visitations upon five

days' notice and two weeks of visitation during the summer each year upon reasonable notice to appellee. Appellant's motion requested that the original decree of divorce be amended and that he be granted eight weeks of visitation each summer, as well as one week during Christmas and Christmas Day and that all child support be abated during the requested periods of visitation.

Both Arkansas and Ohio have adopted the Uniform Child Custody Jurisdiction Act. Our Act was approved February 9, 1979, and became effective July 20, 1979 (90 days after the legislature recessed on April 20, 1979). The purpose of the Act is to promote cooperation between the courts of various states so the state that can best serve the interests of the child will decide the matter. It is designed to discourage continuing controversies and avoid competition and conflict between the courts of the various states. Ark. Stat. Ann. § 34-2701 (Supp. 1983).

The trial court had the discretion in the instant case to take jurisdiction under the alternative situation set forth in Ark. Stat. Ann. § 34-2703(a)(2) which provides:

> (a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> . . . (2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one [1] contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or . . .

Pursuant to the above authority, Arkansas undoubtedly had jurisdiction to hear the evidence on the issue of whether or not a modification of appellant's visitation rights was in order. We hold that the trial court erred in finding that it no longer had proper subject matter jurisdiction in regard to the visitation rights of appellant. The minor children and

appellant have a significant connection in Arkansas and there is available in Arkansas substantial evidence concerning the minor children's present or future care, protection, training and personal relationships in regard to the visitation rights of appellant. Such evidence would include, but is not limited to, the suitability of appellant's home and the ability of appellant to supervise the children while visiting with him in Arkansas. The Arkansas court is in a much better position to obtain the facts which bear on the fitness of appellant and the best interest of the minor children in regard to any change in visitation.

Accordingly, we reverse and remand for a hearing on the merits of appellant's motion to amend child visitation.

Reversed and remanded.

CLONINGER and COOPER, JJ., agree.

CENTRAL MALONEY, INC. and
AETNA CASUALTY & SURETY COMPANY
v. Charles Wayne YORK

CA 83-229 663 S.W.2d 196

Court of Appeals of Arkansas
En Banc
Opinion delivered January 18, 1984

Ramsey, Cox, Lile, Bridgeforth, Gilbert, Harrelson & Starling, by: *Martin G. Gilbert,* for appellants.

F. Wilson Bynum, Jr., P.A., by: *F. Wilson Bynum, Jr.,* for appellee.

DONALD L. CORBIN, Judge. Appellee, Charles Wayne York, was awarded workers' compensation benefits. He

testified that the press brake machine he was operating on September 14, 1981, on behalf of his employer, Central Maloney, Inc., appellant, "cycled through," jerking him off his feet and causing an injury to his back. We affirm.

While there were conflicts in the testimony of appellee, his witnesses and that of the employer, appellants concede that there was substantial evidence to support a decision either upholding or denying appellee's claim.

Attorneys for appellants and appellee have provided this Court with excellent briefs and participated in intelligent as well as stimulating oral arguments. The issue raised on appeal is narrowed in scope to: How do you reconcile the requirement that a claimant prove his injury by a preponderance of the evidence with the doctrine of liberal construction? This issue was apparently triggered by a statement contained in the administrative law judge's opinion, which was adopted by a majority of the full Commission, to-wit:

> After a review of the entire record in this claim it is my opinion that the claimant has proved by a preponderance of the evidence that he suffered a compensable injury on or about September 14, 1981. This decision is necessarily reached after drawing every legitimate inference possible in favor of the claimant and after following a liberal approach in determining whether or not the claimant received a compensable injury. This is as is mandated by the Arkansas Court of Appeals. [See *Bunny Bread, et al.* v. *Shipman,* 267 Ark. 926, 561 S.W.2d 692 (Ark. App. 1980).]

Appellants contend that this statement by the administrative law judge indicates that the administrative law judge was *compelled* to find for appellee. Appellants' attorney further argues that the rule of liberal construction has reached the point where if the claimant adduces substantial evidence, the administrative law judge is compelled or required to find for the employee. He goes further and contends that a claimant would never lose a case if the doctrine is applied as he visualizes it. In support of this

position, appellants rely on an opinion of Judge Newbern in *Johnson* v. *Valmac Industries,* 269 Ark. 626, 599 S.W.2d 440 (Ark. App. 1980), wherein it was stated:

> [W]e have no quarrel with the philosophy of workers' compensation, and certainly none with the notion that the *act should be interpreted* whenever there is doubt as to its meaning, in favor of the claimant. But to say that when there is doubt remaining as to a *factual* issue, and the doubt has been caused by conflicting or equivocal testimony, the resolution of that doubt by the commission must always favor the claimant, is to rob the commission of its fact-finding function which is definitely prescribed by the statute and not to be deprived by us. (Emphasis by the Court.)

A dissent by Justice George Rose Smith in *Boyd Excelsior Fuel Co.* v. *McKown,* 226 Ark. 174, 288 S.W.2d 614 (1956), was noted by Judge Newbern and is relied upon by appellants. Justice Smith's dissent in the *Boyd* case, *supra,* states in part as follows:

> What, then, can be the explanation for the reversal of the Commission's decision upon a question of fact? The answer apparently lies in the final words of the majority opinion, where it is said that compensation cases should be liberally construed and that doubtful cases should be resolved in favor of the claimant. It is undoubtedly true that the compensation law itself should be liberally construed in favor of the workman. It may also be true that the commissioners, within the limits of their consciences, should construe the evidence liberally in the claimant's favor. But if the majority mean that it is reversible error for the Commission to fail to take a liberal view of the evidence in favor of the claim, the decision is demonstrably wrong for several reasons.

It is important to note that Justice Smith has since joined with a majority of the Arkansas Supreme Court in subsequent decisions dealing with this issue.

In writing for a unanimous court in *American Red Cross* v. *Wilson,* 257 Ark. 647, 519 S.W.2d 60 (1975), Justice Fogleman stated:

> We agree with appellants that a claimant bears the burden of proving that his injury was the result of an accident that arose in the course of his employment, and that it grew out of, or resulted from the employment. We do not agree, however, with their argument that the Workmen's Compensation Act does not mandate that the Commission view the evidence liberally in favor of the claimant. To the contrary, the Commission, in considering a claim, must follow a liberal approach and draw all reasonable inferences favorably to the claimant. (citation omitted.) It was the duty of the Commission to draw every legitimate inference possible in favor of the Claimant and to give her the benefit of the doubt in making the factual determination. (citations omitted.) The same rules apply, of course, in determining whether the accident grew out of and occurred within the course of the employment. (citation omitted.)

Again, four years later, Justice Fogleman in writing for a unanimous court in *O.K. Processing, Inc.* v. *Servold,* 265 Ark. 352, 578 S.W.2d 224 (1979), stated:

> The appellants raise two points for reversal. The first of these relates to a statement in the final opinion of the Workmen's Compensation Commission to the effect that, when all doubts are resolved in favor of the claimant, it must be concluded that the administrative law judge's finding that the claimant is totally disabled is correct. The appellants contend that in resolving all doubts in the claimant's favor the commission failed to weigh the evidence according to the accepted standard requiring the claimant to prove the compensability of his or her claim by a preponderance of the evidence. It is true, as appellants contend, that there is no presumption that a claim for workers' compensation comes within the purview of the law, i.e., that it arose out of, and in the course of, the claimant's employment.

> (citations omitted.) But, in a long line of cases, this court has held that, in light of the beneficent and humane purposes of the Workers' Compensation Law (citation omitted), all doubtful cases should be resolved in favor of the claimant. (citations omitted.) This does not mean that a claimant does not have to meet the burden imposed upon him by a preponderance of the evidence. (citations omitted.) It does mean that, in determining where the preponderance of the evidence lies, the Workmen's Compensation Commission *must* draw all legitimate inferences and resolve doubts in favor of the claimant, viewing and construing the evidence in favor of the claimant and the purpose of the statutes to compensate those, who, by reasonable construction, are within the terms of the Workers' Compensation Law. (citations omitted.) The commission obviously did not err in resolving all doubts favorably to appellee.

The doctrine of liberal construction has evolved through precedent handed down by the Arkansas Supreme Court to its present state which is best summarized in *O.K. Processing, Inc., supra.*

A review of cases handed down by the Arkansas Court of Appeals leads us to the same conclusion. A few highlighted cases recognizing and adopting the doctrine of liberal construction include: *Mountain Valley Superette* v. *Bottorff,* 4 Ark. App. 251, 629 S.W.2d 320 (1982) [whether claimant was independent contractor rather than employee]; *City of Sherwood* v. *Lowe,* 4 Ark. App. 161, 628 S.W.2d 610 (1982) [whether injury causing claimant's death arose out of and in course of employment]; *Dedmon* v. *Dillard Dept. Stores, Inc.,* 3 Ark. App. 108, 623 S.W.2d 207 (1981) [whether claimant had shown by preponderance of evidence that she sustained accidental injury arising out of and in course of employment]; and *Williams & Johnson* v. *Nat'l Youth Corps,* 269 Ark. 649, 600 S.W.2d 27 (Ark. App. 1980) [whether joint employment occurred so that both employers liable for compensation].

The rule of liberal construction is not a substitute for a claimant's burden of establishing an injury by a pre-

ponderance of the evidence. It has often been stated that the most important rule of the Workers' Compensation Act is to carry out its humane purpose. The Commission is *required* by statute to make a determination of whether a claimant has established a compensable injury by a preponderance of the evidence. We believe that the doctrine of liberal construction can co-exist with the claimant's burden of proof without robbing the Commission of its fact-finding responsibility. We do not agree with appellants' contention that the application of the rule of liberal construction will always result in a decision in favor of claimant.

Turning to the facts of the case at bar, in addition to appellee's testimony at the hearing, the record reflects that appellee presented the testimony of two fellow employees, his wife and brother-in-law in order to establish his entitlement to benefits as a result of an alleged on-the-job injury by a preponderance of the evidence. Appellee stated at the hearing that he had recurring problems with a "stiff back" which would normally "work itself out" after a short period of time and from which he suffered no pain. He further testified that the stiff back in no way interfered with his work and that he had a stiff back on September 14, 1981. Appellee stated that while running metal side panels into the press brake machine on this date, the machine suddenly slammed through, jerking him off his feet and hurting his back. Appellee's witness and co-employee, Jimmy Ellis, testified that he saw the machine cycle through yanking appellee's arms up. Ellis stated that he went over to appellee and appellee told him he was hurt. Ellis testified that the machine had cycled through before. Raymond Cox, another witness for appellee and a co-worker, testified that he did not witness the incident but that he heard appellee was hurt and he walked over to check. He stated that appellee told him what had occurred, was very pale and appeared to be in pain. He also testified to problems with the machine. Appellee's wife testified that her husband was moving fine at home before leaving for work on September 14 and that he had a stiff back. Finally, appellee's brother-in-law testified on rebuttal to the fact that appellee had never hurt his back while cutting or loading wood to his knowledge and that

appellee had not been in the woods cutting or loading wood since the winter before.

Appellants offered the testimony of a co-worker, appellee's supervisor, and vice president of personnel at the hearing. Charlie Ray Lunsford, a co-worker, testified that he did not remember seeing the machine cycle through and jerk appellee off the ground on September 14, 1981. He stated that he would have remembered it and that appellee did not mention anything to him about it. Lunsford recalled that appellee approached their supervisor, J. D. Hill, that evening to tell him that appellee was going home because he did not think he could make it the rest of the night. Lunsford testified that J. D. Hill came over and helped them with a problem with the machine which would prevent it from cycling through. He remembered Jimmy Ellis commenting that he had seen the machine jerk appellee up. Lunsford stated that he was not watching appellee at all times on September 14, 1981, and that he could have been out of the area. Appellee's supervisor, J. D. Hill, testified that appellee arrived at work on September 14, 1981, with a stiff back and in pain. Hill stated that appellee told him that appellee had taken some shots and that his back was hurting badly. Shortly after the work buzzer rang, Hill testified that appellee hollered at him and said he had to call his wife because he was not able to continue. Hill offered to drive appellee home himself and stated that appellee did not say anything to him at any time about having hurt his back on the job. Hill denied talking to any of the other employees about the machine cycling through and also denied working on it that evening to prevent it cycling. Hill further testified that before appellee started work on September 14, 1981, appellee informed him that he and his son had gone to load wood and that appellee was not able to load any part of it. The vice president of personnel testified that he was present at an interview the week before the date of the hearing and he heard Raymond Cox being questioned. He heard Cox state that when he picked appellee up for work on September 14, appellee told Cox that his back was hurting and stated: "You know how it is when you're handling one of those power saws, they'll get your back." Cox testified that appellee did not tell him on the way to work that he had cut wood with a

power saw the previous weekend. Cox stated that he only remembered wood being mentioned in the conversation.

It is evident that there were conflicts in the testimony of the witnesses. However, it is well settled that questions of credibility and the weight and sufficiency to be given evidence are matters for the Commission to determine. It is also well settled that agencies such as the Commission are better equipped by specialization, insight and experience to analyze and determine issues and to translate evidence into findings of fact. *Allen Canning Co.* v. *McReynolds,* 5 Ark. App. 78, 632 S.W.2d 450 (1982). The Commission in the case at bar specifically found that appellee had established his entitlement to benefits by a preponderance of the evidence.

Under our limited standard of review, decisions of the Workers' Compensation Commission must stand if supported by substantial evidence and, in determining sufficiency of evidence to sustain findings of the Commission, testimony must be weighed in its strongest light in favor of the Commission's findings. *Owens* v. *National Health Laboratories, Inc. and Liberty Mutual Ins. Co.,* 8 Ark. App. 92, 648 S.W.2d 829 (1983). This Court is committed to the rule that the findings of fact by the Commission are, on appeal, given the same verity that would attach to a jury's verdict. Substantial evidence has been defined as more than a mere scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is evidence of such force and character that it would with reasonable and material certainty and precision compel a conclusion one way or the other. *DeFrancisco* v. *Arkansas Kraft Corp.,* 5 Ark. App. 195, 636 S.W.2d 291 (1982).

We cannot say that reasonable minds could not reach the conclusion of the Commission or that the application of the law to that conclusion was erroneous. Nor can we say that it is incorrect under the law as it currently exists for the Commissioners to construe evidence as well as interpret the Workers' Compensation Act liberally in the claimant's favor. The function of the Commission and the scope of review of its decision by this Court have been repeatedly

announced by the numerous decisions of this Court as well as the Arkansas Supreme Court and we must decline to alter them.

Affirmed.

MAYFIELD, C.J., and CRACRAFT, J., concur.

MELVIN MAYFIELD, Chief Judge, concurring. The appellants concede that there is substantial evidence which would support a decision either granting or denying appellee's claim. But that is not the appellants' point. Their contention is that the Commission's decision was not made by finding that the claimant met his burden of proof by a preponderance of the evidence, but by resolving all the inferences in the claimant's favor. That the Commission used that standard is plainly established by the record in this case.

After the Commission had agreed with the administrative law judge and had adopted his decision, the appellants filed a motion for clarification asking that the Commission state whether it determined "the preponderance of the evidence by drawing inferences favorable to the claimant upon evidence which, absent such inferences, would not preponderate in favor of claimant" and the Commission issued another opinion and said "the answer to this question is in the affirmative."

In explaining its answer, the Commission started with the case of *Boyd Excelsior Fuel Company* v. *McKown,* 226 Ark. 174, 288 S.W.2d 614 (1956), and pointed out that the majority opinion stated "doubtful cases should be resolved in favor of the claimant." The next case cited was *Holland* v. *Malvern Sand & Gravel Co.,* 237 Ark. 635, 374 S.W.2d 822 (1964), and the Commission quoted from the majority opinion which stated "where one inference would support an award and another would defeat it, the inference supporting the award must be adopted." The Commission then noted other cases, from the Supreme Court and from the Court of Appeals, for example, *O.K. Processing, Inc.* v. *Servold,* 265 Ark. 352, 578 S.W.2d 224 (1979), and *Bunny*

Bread v. *Shipman,* 267 Ark. 926, 591 S.W.2d 692 (Ark. App. 1979), and concluded that a rule of "liberal construction" was "obligatory" upon the Commission.

I agree that the Commission's conclusion is compelled by the decisions of our appellate courts. Although the standard used by the Commission may not completely "shift the burden of proof from the claimant" as claimed by appellants, or may not completely "rob the Commission of its fact-finding function" which was a concern of the court in *Johnson* v. *Valmac Industries,* 269 Ark. 626, 599 S.W.2d 440 (Ark. App. 1980), we should in candor admit that our decisions do not leave the Commission completely free to decide the issues upon a preponderance of the evidence; and if the Commission is not using the proper standard, it needs to be clearly told what standard it should use.

CRACRAFT, J., joins in this concurrence.

Mary IZZARD and Jeffrey IZZARD
v. STATE of Arkansas

CA CR 83-95 663 S.W.2d 192

Court of Appeals of Arkansas
Division II
Opinion delivered January 18, 1984
[Rehearing denied February 15, 1984.]

Jack Holt, Jr., for appellants.

Steve Clark, Atty. Gen., by: *Marci L. Talbot,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellants appeal their convictions for manufacturing marijuana. They were both sentenced to eight years in the Department of Correction and fined $5,000 each. Appellants contend the trial court erred in (1) denying their motion to suppress, (2) refusing their motion for mistrial, (3) admitting certain value testimony pertaining to the seized marijuana, and (4) refusing to grant their motions for separate trials on both the guilt-innocence phase and the sentence phase of their case. We affirm.

Appellants first argue that the marijuana field discovered on their property is entitled to Fourth Amendment protection. Citing the test earlier adopted by this Court in *Gaylord* v. *State,* 1 Ark. App. 106, 613 S.W.2d 409 (1981), appellants contend they exhibited a reasonable expectation of privacy in the field that was searched; therefore, under the existing circumstances, the court should have suppressed all the evidence derived from the illegal search. *See also Brown* v. *State,* 5 Ark. App. 181, 636 S.W.2d 286 (1982). One circumstance to which appellant refers is a deputy sheriff's aerial observation of their property. The deputy detected appellant's marijuana field during a helicopter search in the same area for an airplane that reportedly had crashed. While flying about 100 feet above the treetops, the deputy saw what he believed was marijuana, which later was found located on appellant's farm.

In view of the deputy's aerial observation and detection of appellants' marijuana field, we are confronted with the question whether such a helicopter observation constitutes a "search" subject to Fourth Amendment protection. While this question has not previously been addressed by our State's appellate courts, cases from other jurisdictions indicate that warrantless aerial observation of that which is not visible from most places on the ground is not *per se* a Fourth Amendment violation. *United States* v. *Mullinex,* 508 F.Supp. 512 (E.D. Ky. 1980); *Burkholder* v. *Superior Court,* 96 Cal. App.3d 421, 158 Cal. Rptr. 86 (1979); *Costello* v. *State,* 442 So. 2d 990 (Fla. Dist. Ct. App. 1983) (Rehearing denied Jan. 11, 1984); *People* v. *Lashmett,* 71 Ill. App. 3d 429, 27 Ill. Dec. 657, 389 N.E.2d 888 (1979), *cert. denied* 444 U.S. 1081, (1980); *State* v. *Ryder,* 315 N.W.2d 786

(Iowa 1982); *State* v. *Roode,* 643 S.W.2d 651 (Tenn. 1982); *Goehring* v. *State,* 627 S.W.2d 159 (Tex. Crim. App. 1982). The same conclusion has been reached in cases in which warrants were issued as a result of aerial observations of contraband. *United States* v. *DeBacker,* 493 F.Supp. 1078 (W.D. Mich. 1980); *State* v. *Stachler,* 58 Hawaii 412, 570 P.2d 1323 (1977); *State* v. *Davis,* 51 Or. App. 827, 627 P.2d 492 (1981).

In the foregoing cases, the courts refused to suppress the contraband that was seized as a result of aerial surveillance, but in doing so, they gave various reasons. For example, the court in *Mullinex* held that the defendant could not have a reasonable expectation of privacy in the area where the seizure was made because it was an "open field." In *Costello,* the Court determined that because the marijuana was clearly visible from an area not constitutionally protected (the pilot identified it when he flew over defendant's property at an altitude of 500 feet), the defendant had no reasonable expectation of privacy in his marijuana patch. The Tennessee Supreme Court in *Roode* adopted the approach taken by the California courts, *viz.,* "the individual seeking constitutional safeguards must show that the land is used in accordance with the common habits of people engaged in the cultivation of agricultural land who exhibit an expectation of privacy with respect to the pursuit in question." *See People* v. *Saint Amour,* 104 Cal. App.3d 886, 891, 163 Cal. Rptr. 187, 190 (1980). In an earlier Tennessee case, *State* v. *Layne,* 623 S.W.2d 629 (Tenn. Crim. App. 1981), the Court, relying on the reasoning given by the Hawaii Supreme Court in *State* v. *Stachler,* held "that when law enforcement officers are in a place where they have a right to be and as a result thereof observe criminal activity, clearly recognizable as such, on the property of a defendant, the 'open view' exception arises." *Layne, supra,* at 635. In *State* v. *Davis,* the Oregon Court of Appeals justified the aerial surveillance of the defendant's marijuana patch because the surveillance constituted a "plain view" exception to the Fourth Amendment prohibitions against unreasonable searches and seizures. In analyzing this issue, most of the courts attempted to apply the "reasonable expectation or privacy" rule enunciated in *Katz* v. *United States,* 389 U.S. 347 (1967),

which was adopted in Arkansas in *Gaylord* v. *State, supra.* Despite their apparent differences in approaching this issue, each court reached the same conclusion: when the defendants' contraband was viewed from the air by police officers, the defendants had no Fourth Amendment protection, as measured by the *Katz* standard.

In keeping with the *Katz* test adopted in *Gaylord,* we believe that given the facts of this case, the appellants did not have a reasonable expectation of privacy in the open marijuana field where the seizure was made, and accordingly cannot claim Fourth Amendment protection. Regardless of how appellants strived to conceal the marijuana from the view of neighbors or intruders, the field was clearly exposed to police aerial surveillance and therefore to the public as well. *See Mullinex, supra,* at 514. As noted by the Court in *Debacker, supra,* at 1081, "open fields" are not areas in which one traditionally can reasonably expect privacy. Here, appellants' marijuana was initially and inadvertently discovered by a deputy searching for a crashed airplane. While he was in a helicopter 100 feet above the treetops, the deputy saw the marijuana field, which was about 75 feet long by 25 rows wide and located approximately 200 yards from appellants' house. The plants numbered over 400 and some were 20 feet tall. Although appellants argued otherwise, the deputy testified that when he saw the plants, he recognized them as marijuana because they were large, dark green and had leaves with long points. Under the circumstances presented, we believe the aerial observation of appellants' property was not a violation of the Fourth Amendment and the trial court correctly denied their motion to suppress.

Appellants' second point for reversal is that the trial court erroneously denied their motion for mistrial which was based on their contention that the State's attorney improperly questioned the jurors. In sum, they argue the prosecuting attorney utilized *voir dire,* not only for the purpose of "getting acquainted," but to philosophize on matters of politics, drug legislation, leniency of marijuana laws, firm law enforcement, the Sheriff's fight on drug trafficking and ideas about prison.

The purpose of *voir dire* examination is to discover if there is any basis for challenge for cause and to gain knowledge for the intelligent exercise of peremptory challenges. *See,* Rule 32.2, Ark. R. Crim. Pro. (Repl. 1977). The extent and scope of *voir dire* examination is largely within the sound discretion of the trial judge and the latitude of that discretion is rather wide; his restriction of that examination will not be reversed on appeal unless that discretion is clearly abused. *Finch* v. *State,* 262 Ark. 313, 556 S.W.2d 434 (1977).

In the instant case, the trial judge did not abuse his discretion but instead used it to properly limit the questioning. For example, appellants' counsel objected when the prosecuting attorney asked a juror if he agreed with trickery employed by police in an effort to "flush out" people who purposefully violate the law. The trial judge instructed the prosecutor to stay with the facts of the case; this instruction met with defense counsel's approval. On another occasion, the prosecutor asked a juror whether he knew anybody who had gone to prison. The juror answered affirmatively after which the prosecutor asked if the person was a family member. The juror said, "No," and before the State's attorney could ask how the juror's acquaintance had been treated while in prison, defense counsel objected and moved for a mistrial. The trial judge denied the motion but admonished the prosecutor to stay with the specific charges before the court. On other occasions during *voir dire,* the trial judge sustained defense counsel's objections, and prevented the State's attorney from discussing the "drug business" and from asking whether the jurors had heard or read anything recently on national news concerning marijuana grown in Arkansas.

On the other hand, the State points to the *voir dire* of prospective jurors by appellants' counsel, who delved into matters such as counselling young people and giving them a chance to do right, inquiring whether the Bible "teaches" one to be merciful and asking if the jurors could be merciful if the woman defendant had been a "good mother" to her children. From a review of the *voir dire* proceedings, we conclude that both the State and appellants were allowed an

extensive, broad *voir dire*. We cannot say the trial judge abused his discretion by the manner in which he controlled such examination.

Appellants' next argument is three-pronged: Detective Brugle was not qualified as an expert on the street value of marijuana, he had insufficient data upon which to base an opinion and assuming the admissibility of such value testimony, it was not relevant and therefore was excludable because of its prejudicial impact. We find no merit to appellants' contentions.

Brugle was the deputy who observed appellants' marijuana when he flew over their property in a helicopter. He testified that he had nine years' experience in law enforcement, that he had attended drug investigation schools and that he had worked narcotics and drug violation cases. He also had completed a 37-hour DEA school in drug enforcement and had been involved in at least fifteen or sixteen marijuana cases prior to the appellants' arrest. It is settled law that the determination of an expert's qualification as a witness is within the sound discretion of the trial court, and, absent an abuse of discretion, it will not be reversed. *Harper* v. *State,* 7 Ark. App. 28, 643 S.W.2d 585 (1982). In view of Brugle's training and experience in drug enforcement, the trial court did not abuse its discretion in allowing his expert testimony. Furthermore, because Brugle personally inspected appellants' marijuana field and knew first-hand the quality and quantity of contraband seized, he undoubtedly had sufficient information on which he could formulate an opinion. In determining the relevance of the value testimony given by Brugle, we reviewed *Brady* v. *State,* 261 Ark. 257, 548 S.W.2d 821 (1977), in which our Supreme Court held that when the jury, as in Arkansas, fixes punishment for criminal offenses, evidence in aggravation of or in mitigation of an offense is admissible to assist the jury in arriving at a fair verdict. Brugle testified that one pound of marijuana could be harvested from one plant and that appellants' plants would bring from $1,400 to $1,600 per pound on the street. Such testimony was evidence in aggravation of the offense with which appellants were charged, because it indicated they were manufacturing

marijuana that had a high value — a fact which allowed the jury to perceive both the nature and magnitude of the crime. Unlike the situation in *Brady,* appellants here had the opportunity to rebut the State's street value evidence but did not do so. We find no error in the State's presenting such evidence.

Appellants' final contention is that they were entitled to a bifurcated trial so they could present evidence of extenuating or mitigating circumstances at a separate sentencing proceeding. In brief, the appellants did not choose to testify at the trial on the merits, and because they were not afforded a sentencing trial to offer mitigating evidence, they claim they were denied due process. We disagree. Under Ark. Stat. Ann. § 43-2303 (1977), appellants had the right of allocution. Although appellants indicate by argument that the trial court's common practice is to "rubber stamp" the jury's verdict, they do not argue in this appeal that they were denied the right of allocution. *See Smith* v. *State,* 257 Ark. 781, 520 S.W.2d 301 (1975) (court reversed, finding the defendant was not accorded the right of allocution). Appellants here were afforded by law the opportunity to address the court before sentencing, and they apparently opted not to be heard. We know of no cases that hold or infer that due process requires a separate jury trial for the sentencing phase of a criminal case, nor do the appellants cite such authority. The trial court had no statutory authority to grant appellants' request, and it was clearly correct in denying their motion.

We affirm.

MAYFIELD, C.J., and COOPER, J., agree.

John VELDER d/b/a LIBERTY TRACTOR *v.*
CROWN EXPLORATION COMPANY,
CROWN REALTY COMPANY, Miles KING
and John M. DUE

CA 83-95 663 S.W.2d 205

Court of Appeals of Arkansas
Division I
Opinion delivered January 25, 1984

David L. Gibbons, for appellant.

No response by appellees.

GEORGE K. CRACRAFT, Judge. The appellees obtained a judgment in an amount in excess of $100,000 against W. C. "Bill" Brickey and Barbara Brickey and Multi-Minerals, Inc. on which writs of execution were issued in June 1982. The Sheriff, acting under one of the writs, levied on all the property located at Multi-Minerals' mining site. Among the items seized are a 40 foot float-trailer and an Ingersoll wagon drill with stems. The appellant, John Velder, claiming ownership of those two items of personal property filed a petition for stay of execution pursuant to the provisions of Ark. Stat. Ann. § 30-305 (Repl. 1979).

At the conclusion of a hearing held on the petition as provided in Ark. Stat. Ann. § 30-308 (Repl. 1979) the trial court ruled that the burden was on the appellant to prove ownership of the seized property and that although he had met that burden with respect to the trailer he had failed in his burden of proving ownership to the drill. The appellant brings this appeal contending that the trial court erred in placing the burden on him to prove his ownership under the circumstances of this case. We find no error.

Ark. Stat. Ann. § 30-308 (Repl. 1979) provides that in a contest between the execution plaintiff and a party other than the judgment debtor claiming ownership of property levied on, the trial court shall "direct which party shall be considered plaintiff in the issue." Under this statute the placing of the burden of proof is to be determined by the trial court according to circumstances. Where the levy is made on property located in a public place based merely on the assertion of the judgment creditor that it is the property of the judgment debtor, the creditor could properly be required to carry the burden of proving his assertion. It is well settled, however, that possession of personal property is *prima facie* evidence of ownership. *Golenternek* v. *Kurth,* 213 Ark. 643, 212 S.W.2d 14 (1948); *Norton* v. *McNutt,* 55 Ark. 59, 17 S.W. 362 (1891). *Prima facie* evidence is deemed sufficient to establish a given fact if not contradicted, rebutted or

explained by other evidence. Here the property in issue was in the possession of Brickey at the time of the levy and it was on this fact that the trial court determined that the burden of proof should be on appellant. In *Norton* v. *McNutt, supra,* the court held that it was not improper to place the burden on the intervenor even where not aided by *prima facie* evidence. We find nothing improper in the action of the trial court.

The appellant testified that the judgment-debtor owed him a substantial amount of money but had told him he could not pay the debt unless he had the necessary equipment to work his mine. The appellant testified that they delivered the drill to him under an agreement that he would pay them rent for its use and use it to make the necessary profits to discharge the debt. There was, however, introduced into evidence an invoice issued by the appellant which indicated that the item had been sold to Brickey and Multi-Minerals, Inc. There was also evidence from another witness that he had been told by the appellant that the item had been sold. As the appellant was a party to the action, his testimony could not be considered as uncontradicted. *Livingston* v. *Livingston,* 247 Ark. 1137, 449 S.W.2d 396 (1970).

The findings of fact of a trial court shall not be set aside unless clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witness. ARCP Rule 52(a). From our review of the record we cannot say that the finding of the trial court that appellant had failed to meet the burden of proof was clearly erroneous.

Affirmed.

MAYFIELD, C.J., and GLAZE, J., agree.

Pauline Ellis HENDERSON, Woodrow ELLIS, Mike ELLIS, Linda ELLIS, and the heirs of Forrest ELLIS, they being Lila JOHNS, Lewis ELLIS and Louise ELLIS *v.* Luther ELLIS

CA 83-83 665 S.W.2d 289

Court of Appeals of Arkansas
Division II
Opinion delivered January 25, 1984
[Supplemental Opinion on Denial of Rehearing March 21, 1984.]

[redacted]

Boeckmann & Humphrey, by: *Joseph Boeckmann,* for appellants.

Killough & Ford, by: *John N. Killough,* for appellee.

JAMES R. COOPER, Judge. This is an appeal from a decree dismissing the appellants' petition to partition land willed to the appellee Luther Ellis by the mother of Luther Ellis, who was the grandmother of appellants Mike and Linda Ellis. Marion Edgar Ellis acquired two 80-acre tracts of land in Cross County in 1925. In 1917, his wife Dana Ellis died, leaving two children of their marriage, Forrest and Woodrow Ellis. Following the death of Dana Ellis, M. E. Ellis married Martha Ellis, by whom he fathered three children, Luther, Eugene and Pauline Ellis (Henderson). In 1931, M. E. Ellis died intestate and left surviving his widow, Martha Ellis, and the children referred to above.

The family continued to reside on the 160 acres and in 1931, one 80-acre tract forfeited to the state for nonpayment of taxes, followed by the other in 1932. In 1937, Jess Hunt acquired a deed to these lands at a tax sale and brought suit against Martha Ellis and the children of M. E. Ellis to expel them from the land and for a Writ of Possession. The Writ was granted on November 27, 1938, but the Ellis family never vacated the premises, though the Writ was to be effective December 27, 1938. Jess Hunt quitclaimed his interest in the lands to Mr. H. Steinberg on December 24, 1938, and on the same date Martha Ellis gave Mr. Steinberg a warranty deed to the 160 acres. Martha Ellis and her family remained in continuous possession of these lands and on November 25, 1942, Mr. Steinberg and his wife gave a quitclaim deed to Martha Ellis. Martha Ellis died in 1979

and left a will devising all of this land to her youngest son, Luther Ellis. Forrest Ellis is deceased, and survived by Lila Ellis Johns, Lewis (John) Ellis and Louise Ellis (Mitchell). Eugene Ellis is also deceased, and is survived by Mike Ellis and Linda Ellis.

The appellants herein brought this suit to partition these two 80-acre tracts, claiming to be co-tenants of the appellee. Their claim rests on the allegation that when M. E. Ellis died intestate in 1931, their mother Martha Ellis became a life tenant on these lands through her dower and homestead rights, and the children had a remainder interest in this land. They further allege that when Martha Ellis reacquired this land from H. Steinberg in 1942, this acted as an equitable redemption in favor of the children of Martha Ellis. The appellee contends that when Martha Ellis purchased her quitclaim deed from H. Steinberg, she purchased the fee simple title and that there was no equitable redemption. The chancellor found that there was no equitable redemption; that through her actions, Martha Ellis had acquired title to the land by adverse possession, and that the appellants were barred by laches from asserting their claim to these lands. For reversal, the appellants argue that the findings of the chancellor are not supported by substantial evidence. We will consider each point separately.

It is undisputed that in 1931, upon the death of her husband, M. E. Ellis, Martha Ellis had a life estate in these lands, and among her duties as the life tenant was the payment of the taxes on this land. If a life tenant allows the taxes on the land occupied to become delinquent and purchases the land at the tax sale, this acts as a mere redemption, as a life tenant in possession cannot acquire title thereto by permitting it to sell for the taxes and buying it at a tax sale. *Findley* v. *Tyler,* 227 Ark. 663, 300 S.W.2d 598 (1957). Likewise, a life tenant cannot allow the land to be forfeited for nonpayment of taxes and later purchase it from a third party who has purchased at a tax sale, thereby strengthening his title, as the law will not allow that to be done indirectly which may not be done directly. *Inman* v. *Quirey,* 128 Ark. 605, 194 S.W. 858 (1917). The appellant argues that these principles of equitable redemption are not relevant due to the fact that the purchaser at the tax sale, Jess

Hunt, instituted an action that ultimately resulted in a Writ of Possession being awarded to Hunt against Martha Ellis and her minor children. The appellee reasons that this action had the effect of adjudicating title to the lands in question and ultimately cut off any claim that Martha Ellis or her minor children may have had to the lands. However, an action in ejectment is a mere possessory action and does not serve to adjudicate title unless title was made an issue in the action. *Jimmerson* v. *Fordyce Lumber Co.*, 119 Ark. 413, 178 S.W. 381 (1915); 28 C.J.S. *Ejectment* § 119. From the record we cannot find where the action instituted by Jess Hunt did anything more than award possession to Jess Hunt upon the strength of his tax deed. Therefore, that action cannot be relied upon to cut off the rights of Martha Ellis or her children or the children of M. E. Ellis in the lands as the appellee would have us believe. Although Jess Hunt was awarded a Writ of Possession in these lands, it is clear from the record and testimony that he never took possession from Martha Ellis, and, in fact, had no interest in the land when the writ of possession became effective.

As has already been stated, Martha Ellis was under a duty to the remaindermen to pay the taxes on this land and a failure to do so is waste. *Magness* v. *Harris,* 80 Ark. 583, 98 S.W.362 (1906). The law is well settled "that a life tenant, whose duty it is to pay the taxes, cannot permit a sale of the land for taxes, and thus acquire the interest of the remainderman. Such purchases are regarded as mere redemptions." *Galloway, supra; Inman, supra.* Thus, the subsequent purchase of the lands herein by Martha Ellis from H. Steinberg was an equitable redemption in favor of the remaindermen children of M. E. Ellis and did not strengthen the interest of Martha Ellis in the land.

The chancellor below also found that Martha Ellis had acquired title to the subject lands by adverse possession. In order for a life tenant whose interest arises out of a homestead right to acquire title by adverse possession against her remaindermen, the life tenant must first abandon her homestead right and bring this fact home to the remaindermen in order to set the statute of limitations into action. *Ingram* v. *Seaman,* 223 Ark. 414, 267 S.W.2d 6 (1954). There is no evidence in the record that Martha Ellis ever

abandoned her homestead rights in this property or otherwise moved off this property until her death, thus there could be no adverse possession.

Finally, the court below found that the appellants were guilty of laches by not asserting their rights in the subject property sooner. It is clear that one in the position of a remainderman may not maintain any action for possession until the death of the life tenant. *Luster* v. *Arnold,* 249 Ark. Ark. 152, 458 S.W.2d 414 (1970). Since Martha Ellis, the life tenant did not die until 1979, there can be no laches on the part of the appellants.

Reversed and remanded for further proceedings consistent with this opinion.

CLONINGER and CORBIN, JJ., agree.

Supplemental Opinion on Denial of Rehearing
delivered March 21, 1984

JAMES R. COOPER, Judge. In our original opinion, we held that, since Martha Ellis was a life tenant in possession, she could not adversely possess the 160 acres without first abandoning her homestead rights. The appellee, Luther Ellis, has filed a petition for rehearing which alleges that, perhaps, not all of the 160 acres could be so claimed by her. Therefore, says the appellee, she could have adversely possessed a portion of the land, specifically, that portion which exceeds the limits contained in the Arkansas Constitution, Article 9, section 4. That section limits the homestead to 160 acres, or an amount of land valued at no more than $2,500.00, but not less than 80 acres.

The chancellor found that Martha Ellis adversely

possessed the entire tract, and did not decide this issue. It appears from the record that Martha Ellis could have adversely possessed a portion of the 160 acres, that being the lands in excess of that which she could have claimed by virtue of her homestead rights under Article 9, section 4 of our Constitution and her dower rights.

Accordingly, the appellee is correct in asserting that the case should be remanded for the chancellor to determine, in light of our original opinion, what lands were subject to adverse possession, if any. As to those lands, we hold that the chancellor's finding of acts sufficient to constitute adverse possession is neither clearly erroneous or against a preponderance of the evidence. Reversed and remanded for further proceeding.

Gordon Oren HADA *v.* Barbara Ann HADA

CA 83-96 663 S.W.2d 203

Court of Appeals of Arkansas
Division I
Opinion delivered January 25, 1984

Thomas A. Martin, Jr., for appellant.

M. E. Roger and *D. Michael Hancock,* for appellee.

TOM GLAZE, Judge. This appeal involves the property settlement provisions of a divorce decree rendered in appellee wife's favor on June 10, 1982. Appellant husband contends the chancellor erred in two respects: (1) in using an award of alimony to effectuate an unequal division of the parties' home held in tenancy by the entirety; and (2) in awarding excessive alimony.

The parties were married for twenty-one years and were about forty-one years old at the time of the divorce. Their three children were past majority and in college. The appellee did not work outside the home during the marriage except for two brief stints as a nurse's aide, one in 1960 and the other in 1967 or 1968. At the time of the hearing, she testified that her only sources of support were from piano lessons she gave two days a week and food stamps. The appellant provided the sole financial support for the family throughout the marriage by working as a Methodist minister and as a carpenter. His income tax records for 1981 reflected a gross income of $12,000; he testified that was about as much as he ever earned. At the time of the hearing, he was a building contractor in Oklahoma, earning $8.00 an hour.

The chancellor awarded appellee a divorce and alimony of $150 a month for twelve months, to be reduced to $100 a month for the next twenty-four months, then to terminate. Appellant's arguments on appeal concern the chancellor's orders pertaining to both the real property which the parties owned as tenants by the entirety and the alimony award. The appellee resided on the subject property and neither party wanted it sold at the time of divorce. The chancellor awarded possession of the residence to the appellee for three years, provided she uses it as her principal residence. He ordered the appellant to pay all mortgage payments, taxes, and insurance; one-half of these were ordered to be reimbursed to him when the property is sold. Should appellee choose to vacate the residence before the three-year term ends, the chancellor ordered that she be paid $200 a month additional alimony — the apparent rental value of the property — for the balance of the designated term. In addition, the chancellor determined that $4,200 was the equity in the property, and the parties are to receive one-half of that equity amount if the property is sold. He further directed that, upon receiving that amount, the parties will share equally in any additional equity above $4,200, after appellant is reimbursed for his payments of the appellee's share of mortgage, insurance, and taxes. Finally, the chancellor provided that any mortgage payments, insurance, and taxes not reimbursed are to be considered additional alimony, support, and maintenance.

Appellant first contends that the chancellor erroneously used an award of alimony to effectuate an unequal division of the property held as tenants by the entirety. We disagree. The law is well settled that it is within the discretion of the trial court to award the innocent party in divorce suits the possession, for a limited time or for life, of a homestead held by the entirety. *Yancey* v. *Yancey,* 234 Ark. 1046, 356 S.W.2d 649 (1962). The Supreme Court has also held that the trial court may award the possession of the homestead to either spouse, upon such terms as appear to be equitable and just. *Schaefer* v. *Schaefer,* 235 Ark. 870, 362 S.W.2d 444 (1962).

In *Schaefer,* the chancellor awarded possession of the homestead to the wife, who was given custody of the parties'

children at the time of divorce. Later, the husband attained custody of the children, but the wife retained possession of the home; the husband was ordered to keep the house in repair. On appeal, the husband contended the award of possession and payment on the home's upkeep amounted to an impermissible award of alimony. In affirming the chancellor's action, the court pointed out the disproportionate incomes of the two parties and said that if the wife were evicted from the property, the chancellor presumably would require the husband to make monetary payments to his wife. In the instant case, as in *Schaefer,* the parties had widely disproportionate incomes and earning abilities; accordingly, the chancellor went to great lengths to provide for the wife's basic needs until she is able to provide for herself. In doing so, the chancellor awarded appellee possession of the property on terms both equitable and just. In fact, although the chancellor ordered appellant to pay the note, insurance and taxes on the house, the appellant will be reimbursed these payments *before* the final net proceeds are distributed equally between the parties. As was the case in *Schaefer,* the trial judge presumably could have given larger monthly monetary payments to the appellee to rent a home for the designated three-year term. Instead, the chancellor adopted an arrangement whereby appellant could ultimately receive part or all such payments made to temporarily provide a home for his wife of twenty-one years.

Before proceeding, we note appellant's argument that the chancellor's award violates the principles announced in *Belanger* v. *Belanger,* 276 Ark. 522, 637 S.W.2d 557 (1982), and *Warren* v. *Warren,* 273 Ark. 528, 623 S.W.2d 813 (1981). Neither *Belanger* nor *Warren* controls here. In *Belanger,* the contested properties were owned either by the husband or his parents; they were not homestead property held by the entirety. Thus, that case simply is not applicable here. The Supreme Court's decision in *Warren* is applicable only to the extent that the instant case involves entirety property. Within that context, we find the trial court's award totally consistent with the rules set forth in *Warren.* In this connection, the trial court determined the parties' property was held by the entirety, and its decree provided for the equal division of the property when it is sold. As we pointed out earlier, the trial court otherwise had authority to place

appellee in possession of the property until it is sold and to provide during this interim period for the appellant to pay the necessary monthly encumbrances.

Appellant also contends the chancellor abused his discretion by making an excessive and unreasonable award of alimony. Appellee was awarded $150 a month for twelve months to be decreased to $100 a month for the next twenty-four months, subject to termination at her remarriage. The evidence showed that appellee's only income was derived from teaching private piano lessons. This income varied from $7 to $21 a week in the summer and from $50 to $70 a week during the school term. In addition, appellee testified she had been forced to collect food stamps in amounts ranging from $21 to $70 a month. She testified that her needs included food, utilities and gasoline for her car. She expressed her desire to work, but testified that her attempts had been thus far unsuccessful because of her lack of training and experience.

Although appellant was somewhat evasive in his testimony concerning his income and expenditures, the record indicates that his net income was about $11,000 a year, or $916 a month.[1] He testified that he lives in a house owned by his aunt and that he pays no rent. His expenses include food, utilities, and gasoline for his car, totaling about $300 a month. At the time of the hearing, his children were living with him and sharing expenses, although he testified that all three children would be going to college soon and that he would help them with their expenses if he could. If we add to his expenses of $300 the $250 monthly mortgage payment and $24 monthly tax and insurance payments the chancellor ordered him to pay, his total expenditures are $574 a month, leaving appellant with approximately $342 a month. In view of these figures, we cannot say the chancellor was clearly erroneous in ordering appellant to pay alimony in the amount he set.

Affirmed.

MAYFIELD, C.J., and CRACRAFT, J., agree.

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[1]Appellant testified that $1,000 of his income was derived from his share in certain oil leases. Although he indicated there was no guarantee that he would receive such lease payments in the future, the leases were still in effect at the time of trial.

IZARD COUNTY BOARD OF EDUCATION et al *v.* VIOLET HILL SCHOOL DISTRICT NO. 1 et al

CA 83-122 663 S.W.2d 207

Court of Appeals of Arkansas
Division I
Opinion delivered January 25, 1984

Osmon & Wilber, by: *Norman C. Wilber,* for appellant.

Seay & Bristow, P.A., by: *Bill W. Bristow,* for appellee.

TOM GLAZE, Judge. This case involves a boundary line dispute between the Oxford and Violet Hill school districts. The trial court decided the dispute in Violet Hill's favor. Oxford contends on appeal that the court's decision is against the preponderance of the evidence and that the court erred by applying the wrong law. We affirm.

In its brief, Oxford characterizes this action as the "battle of the maps" — a vivid description depicting a boundary dispute caused in large part because of variances in four different maps, each supposedly reflecting the correct line dividing the two school districts. Violet Hill relied on two maps, dated 1936 and 1971, located in the State Department of Education. To establish the boundary line, Oxford used maps located in the County Supervisor's and the County Assessor's offices. In holding for Violet Hill, the trial judge established the line between the districts in accordance with the boundaries reflected in the 1936 and 1971 maps. In reviewing the findings of a circuit judge

sitting as a jury, we do not reverse unless we find them clearly erroneous or clearly against a preponderance of the evidence. *National Investors Fire and Casualty Insurance Co.* v. *Chandler,* 4 Ark. App. 116, 628 S.W.2d 593 (1982).

This controversy was precipitated in part by a dispute between the parties over which district certain students should attend. One student is a basketball player, and Oxford contended he should attend school in its district because he and his family reside there. Violet Hill countered that his family's home was within its district.[1] Subsequently, Violet Hill commenced this cause to establish the location of the districts' boundary line to determine in which district these students, including the basketball player, lived. The basketball player's home is situated in Section 8, Township 18 North, Range 8 West; however, the disputed boundary line involves not only Section 8 but also eight other sections, *viz.*, 4, 9, 16, 17, 20, 21, 29 and 32. Each district's tax revenues from the State and local property assessments also are affected by the outcome of this lawsuit.

Violet Hill's suit challenged two decisions made by the Izard County Board of Education (hereinafter Board): (1) its initial decision adopting the County Supervisor's map which placed all nine sections in the Oxford district, and (2) its subsequent decision drawing the boundary line to correspond with the County Assessor's map and tax records, thus placing Sections 8, 20 and part of 17 in Oxford and the remaining sections in Violet Hill. In reaching these decisions, the Board had attempted to resolve the parties' dispute on the location of their common boundary line; instead, the Board's actions led to this suit. In reviewing the Board's decisions, the trial court found that the Board erred in relying on the County Supervisor's map and the Assessor's records. Alternatively, the court concluded the correct dividing line should reflect that which appeared on the 1936 and 1971 maps filed with the State Board of Education.

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[1]At some point in time, the student moved to live with his grandparents, who reside in Horseshoe Bend, which is within the Violet Hill school district.

We believe the trial judge's findings are supported by the evidence. The judge found that the two maps relied on by Oxford had been altered — a fact which we quickly affirm by way of our own inspection. Upon examining the County Supervisor's map, we observed a dim red line which has been erased. Before the erasure, this line was drawn reflecting sections 8, 20 and part of 17 in Oxford and sections 4, 9, 16, 21, 29, 32 and part of 17 in Violet Hill. A new red line now exists on the map, placing all nine sections in Oxford. The County Assessor's map relied on by Oxford also reveals an erased red line; this erased line, however, reflected all nine sections in Violet Hill. Like the Supervisor's map, the Assessor's map has a new red line showing all nine sections in Oxford. The trial court found the Board made these alterations sometime in the 1970's. In support of this finding, the record reflects that the County Supervisor, Tom Simpson, testified that he recognized the lines appearing on the 1936 and 1971 maps (introduced by Violet Hill) as being the existing boundary between the parties during the entire time he served in office — from 1937 until 1972. As noted earlier, the 1936 and 1971 maps show all nine sections in Violet Hill, not in Oxford as is now depicted by the County Supervisor's map. Of course, we are aware of Oxford's argument in this appeal that Simpson, due to infirmities of old age, was confused when he testified on this point. On re-direct examination, he attempted to correct his prior testimony, stating he incorrectly relied on the 1936 and 1971 maps and instead the County Supervisor's map reflected the proper boundary line. Of course, the trial court had to weigh Simpson's testimony to decide which part of it, if any, to accept as credible and in such matters, we defer to the superior position of the trial judge. *Id.* at 117, 628 S.W.2d at 594. Obviously, the court accepted Simpson's testimony that the lines on the 1936 and 1971 maps were correct and rejected the maps presented by Oxford because they contained questionable alterations, which had occurred after Simpson left office.

In addition to Simpson's testimony, other reasons support the court's refusal to rely on the Supervisor's and Assessor's maps and its finding that those maps had been altered during the 1970's. For example, the County

Supervisor's map was printed in 1976 and both the erased and new red line obviously were placed on the map in 1976 or thereafter. The same is true concerning the Assessor's map since it, too, was printed in 1976. An Assessor's employee, June Maxwell, conceded that this map was changed to correspond with the Supervisor's map sometime after she began working in the Assessor's office, apparently in 1975 or 1976. Thus, according to Maxwell's testimony, the Assessor's map was changed in the 1970's and before that change, the map reflected the disputed line drawn so as to place all nine sections within the Violet Hill district. In sum, Oxford's witnesses and the two maps it introduced presented conflicting views regarding the true location of the parties' common boundary line; based on this evidence alone, the trial judge reasonably could have inferred that all nine sections had been in the Violet Hill district since 1936 and that the confusion over the correct line arose only when new and different lines appeared on the Supervisor's map which was altered sometime during the 1970's.

The court's findings are further supported by other evidence presented by Violet Hill. Violet Hill called as its witness, Truett Goatcher, an official of the Arkansas State Department of Education. After testifying that the County Supervisor is required to submit any changes in school district boundaries to the State Education Office, Goatcher stated that the Izard County Board had submitted no changes. In fact, he testified that the only Izard County records on file in his office before this controversy arose were two maps reflecting that all of the disputed sections are in the Violet Hill district. These maps were dated 1936 and 1971, and neither has a hint of an alteration in the boundary lines. These maps are also the ones Simpson, the former County Supervisor, identified as reflecting the official boundary he relied on from 1937 until 1972.

Oxford argues that the two maps located in the State Education Office are not official and that the only official map is the one required by law to be kept in the County Supervisor's office. This argument ignores the real issue. All parties agreed that no official changes had been made in the common boundary line between the two districts; thus, the

trial judge was confronted with determining where their original dividing line was drawn. The trial court did not rely on the County Supervisor's map because it had been altered. The judge chose to accept the maps on file with the State Education Department — not because these maps were official — but because, along with certain testimony, they revealed where the dividing line existed in 1936.

For the same reason, we dispose of Oxford's contention that the trial judge erred by misapplying Ark. Stat. Ann. §§ 80-404, -424 and -425 (Repl. 1980). Section 80-404 deals with the formation, dissolution or change in school districts. As Violet Hill points out, the Izard County Board clearly did not intend to change existing boundary lines but only attempted to resolve where the line was located. Therefore § 80-404 has no application to the facts here.

Sections 80-424 and -425 are likewise inapplicable. Section 80-424 merely ratified actions taken by county boards of education before March, 1951, in creating, consolidating or altering school districts. In the instant case, no change has occurred in the line between Oxford and Violet Hill since it was established in 1936; thus, § 80-424 is inapposite. Nor can we agree that § 80-425 helps Oxford's cause. Among other things, § 80-425 compiles a 1931 Act that cures any defects which may have existed in the formation of a *present* (then existing) school district; it also empowered the county boards of education to fix boundaries of such a district where they are uncertain because of lost records or other reasons. According to Mr. Simpson's testimony, the Izard County Board was established in 1937. We also find no evidence that the Oxford and Violet Hill districts even existed in 1931, thus making § 80-425 inapplicable.

We believe the evidence clearly supports the findings of the trial court, and therefore, we affirm its decision in all respects.

Affirmed.

MAYFIELD, C.J., and CRACRAFT, J., agree.

Wallace S. PETER *v.* Rita K. PETER

CA 83-72 663 S.W.2d 744

Court of Appeals of Arkansas
Division II
Opinion delivered February 1, 1984

Callahan, Wright, Crow, Bachelor & Lax, by: *John H. Wright,* for appellant.

Anderson & Anderson, by: *Michael Crawford,* for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal by Wallace Peter from a decree of divorce granted to his wife, Rita. Suit for divorce on the grounds of personal indignities was filed by Rita and the appellant filed a pro se answer in which he denied that she had grounds for divorce. The

appellant did not appear in person at the trial, but his attorney did appear and at the close of appellee's case moved that her complaint be dismissed for lack of corroborating evidence as to the grounds for divorce. This motion was overruled on the theory, stated by the court, that appellant, by failing to appear at the trial of which he had notice, had abandoned his contest of the grounds for divorce.

Appellant cites us to *Calhoun* v. *Calhoun,* 3 Ark. App. 270, 625 S.W.2d 545 (1981) and *Copeland* v. *Copeland,* 2 Ark. App. 55, 616 S.W.2d 773 (1981), and says that those are the more recent of numerous cases which hold that testimony as to grounds for divorce must be corroborated by some witness other than the parties to the action. We agree those cases so hold.

In *Calhoun* the court cited many cases as authority and quoted from one that said the reason for the rule is "the interest which the public have in the marriage relation." In *Copeland* the court said: "Divorce is a creature of statute and can only be granted when statutory grounds have been proved and corroborated." Those cases were based on the long-standing statute compiled as Ark. Stat. Ann. § 34-1207 (Repl. 1962), which was consistently construed to require that a divorce could not be granted upon the uncorroborated testimony of a party to the suit. *See Smith* v. *Smith,* 245 Ark. 668, 433 S.W.2d 835 (1968).

The appellee, however, points out that this statute has been amended and at the time this case was tried provided "in uncontested divorce suits corroboration of plaintiff's ground or grounds for divorce shall not be necessary nor required." *See* Ark. Stat. Ann. § 34-1207.1 (Supp. 1983). Thus, while admitting that there was no corroboration of the grounds for divorce in this case, appellee says it was not necessary because the appellant did not show up for the trial and therefore the suit for divorce was uncontested. We do not agree.

Appellant filed an answer denying grounds for divorce. His attorney appeared at the trial and at the close of appellee's testimony moved to dismiss appellee's complaint

for lack of corroboration. No authority is cited by appellee to support her contention that the failure of the appellant to appear at trial makes the case uncontested and we know of no authority to that effect. In fact, *Anderson* v. *Anderson,* 269 Ark. 751, 600 S.W.2d 438 (Ark. App. 1980), seems to hold to the contrary. The opinion there clearly recognizes that the amendment to section 34-1207 eliminated the requirement of corroboration in uncontested cases, and while it does not state whether the appellant was in attendance at the trial, it indicates that he did not testify and states:

> The appellee's allegations are not proven by appellant's failure to deny them. The failure to deny the incidents or conduct does not relieve the appellee of her burden to corroborate her testimony.

We simply do not agree that the instant case was uncontested as to the grounds for divorce. Since there was no corroboration of the appellee's testimony in that regard, the decree is reversed as to the granting of the divorce and as to any provision based upon the divorce or made because of it.

Reversed and remanded for proceedings consistent with this opinion.

COOPER and GLAZE, JJ., agree.

Willie THOMAS *v.* STATE of Arkansas

CA CR 83-141 663 S.W.2d 745

Court of Appeals of Arkansas
Division II
Opinion delivered February 1, 1984

Ken Cook, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was convicted by a jury of theft of property and was sentenced to four years and six months in the Arkansas Department of Correction. From that conviction, comes this appeal.

On December 24, 1982, the appellant allegedly broke into and entered Mengarelli's store in Turrell, Arkansas, with the intent to commit theft. The appellant allegedly stole cigarettes valued at more than $100.00 with the intent

to deprive the owner of them. After taking the cigarettes from Mengarelli's, the appellant allegedly transported them to Ricky Jackson's cafe in Turrell, then known as the Arcade, and attempted to sell them.

At the appellant's trial, a witness for the State testified that an unidentified person standing next to the appellant said that the appellant had cigarettes for sale, and that the appellant did not deny or otherwise acknowledge the statement. Counsel for the appellant objected to this testimony on the ground it was inadmissible hearsay. The trial judge overruled the objection, holding that it was a tacit admission by the appellant due to the fact that he failed to deny that he had the cigarettes for sale when the statement was mde. Such a failure to deny serves as an adoption of the statement in certain circumstances.

The Uniform Rules of Evidence, Rule 801 (d) (2) (ii), Ark. Stat. Ann. § 28-1001 (Repl. 1979), provides that a statement is not hearsay if the statement is offered against a party and is a statement in which that party has manifested a belief in its truth. *Wilson* v. *City of Pine Bluff,* 6 Ark. App. 286, 641 S.W.2d 33 (1982). This principle has been recognized in Arkansas prior to the adoption of the Uniform Rules of Evidence. *See Burford* v. *State,* 242 Ark. 377, 413 S.W.2d 670 (1967); *Moore* v. *State,* 151 Ark. 515, 236 S.W. 846 (1922). Before hearsay evidence of an implied admission can fit within this exception, it must have been shown that the accused heard the statement, that he understood it, and that he failed to deny it. *Kagen and Tibbett* v. *State,* 232 Ark. 189, 334 S.W.2d 865 (1960).

In *Wilson* v. *City of Pine Bluff,* we said:

> The sole question in determining whether statements made by another person are admissible against a party as an admission by silence or acquiescence is whether a reasonable person, under the circumstances, would naturally have been expected to deny them, if the statements were untrue. Some of the factors which should be considered in determining whether a party has impliedly admitted the statements are:

(1) The statement must have been heard by the party against whom it is offered;

(2) it must have been understood by him;

(3) the subject matter must have been within his personal knowledge;

(4) he must have been physically and psychologically able to speak;

(5) the speaker or his relationship to the party or event must be such as to reasonably expect a denial; and

(6) the statement itself must be such that, if untrue, under the circumstances, it would have been denied.

Other factors besides these may need to be considered, depending on the facts of a particular case. See, 4 J. Wigmore, Evidence § 1071-1073 (Chadbourn rev. 1972); C. McCormick, The Law of Evidence § 270 (2d ed. 1972).

In the case at bar, the testimony indicated the appellant was present, and was standing within four feet of the person making the statement. Further, the appellant failed to object to the statement or otherwise deny that he was attempting to sell the cigarettes. On these facts, adequate foundational facts were presented to the trial court so as to render the statements admissible. The trier of fact could reasonably infer that the appellant heard and understood the statements, and that, had the statements been untrue, he would have responded with either a denial or an explanation.

Affirmed.

CLONINGER and CORBIN, JJ., agree.

Edwin N. HARPOLE *v.* Patricia B. HARPOLE

CA 83-240 664 S.W.2d 480

Court of Appeals of Arkansas
Division I
Opinion delivered February 1, 1984

Howell, Price & Trice, P.A., by: *Dale Price*, for appellant.

Wright, Lindsey & Jennings, for appellee.

TOM GLAZE, Judge. This is a divorce case in which the appellee was granted the divorce. The decisive question on appeal is whether appellee's proof was sufficient to establish her cause of action.

The appellee filed her complaint alleging general indignities. Appellant answered, denying such allegations and requesting that appellee's complaint be dismissed. At trial, appellant's counsel made the following opening statement:

> May it please the Court. At the outset, we, of course, have filed an answer and counterclaim in the case, but as a practical matter we will not fight the grounds for divorce.[1] It's our understanding that minimal testimony would be presented with reference to the grounds.

Counsel concluded his statement by indicating that appellant mainly objected to appellee's property demand and would object to anything other than a fifty-fifty division of marital property. Following other preliminary remarks between counsel and the court, appellee took the stand and testified first to establish her grounds for divorce. That testimony in its entirety is as follows:

> Q. Mrs. Harpole, we have alleged in the complaint what is described as general indignities and have alleged that Mr. Harpole treated you with contempt, neglect, abuse, that he nagged you and that you all just weren't able to get along. Is that correct?
>
> A. That's true, yes.
>
> Q. And was that the reason for the separation?

[1]Appellant did file an answer but not a counterclaim.

A. Yes.

Q. Did you ask him to leave?

A. Yes.

Q. Did you find that the conditions were such that you just couldn't live together any longer?

A. Yes.

At this point, appellant's counsel declined the court's invitation to cross-examine appellee on the issue of her grounds for divorce, so appellee's sister was called to corroborate grounds. After establishing her relationship and contact with the appellee, the sister testified as follows:

Q. Do you know that the conditions were such that Mr. Harpole nagged her and neglected her and they just didn't get along in the home?

A. They just didn't get along.

Q. And do you know that Mrs. Harpole ultimately asked him to leave and —

A. Yes, sir.

Q. —filed suit for divorce?

A. Yes, sir.

In this appeal, appellant argues that appellee failed to prove or corroborate general indignities by the foregoing testimonies. He raises a second issue as well, because the court's decree, when entered, actually reflected that appellee was awarded a divorce on the grounds of three years' separation without cohabitation. Both parties agree that appellee neither alleged nor proved the three-year-separation ground and that this ground was mistakenly placed in the decree. Nevertheless, appellee argues that by the time the decree was entered, three years had passed. Thus, since

appellee and her sister both testified that the parties separated in July, 1979, she contends this Court is permitted, when reviewing the correctness of the lower court's decision, to assume the parties remained separated for the required three year period. This case was filed in August, 1979, last heard by the trial court in April, 1982, and decreed in December, 1982.

We dispose of the second issue first. In doing so, we note that the parties tried this divorce action on three separate dates, October 26, 1981, November 3, 1981, and April 15, 1982.[2] As previously mentioned, appellee never alleged three years' separation without cohabitation as a ground for the divorce and offered no proof on that issue at any of the three hearings. In fact, the parties had not been separated for three years even at the time of their last hearing in April, 1982. The trial court took the case under submission until December, 1982, when it awarded the divorce. The law is well established that the chancellor cannot incorporate into the decree at any time a matter not within the issues raised by the pleadings and proof. *Evans* v. *United States Anthracite Coal Co.,* 180 Ark. 578, 21 S.W.2d 952 (1929); *Gregory* v. *Moose,* 266 Ark. 926, 590 S.W.2d 665 (Ark. App. 1979), *cert. denied,* 267 Ark. 86, 590 S.W.2d 662 (1979). The purpose of this rule is to afford parties the opportunity to cross-examine and to be heard on any matter on which the trial court might base its findings and decision. Here, appellant was denied a hearing on the three-year-separation issue, and contrary to appellee's suggestion, we are unable to assume this ground existed at the time the decree was entered.

Nor can we affirm the trial court's decree on the general indignities ground which appellee asserted. As we pointed out in *Copeland* v. *Copeland,* 2 Ark. App. 55, 616 S.W.2d 773 (1981), divorce is a creature of statute and can only be granted when statutory grounds have been proved and corroborated. Nine grounds for divorce are set forth in Ark. Stat. Ann.

[2]In these three hearings, the parties primarily asserted their respective claims to certain marital property. Several issues concerning the trial court's award of property are raised in this appeal, but we do not reach them since we find insufficient proof was presented to substantiate grounds for a divorce.

§ 34-1202 (Supp. 1983), and the general indignities ground alleged here by appellee is one of six that Arkansas adopted and has recognized since 1838. *See* Compiler's Note to Ark. Stat. Ann. § 34-1202 (Repl. 1962). Over the years, these first six grounds have remained unchanged; however, the necessity for corroborating grounds has changed. Corroboration of grounds has been required since 1869, when Arkansas adopted the Kentucky Code. *See* Ky. Code, Divorce § 458 [codified in Gantt's Digest, Divorce § 2200 (1874)]. In 1969, the General Assembly enacted Act 398, eliminating the necessity of corroborating a plaintiff's (or counterclaimant's) ground or grounds for divorce in uncontested divorce suits. *See* Ark. Stat. Ann. § 34-1207.1 (Supp. 1983). By a 1981 amendment, a spouse now may waive in writing the necessity of corroborating the injured party's grounds even when suits are contested. *Id.*[3] Nevertheless, regardless of whether a divorce is contested or uncontested, the injured party must always prove his or her ground(s) for divorce as set forth in Ark. Stat. Ann. § 34-1202 (Supp. 1983). In other words, existing statutory law does not allow a spouse to stipulate to or waive grounds for divorce. Thus, the opening remarks made by appellant's counsel in no way permitted appellee to proceed without first establishing her required grounds for divorce.

In the instant case, appellee alleged in her complaint that appellant treated her "with rudeness, contempt, neglect and abuse, deliberately and systematically pursued and offered such indignities to her as to render her condition in life intolerable and to make it impossible for her to live with him." Appellee testified — as set out above — in conclusory terms, paraphrasing those allegations contained in her complaint. Such testimony and proof is clearly insufficient. In the early case of *Bell* v. *Bell,* 105 Ark. 194, 150 S.W. 1031 (1912), the Supreme Court defined what evidence is necessary to establish indignities as a ground for divorce. The Court said:

> It is for the court to determine whether or not the alleged offending spouse has been guilty of acts or

[3]Section 34-1207.1 still requires corroboration of residence and continuous separation without cohabitation.

> conduct amounting to rudeness, contempt, studied neglect or open insult, and whether such conduct and acts have been pursued so habitually and to such an extent as to render the condition of the complaining party so intolerable as to justify the annulment of the marriage bonds. *This determination must be based upon facts testified to by witnesses, and not upon beliefs or conclusions of the witnesses. It is essential, therefore, that proof should be made of specific acts and language showing the rudeness, contempt and indignities complained of. General statements of witnesses that defendant was rude or contemptuous toward the plaintiff are not alone sufficient. The witness must state facts — that is, specific acts and conduct from which he arrives at the belief or conclusion which he states in general terms — so that the court may be able to determine whether those acts and such conduct are of such a nature as to justify the conclusion or belief reached by the witness.* The facts, if testified to, might show only an exhibition of temper or of irritability probably provoked or of short duration. The mere want of congeniality and the consequent quarrels resulting therefrom are not sufficient to constitute that cruelty or those indignities which under our statute will justify a divorce.

Id. at 195-96, 150 S.W. at 1032 (emphasis supplied).

Our appellate courts have not departed from that quantum of proof recognized and required by the Court in *Bell. Cf. Oxford* v. *Oxford,* 237 Ark. 384, 373 S.W.2d 707 (1963); *Lipscomb* v. *Lipscomb,* 226 Ark. 956, 295 S.W.2d 335 (1956); *Coffey* v. *Coffey,* 223 Ark. 607, 267 S.W.2d 499 (1954); and *Welborn* v. *Welborn,* 189 Ark. 1063, 76 S.W.2d 98 (1934); *Copeland* v. *Copeland,* 2 Ark. App. 55, 616 S.W.2d 773 (1981); *Milne* v. *Milne,* 266 Ark. 900, 587 S.W.2d 229 (Ark. App. 1979). Accordingly, in this *de novo* review of the evidence, we must conclude that appellee failed to prove her alleged claim of general indignities.[4]

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[4]The trial court made no finding on whether the appellee presented proof to establish the alleged ground of general indignities.

Finally, we consider appellee's contention that because appellant failed to take any action to advise the trial court that the evidence was insufficient to establish grounds, appellant should not be able to raise the issue for the first time on appeal. Again, we must disagree. First, appellant did file a motion for new trial below, but appellee successfully challenged the motion for being untimely. Second, and more importantly, the appellant was not required to raise the sufficiency of evidence question below. In equity cases, a party *may* challenge the sufficiency of the evidence at the conclusion of the opponent's evidence by moving either orally or in writing to dismiss the opposing party's claim for relief. Ark. R. Civ. Pro. 50(a). However, in a non-jury trial, a party who does not challenge the sufficiency of evidence does not waive the right to do so on appeal. *See Bass* v. *Koller,* 276 Ark. 93, 632 S.W.2d 410 (1982).

We conclude that appellee did not establish a cause of action. However, because the three-year-separation issue raised in this suit may be merely premature, we reverse and dismiss without prejudice. *Oxford* v. *Oxford, supra.*

Reversed and dismissed.

MAYFIELD, C.J., and CRACRAFT, J., agree.

COLONIAL LIFE AND ACCIDENT INSURANCE COMPANY *v.* Ruth WHITLEY

CA 83-149 664 S.W.2d 488

Court of Appeals of Arkansas
Division I
Opinion delivered February 8, 1984
[Rehearing denied March 7, 1984.]

Davidson, Horne, Hollingsworth, Arnold & Grobmyer, A Professional Association, for appellant.

Boswell & Smith, by: *David E. Smith,* for appellee.

GEORGE K. CRACRAFT, Judge. Colonial Life and Accident Insurance Company appeals from a jury verdict awarding long term disability benefits to Ruth Whitley under a policy of insurance. It advances a number of points for reversal but we find sufficient merit in only one of them to warrant reversal. In view of the disposition we make of this case, however, we will address some of the other issues advanced because of the likelihood that they will arise in a retrial.

The policy in question insured appellee against loss resulting from accidental bodily injuries. The conditions of payment contained in the policy were as follows:

PART A — TOTAL DISABILITY

> If injuries as described in this policy are sustained by the Insured and within 30 days from the date of accident, independently of all other causes, wholly and continuously disable the Insured from performing any and every duty pertaining to his occupation, the Company will pay an indemnity for the period and at the rate shown in the Policy Schedule for "Initial Disability;" and thereafter, if the Insured is thereby continuously and totally disabled and prevented from engaging in any and every occupation or employment for wage or profit for which he may be qualified by reason of education, training or experience, the Company will pay a monthly indemnity for the period and at the rate shown in the Policy Schedule for "Long-Term Disability."

The policy schedule referred to above provided for the payment of $100 per month. The "initial period" prescribed was six months. The "long-term disability" was to be paid in the same amount for the next 10-1/2 years.

Under such policy provisions total disability benefits are provided for two separate and distinct conditions, i.e., 1) benefits are to be paid for a maximum of six months while the insured is totally and continuously disabled from performing the duties of his current occupation; 2) benefits are payable thereafter for so long as the insured is continuously disabled from performing the duties of *any* occupation for which he is reasonably qualified by reason of education, training and experience. *Continental Casualty Co.* v. *Davidson,* 250 Ark. 35, 463 S.W.2d 652 (1971). It is settled in this state that the words "wholly disabled" in his occupation do not mean that the insured must be absolutely helpless or unable to perform *all* of the substantial and material acts of his occupation. Our courts have adopted the rule that in determining whether one is wholly disabled it is

only necessary that it be shown that he is unable to perform *any one or more* of the substantial or material acts of his occupation in his usual and customary manner. *Continental Casualty Co.* v. *Davidson, supra; Avemco Life Ins. Co.* v. *Luebker,* 240 Ark. 249, 399 S.W.2d 265 (1966). Nor does the mere fact that one continues to work at his regular job establish a lack of disability. It is only a factor to be considered, and where an insured is able to continue his employment with the aid of his fellow employees or in some manner other than his usual and customary one, he may still be "disabled." *Franklin Life Ins. Co.* v. *Burgess,* 219 Ark. 834, 245 S.W.2d 210 (1952); *Benefit Ass'n of Ry. Employees* v. *France,* 228 Ark. 765, 310 S.W.2d 225 (1958).

Similar rules have been adopted with regard to the words "Wholly or totally disabled" in *any* occupation. It has been declared that one may be wholly disabled to perform the duties in *any* occupation if he is unable to perform *any one or more* of the substantial and material acts necessary to the prosecution, in the customary manner, of *any* occupation or business for which the insured is reasonably qualified by reason of his education, training and experience. *Continental Casualty Co.* v. *Davidson, supra.*

It is also well settled that policy provisions conditioning the right to payments for disability, to disability resulting within a specified time from the date of injury are valid, and that the issues of whether an insured is totally disabled and whether that disability resulted within the specified period are jury questions. *Business Men's Assur. Co.* v. *Selvidge,* 187 Ark. 1040, 63 S.W.2d 640 (1933); *Benefit Ass'n of Ry. Employees* v. *France, supra.* Under the policy here in issue the obligation to pay either the initial or long-term disability benefits did not arise unless the disability resulted within thirty days of the injury. On this point the appellant contends that, while there might have been sufficient evidence to support a finding that the appellee became disabled as a result of her accidental injury at *some* time, there was none to support a finding that it resulted within the time specified in the policy. It contends that the trial court should have granted its motion for directed

verdict and erred in submitting that issue to the jury. We agree.

A directed verdict is proper only when there is no substantial evidence from which a jury might determine an issue of fact. In determining whether there is substantial evidence to preclude the direction of a verdict the trial court must view the testimony and all reasonable inferences arising from it in the light most favorable to the party against whom the verdict is sought. *Dickerson Const. Co.* v. *Dozier,* 266 Ark. 345, 584 S.W.2d 36 (1979). In determining the sufficiency of evidence to sustain a verdict the same test is applied on appellate review.

When we view the testimony in that light we agree with the appellant that, although there was substantial evidence on which a jury might find that the appellee was ultimately disabled as a result of her injury, there was none to support a finding that it resulted within the initial thirty day period specified in the policy.

The appellee was a practical nurse employed at a state facility providing care for the aged. Her job required considerable lifting of patients, climbing stairs and other heavy physical labor such as lifting and stooping. She testified that before August 18, 1978 she was able to perform all of the duties without difficulty. On the night of August 18, 1978 while she was lifting an aged patient from his bed he fell on her, causing her to injure her knees. She experienced immediate pain and was seen at work that night by a staff doctor. She completed her shift and returned to herjob on the next workday. As she continued to have pain in her knees another staff doctor prescribed a painkilling drug which she continued to take. She hoped that she would get better and continued to work her regular schedule at full wages. She stated, however, that her condition did not get better but "became progressively worse."

In March 1979 her condition had worsened to such an extent that she consulted Dr. Thompson who found that the fall had aggravated the symptoms of preexisting osteoarthritis to such an extent that she could not perform her

customary duties and advised her to terminate her employment. She immediately resigned and gave notice of her claim of injury to the appellant. The appellant promptly denied the claim, contending that her present disability had not resulted within thirty days of the accident as provided in the policy.

Appellant then brought this action in which she did not seek recovery of the initial benefits "because she had received full wages during that period." She sought only to recover those benefits which had accrued since she terminated her employment in March 1979. There was evidence that after her visit to Dr. Thompson her disabilities had progressed to a point where she is not unable to perform household duties or to engage in any employment.

Two of her supervisors testified that after her fall in August 1978 she returned to work and worked regularly until she quit work altogether. They testified that they observed her constantly during the workday and that she always satisfactorily performed all of her usual, customary duties.

Dr. Thompson testified that he first saw her in March 1979, and after his initial examination it was his opinion that she was disabled from the performance of her occupational duties as a result of osteoarthritis which is a progressive disease. It was his opinion that the osteoarthritis had preexisted the injury but was not symptomatic until the fall in August. Dr. Thompson, however, could say only that the condition which he diagnosed in March had become disabling at some time subsequent to the accident. He could not testify that appellee was disabled from the performance of her ordinary and customary duties in her usual manner during August and September of 1978 or that the disability resulted within thirty days of her injury.

If substantial evidence of that fact is to be found in the record it must be found in the testimony of appellee, who was the only other witness who testified. Counsel has not pointed out to us any testimony of the appellee which supplies this deficiency; our review of the record discloses

none. Although she testified to many things she could do before the accident that she could not now do there was nothing in her testimony indicating that her present disability resulted within the thirty day period. Her testimony was in essence that she continued to work in the belief that she would get better, but that her condition became progressively worse until she couild not do her work. In the absence of substantial evidence tending to establish, or from which a jury might draw a reasonable inference, that the ultimate disability suffered by the appellee resulted within thirty days of the accident, the jury's award is speculative and without reasonable basis.

Our ruling, however, does not necessarily require that the case be reversed and dismissed. In similar situations this court has adhered to the rule that where there is a simple failure of proof, justice requires that the court remand the case to allow the appellee an opportunity to supply the defect. Only where the record affirmatively shows that there can be no recovery on retrial should the case be dismissed in the appellate court. *Pennington* v. *Underwood,* 56 Ark. 53, 19 S.W. 108 (1892); *Follett* v. *Jones,* 252 Ark. 950, 481 S.W.2d 713 (1972); *Continental Geophys. Co.* v. *Adair,* 243 Ark. 589, 420 S.W.2d 836 (1967); *Crisp* v. *Brown,* 4 Ark. App. 208, 628 S.W.2d 596 (1982). We cannot say here that the record affirmatively shows that there could be no recovery.

We find no merit to appellant's argument that the trial court erred in not directing a verdict in its favor on grounds that appellee had failed to prove compliance with the notice provisions of the policy. The policy in question contained a requirement that written notice of claim be given to the company within sixty days after the occurrence or commencement of any loss covered by the policy, *"or as soon thereafter as is reasonably possible."* Appellant contends that the accident on which appellee bases her claim occurred in August 1978 and she did not give written notice of that claim until May 1979. Appellee testified that she experienced immediate pain as a result of the accident and saw a doctor at the hospital at that time. The doctor examined her but took no x-rays and did not inform her that she had received a serious injury. She testified that although she was taking

painkillers and the pain was severe she continued to work "because I thought I would get better where I could carry on my work but I got worse, continued to get worse." She testified that during the entire period from the date of the accident until she gave notice, she was unaware that she had received a disabling injury and did not know of it until it was diagnosed by Dr. Thompson. It was her testimony that after being notified of the true extent of her injury she immediately notified the appellant.

In *Benefit Ass'n of Ry. Employees* v. *France, supra,* our court declared that it was self evident that one could not give notice of a claim until he had learned of it. If it can be proved that during a specified period the insured did not know that he was suffering from a disabling injury until it was made known to him by his physician, the failure to notify within the stated time period is excused under a clause such as that contained in this policy. In *Pacific Mutual Ins. Co.* v. *Dupins,* 188 Ark. 450, 66 S.W.2d 284 (1934) and *Mutual Benefit Health & Accident Ass'n* v. *Bird,* 185 Ark. 445, 47 S.W.2d 812 (1932) the court stated that the purpose of the inclusion of the exception "or as soon thereafter as reasonably possible" is to excuse the filing within the prescribed period where it is shown that the insured was not aware of the full nature and extent of his injuries during that period. The question of whether a claimant gives notice "as soon thereafter as is reasonably possible" is a question of fact for the jury to determine. *Benefit Ass'n of Ry. Employees* v. *France, supra.* We find no error in the refusal of the trial judge to direct a verdict and in properly instructing the jury on this issue.

The appellant also contends that the trial court erred in refusing to direct a verdict in its favor for failure of the appellee to prove that she furnished timely proof of loss. The policy provided that the company would, upon receipt of notice of claim, furnish to the claimant forms for filing proof of loss. It further provided that if such forms were not furnished within fifteen days after giving notice the claimant shall be deemed to have complied with the requirements of the policy as to proof of loss within the time fixed in the policy upon furnishing written proof of the

occurrence and character and extent of the loss for which the claim is made. We find no error for two principal reasons. On May 9, 1979 after having seen Dr. Thompson appellee filed her notice of claim in which she gave written proof of the occurrence and the character and extent of the loss. The appellant promptly denied the claim but furnished no forms. An insurance company by its conduct or by written provision of its contract may waive the requirements of proof of loss. *Farmers Mutual Ins. Co.* v. *Denniston,* 237 Ark. 768, 376 S.W.2d 252 (1964). There was evidence from which the jury could have found that the filing of formal proof of loss had been excused under the provisions of the policy. Additionally we note that upon receipt of the notice filed by appellee the appellant promptly denied liability. It is settled that the denial of liability by the insurer is effective as a waiver of formal proof of loss. *Federal Life & Casualty Co.* v. *Weyer,* 239 Ark. 663, 391 S.W.2d 22 (1965).

Appellant also contends that there was error in other instructions given by the court. When we view the instructions as a whole, we find that there was no error. The cause is reversed and remanded for new trial.

MAYFIELD, C.J., and GLAZE, J., agree.

CITY OF FAYETTEVILLE *v.* James R. GUESS

CA 83-370 663 S.W.2d 946

Court of Appeals of Arkansas
Division I
Opinion delivered February 8, 1984

E. Diane Graham, Public Employee Claims Division, Arkansas Insurance Department, for appellant.

Odom, Elliott, Lee & Martin, by: *Mark L. Martin,* for appellee.

GEORGE K. CRACRAFT, Judge. The City of Fayetteville appeals from an order of the Workers' Compensation Commission affirming the finding of the Administrative Law Judge that appellee has sustained permanent partial disability equal to 25% to the body as a whole. Appellant contends that the finding is not supported by substantial evidence and was the result of misapplication of the law. We do not agree.

At a hearing before the Administrative Law Judge it was stipulated that the appellee had received a compensable injury while in the employ of the appellant and that he had incurred at least a 10% functional impairment. The appellee contended that he has suffered wage loss disability in addition to his functional impairment.

After the injury a myelogram revealed a herniated disc and lumbar strain. Appellee was given a steroid injection and made remarkable symptomatic improvement without surgery. The doctor gave him a rating of 10% permanent disability to the body as a whole. He was released to his regular work the following month. There was testimony that the doctor had informed appellee when he returned to work that he should remain on light work duty for at least a year. Appellee testified that he had told the doctor that in view of the nature of his work this would be impossible. He stated that the doctor then told him to go back to his regular employment but to "be careful."

Appellee's job activities included lifting, standing, squatting, bending, kneeling, twisting, turning, and required moderate to heavy physical activity. The appellee testified that since his return to work he had lost strength in his back and his legs as a result of pain. He was unable to

handle the air compressors, jackhammer, 90 pound bags of cement and sections of pipe as he had before his injury. He stated that he now requires the assistance of a helper in lifting objects. He stated that he could not tighten bolts as he had before, and that bending and shoveling affected him quickly. He had difficulty torquing clamps on water mains because of his pain and could not work in crouched positions on water mains for over twenty or thirty minutes at a time without resting. He testified that his additional rest breaks to get relief from pain and his physical limitations had affected his ability to complete his work on time. His pain was getting worse and he was concerned about not being able to carry his share of the workload with his crew. A supervisor testified that he would hesitate to assign some jobs to appellee because of his back problems and his having to "watch heavy lifting."

Appellee was twenty-nine years old with a tenth grade education. He had formerly worked as a drill press operator, a delivery truck driver and in a power line construction crew. He was first employed by the City of Fayetteville as a laborer and at the time of his injury he was working foreman over a three man labor crew. After his injury he had returned to his job at the same wages and subsequently received, along with all other city employees, a 14% cost of living increase.

The Administrative Law Judge found that appellant had suffered wage loss disability in addition to the 10% functional loss and he had proved by a preponderance of the evidence that he had incurred permanent partial disability equal to 25% to the body as a whole. On appeal the Commission found that the Administrative Law Judge's decision was supported by the preponderance of the evidence and affirmed his decision. This action by the Commission had the effect of adopting the findings and conclusions of the Administrative Law Judge as its own. *Lybrand* v. *Ark. Oak Flooring*, 266 Ark. 946, 588 S.W.2d 449 (1979).

On appellate review the decision of the Commission will be upheld if supported by substantial evidence. There is substantial evidence to uphold such an award if reasonable

minds could have reached the same conclusion. This court reviews the evidence in the light most favorable to the findings of the Commission and gives the testimony its strongest probative value in favor of its order. *Allen Canning Co.* v. *McReynolds,* 5 Ark. App. 78, 632 S.W.2d 450 (1982).

It is well settled that a worker who sustains an injury to the body as a whole may be entitled to wage loss disability in addition to his anatomical loss. *Glass* v. *Edens,* 233 Ark. 786, 346 S.W.2d 685 (1961). In determining the additional wage loss disability the Commission may take into consideration the worker's age, education, work experience, medical evidence and other matters reasonably expected to affect the worker's future earning power. A worker may be entitled to additional wage loss disability even though his wages remain the same or increase after the injury. *Lion Oil Company* v. *Reeves,* 221 Ark. 5, 254 S.W.2d 450 (1952).

Appellant contends, however, that in affirming the findings and conclusions of the Administrative Law Judge, the Commission considered factors which were improper in a determination of additional wage loss disability. He argues that the Commission shifted the burden to the appellant to produce "negative factors" which tend to diminish any wage loss disability instead of requiring the appellant to prove his disability factors. One conclusion of the Administrative Law Judge which was adopted by the Commission was as follows:

> The Workers' Compensation Commission in determining the amount of disability as opposed to functional impairment takes into consideration not only the claimant's age, education and work experience, but other factors as well. Motivation to return to work, post-injury earnings, credibility, demeanor and a multiplicity of factors should be and are considered by the Law Judge in his determination.

His decision commented on the fact that appellee was found to be "highly believable, credible and one who is making a genuine and sincere effort in attempting to return

to the work environment." He found that the appellee had returned to full duties against the advice of his doctor, was attempting to perform many duties which he probably ought not perform and was doing everything possible to minimize the effects of his injury. He concluded, "[T]his basically translates that in my opinion there are not present any negative factors which would have a tendency to *diminish a consideration* of wage loss."

Our reading of the Administrative Law Judge's opinion does not lead us to the conclusion that the Commission was using his discussion of the absence of negative factors to reward appellee by giving him an unjustified additional wage loss disability, as contended by appellant. To the contrary we conclude that the Commission was saying that the absence of negative factors made appellee's evidence of diminished earning capacity a more acceptable basis for its finding of fact. This is clear from the discussion by the Administrative Law Judge of recent opinions in which we upheld the Commission's consideration of apparent negative attitudes on the part of some claimants to exploit full potential on entering the job market. We stated that a claimant's lack of interest and negative attitude was an impediment to the Commission's full assessment of a claimant's loss and was a factor it could consider in determining that his wage loss was not as great as he stated it to be. *Oller* v. *Champion Parts Rebuilders,* 5 Ark. App. 307, 635 S.W.2d 276 (1982). Here the Commission merely held that there was an absence of negative circumstances having a tendency to diminish those wage loss factors about which this appellee testified. It is clear to us that these factors were considered by the Commission, not in arriving at the amount of the award, but in determining whether the appellee had sustained his burden of proof that he had in fact sustained additional wage loss disability.

Although the Commission's knowledge and experience is not evidence, once it has before it firm medical evidence of physical impairment and functional limitation it has the advantage of its own superior knowledge of industrial demands, limitations and requirements and can apply its knowledge and expertise in weighing the medical evidence

of functional limitations together with other evidence of the manner in which the functional disability will affect the ability of an injured employee to obtain or hold a job and thereby arrive at reasonably accurate conclusions as to the extent of permanent partial disability as related to the body as a whole. *Oller* v. *Champion Parts Rebuilders, supra; Rooney & Travelers Ins. Co.* v. *Charles,* 262 Ark. 695, 560 S.W.2d 797 (1978). We find no error.

GLAZE, J., agrees; MAYFIELD, C.J., concurs.

MELVIN MAYFIELD, Chief Judge, concurring. I agree that the decision of the Workers' Compensation Commission should be affirmed but am not in full accord with the majority opinion's discussion of the "negative factors" theory invented by the administrative law judge who conducted the hearing in this case.

There should be no occasion to even discuss the law judge's decision. Twenty years ago the Supreme Court of Arkansas said "it is the duty of the Commission to make a finding according to a preponderance of the evidence, and not whether there is any substantial evidence to support the ruling of the Referee." *Moss* v. *El Dorado Drilling Co.,* 237 Ark. 80, 81, 371 S.W.2d 528 (1963). More recently that court said, "We give the law judge's findings no weight whatever." *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 495, 579 S.W.2d 360 (1979). The decisions of this court should have made it abundantly clear that we think the above statements are still the law. *See Roberts* v. *Leo Levi Hospital,* 8 Ark. App. 184, 649 S.W.2d 402 (1983); *Oller* v. *Champion Parts Rebuilders,* 5 Ark. App. 307, 635 S.W.2d 276 (1982); *Dedmon* v. *Dillard Dept. Store,* 3 Ark. App. 108, 623 S.W.2d 207 (1981); and *Jones* v. *Scheduled Skyways, Inc.,* 1 Ark. App. 44, 612 S.W.2d 333 (1981).

The problem is that the Commission's opinion in this case really does not state that the Commission has made any findings for itself. The opinion states: "Our *de novo* review of the record developed before the Administrative Law Judge leads us to the conclusion that the decision of the Administrative Law Judge is supported by a preponderance

of the evidence and must be affirmed." There is no real difference between that statement and the one in *Moss* v. *El Dorado Drilling Co., supra,* which caused the court there to point out that it is the Commission's duty to make a finding according to a preponderance of the evidence.

The appellant, however, states in its brief that the Commission's action in this case made the findings and conclusions of the law judge those of the Commission. Since the appellant accepts these as made by the Commission, I also will so accept them. It, therefore, becomes necessary to consider the "negative factors" theory invented and advanced by the law judge.

According to the law judge's opinion, he gets this theory from two cases where the Commission found the disability to be less than that found by the law judge. One is an unpublished opinion by this court and under Rule 21 of the Supreme Court and Court of Appeals is not to be "cited, quoted, or referred to by any court or in any argument, brief, or other materials presented to any court." See, 279 Ark. 516. The other case is *Oller* v. *Champion Parts Rebuilders, supra.* In that case this court noted that the Commission had referred to the Claimant's lack of interest in exploring vocational rehabilitation. We then discussed a case decided by the Arkansas Supreme Court and one which we had decided and said, "If in the instant case, appellant's lack of interest in exploring vocational rehabilitation was an impediment to the Commission's full assessment of appellant's loss of earning capacity, she cannot be heard to complain of that now." The law judge takes this and, as the appellant says, "reasons that the inverse must be true — absence of negative factors can increase the amount of wage loss disability, or at least support an award of wage loss disability."

I think the law judge missed the point of the statement in *Oller.* If there was any problem with what we meant in *Oller,* it should have been clarified in *Chism* v. *Jones,* 9 Ark. App. 268, 658 S.W.2d 417 (1983), and *Nicholas* v. *Hempstead County Mem. Hospital,* 9 Ark. App. 261, 658 S.W.2d 408 (1983). In the first case we noted that the Commission's

opinion appeared to say that any wage loss disability was precluded by the claimant's [negative] attitude toward rehabilitation, but we pointed out that even if he had refused to participate in a rehabilitation program that alone would not preclude the Commission from determining his wage loss disability rating. In the *Nicholas* case we said that while under the law, Ark. Stat. Ann. § 81-1310(f) (Supp. 1983), an employee cannot be required to enter a program of vocational rehabilitation, the failure to participate may hinder or prevent the Commission from fully assessing the wage earning loss.

Nothing in the above cases would seem to me to justify the law judge's theory that the *absence of negative circumstances* can add to or support any wage loss determination, and it is difficult for me to understand how he could so misread our opinions. But whatever his inspiration, I do not agree with the majority opinion that the law judge's reference to the absence of negative factors was merely a way of saying that this made appellee's evidence of diminished earning capacity "a more acceptable basis" for the law judge's finding or "a factor to be considered" in determining whether appellee had sustained his burden of proof as to his wage loss disability. I would totally reject the law judge's theory as having any proper place in the consideration or determination of a workers' compensation claim.

I do think the evidence supports the Commission's decision. Since the appellant accepts the law judge's decision as the Commission's decision, I agree to affirm that decision on the basis that it is right and should be affirmed even if a wrong reason has been given in its support. See, *Popeye's Famous Fried Chicken* v. *Willis,* 7 Ark. App. 167, 646 S.W.2d 17 (1983).

Harrison SANDERS *v.* THE ALAN WHITE COMPANY and HOME INSURANCE COMPANY

CA 83-346 663 S.W.2d 939

Court of Appeals of Arkansas
Division II
Opinion delivered February 8, 1984

Brent Haltom, for appellant.

Shackleford, Shackleford & Phillips, P.A., for appellee.

JAMES R. COOPER, Judge. In this workers' compensation case, the appellant was denied any compensation on a finding that he had knowingly concealed a prior injury from the appellee employer. From that decision, comes this appeal.

The appellant sought compensation for a back injury which he allegedly suffered on August 25, 1982. He also sought a change of physicians. The appellant had suffered a work-related back injury in 1978, and, in August, 1980, he received a substantial settlement by way of a joint petition. Approximately eight months after that settlement, he sought employment with the appellee employer, and in the course of his application, he answered "no" to the following question:

> Do you have any physical, mental or medical impairment or disability that would limit your job performance for the position for which you are applying?

The appellees claimed that the appellant was not entitled to either a change of physicians or temporary total disability for two reasons, first, because he had not sustained an accidental injury arising out of and in the course of his employment, and second, because of his false statement which would bar recovery under the doctrine announced in *Shippers Transpsort of Georgia* v. Stepp, 265 Ark. 365, 578 S.W.2d 232 (1979). In that case, the Arkansas Supreme Court stated:

> The following factors must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

The administrative law judge found that the appellant had not deliberately made a false representation concerning

his physical condition, and that there was insufficient evidence on which he could find that there was a causal connection between the two injuries. He found that the appellant had suffered a compensable injury, ordered a change of physicians, but made no finding concerning temporary total disability. The Commission reversed the administrative law judge's finding concerning the *Shippers Transport* doctrine, thus denying any recovery. The Commission never reached or considered the question of whether the appellant had sustained a work-related injury.

We agree with the Commission's finding that the appellant's statement on his job application constituted a deliberate false representation as to his physical condition. The work for which the appellant was applying involved substantial lifting, and, from a review of the appellant's testimony, it is clear that he knew he had a disability at the time the joint petition was granted, and that he concealed his pre-existing disability on the new application. Although the appellant testified that he believed that he had recovered from his earlier disability, the Commission was not bound to accept his testimony. *May* v. *Crompton-Arkansas Mills, Inc.,* 253 Ark. 1080, 490 S.W.2d 794 (1973). We find substantial evidence to support the Commission's finding that the appellant knowingly misrepresented his physical condition.

As to the second requirement of *Shippers Transport,* reliance by the employer on the false statement, the appellant concedes that, if there was a false statement on the application, the employer relied on it, so we have no need to discuss this point.

However, we disagree with the Commission's decision regarding a causal connection between the 1978 and 1982 injuries. The Commission found that "claimant's symptoms from his alleged work related injury in the case at bar were completely consistent with this earlier injury. Under the circumstances we think a causal connection is clearly inferrable." No witness, medical or otherwise, testified that there was any connection whatever between the two injuries. We do not find any substantial evidence to support the

Commission's finding on this point, and therefore we reverse and remand for the purpose of developing this critical factual question of causal connection between the 1978 and 1982 injuries. *See, Mosley* v. *Heim Bros. Packing Co.*, 271 Ark. 722, 610 S.W.2d 276 (Ark. App. 1981); *Foust* v. *Ward School Bus Mfg. Co.*, 271 Ark. 411, 609 S.W.2d 88 (Ark. App. 1980); *Shock* v. *Wheeling Pipe Line, Inc.*, 270 Ark. 57, 603 S.W.2d 446 (Ark. App. 1980).

Of course, since the Commission did not reach the issue of whether the appellant suffered an injury which arose out of and in the course of his employment, that question is still open in the event the causal connection between the 1978 and 1982 injuries is not established by a preponderance of the evidence.

Reversed and remanded for further proceedings consistent with this opinion.

CLONINGER and CORBIN, JJ., agree.

Mark T. MEADOR *v.* STATE of Arkansas

CA CR 83-132 664 S.W.2d 878

Court of Appeals of Arkansas
Division II
Opinion delivered February 8, 1984
[Rehearing denied March 7, 1984.]

William C. McArthur, for appellant.

Steve Clark, Atty. Gen., by: *Velda West Vanderbilt,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was charged with attempted robbery. After a trial by jury, he was found guilty and sentenced to ten years in the Arkansas Department of Correction. From that decision, comes this appeal.

In the early morning hours of February 1, 1982, the appellant entered a nursing home in Perryville, Arkansas, and asked to use the telephone, stating that he had run out of gas. The appellant was unsuccessful in obtaining help and the attendant offered to try to obtain help for him by calling a friend. Just as the attendant completed dialing the phone number of the sheriff's department where a friend of hers worked, the appellant disconnected her and brandished a pistol, announcing he was holding up the nursing home. Upon being informed by the attendant that she had contacted the sheriff's office, and after hearing an alarm sound, the appellant fled. Later that morning a .380 caliber semi-automatic pistol was found behind the nursing home. There were also footprints in the snow and mud leading off from that point.

Upon fleeing the nursing home, the appellant went to the nearby residence of Judy (Wise) Stain, the assistant administrator of the nursing home, with whom the appellant was acquainted. Mrs. Stain testified that the appellant appeared at her home at around 3:15 a.m. on February 1, 1982, and stated that someone had picked him up at his apartment in Conway and attempted to collect some money from him. He stated the men who picked him up were going to use him to rob some place in order to collect their money, but that he had gotten away from them and not to worry. After this, the appellant was taken by Mrs. Stain's sister to a spot near the Bigelow Junction to meet his girl friend who came from Conway to pick him up.

At the appellant's trial for attempted robbery, the State attempted to introduce the pistol found near the nursing home through Sheriff Byrd. The appellant challenged its introduction on the grounds it was not properly authenticated due to an incomplete chain of custody, and also the fact

that the serial number of the weapon was not on the receipt made on the pistol when it was found.

The appellant asserts that Uniform Rules of Evidence, Rule 901, Ark. Stat. Ann. § 28-1001 (Repl. 1979), requires sufficient identification and authentication of evidence to support a finding that the evidence is what it is purported to be. He also states the cases interpreting this rule require only a common sense approach. The appellant argues, however, that when one considers the fact that the serial number of the gun which was purported to be on a receipt was not, and no recorded serial number is available, along with the weapon being out of the sheriff's custodian's hands for a substantial period of time with no verification, then the authentication is doubtful. We disagree.

Following the incident at the nursing home, Sheriff Byrd and the Perryville City Marshal, Troy England, searched the woods behind the nursing home. At the appellant's trial, Mr. England identified state's exhibit #7 as the gun he found during that search. Mr. England testified that Sheriff Byrd made a receipt and recorded the serial number of the gun on it. The receipt was then typed at the sheriff's office and the weapon remained there except for the time it was with the State Crime Lab. The description on the receipt matched the weapon and both Sheriff Byrd and Marshal England identified the pistol as the one which was found behind the nursing home.

The purpose of the rule requiring a chain of custody is to guard against the introduction of evidence which is not authenticated. In establishing a chain of custody prior to the introduction of evidence at the trial, it is not necessary to eliminate every possibility that the evidence has been tampered with. The fact that the weapon was not in the Sheriff's possession at all times and also that there was no serial number of the receipt, goes to the weight to be given the evidence, rather than its admissibility. *Gardner* v. *State,* 263 Ark. 739, 569 S.W.2d 74 (1978); *Bedell* v. *State,* 260 Ark. 401, 541 S.W.2d 297 (1976) cert. denied, 430 U.S. 931, 97 S.Ct. 1552, 51 L. Ed. 2d 775 (1977). The issue is whether the trial court abused its discretion in determining that in reasonable

probability the integrity of the evidence was not impaired and that it had not been tampered with. *Callison* v. *State,* 1 Ark. App. 335, 615 S.W.2d 406 (1981); *Baughman* v. *State,* 265 Ark. 869, 582 S.W.2d 4 (1979). From the unequivocal identification of the pistol by Sheriff Byrd and Marshal England and the circumstances surrounding the discovery of the weapon, we find the trial court properly admitted the pistol into evidence.

The appellant's second point for reversal concerns the trial court's refusal to grant a mistrial when the prosecutor questioned one of the appellant's witnesses concerning a prior conviction of the appellant. The character witness had stated the appellant's reputation for truth and honesty was good. On cross-examination, the prosecutor asked the witness if he was aware of the appellant's prior conviction for obtaining controlled substances by fraud and if this would change his opinion of the appellant. In *Caldwell* v. *State,* 267 Ark. 1053, 594 S.W.2d 24 (1980), the Arkansas Supreme Court stated:

> "When the defendant produced five character witnesses the trial court ruled it proper for the prosecutor to cross-examine the witnesses by asking whether their opinions as to the defendant's reputation would be altered by knowing of the defendant's prior conviction. This was proper pursuant to Ark. Stat. Ann. § 28-1001, Rule 405(a) (Repl. 1979).

We find no merit to this argument.

The appellant's third point for reversal concerns the trial court's refusal to give the appellant's proffered instruction on the defense of duress. The instruction given by the court on the appellant's defense of duress was AMCI 4001 and it stated as follows:

> Mark Meador asserts the affirmative defense of duress to the charge of aggravated robbery and attempted aggravated robbery. To establish this defense, he must prove that he engaged in the conduct charged because he reasonably believed that he was compelled to do so

> by the threat of unlawful force against his person that an individual of ordinary firmness in Mark Meador's situation would not have resisted.
>
> Duress is not a defense if Mark Meador recklessly placed himself in a situation in which it was reasonably foreseeable that he would be subjected to the force or threatened force.
>
> Mark Meador has the burden of proving an affirmative defense by a preponderance of the evidence, unless the affirmative defense is so proved by other evidence in the case. "Preponderance of the evidence" means the greater weight of evidence. The greater weight is not necessarily established by the greater number of witnesses testifying to any facts or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If the evidence with regard to the affirmative defense appears to be equally balanced or if you cannot say upon which side it weighs heavier, then the affirmative defense has not been established.
>
> If you find that this defense has been established by the Defendant, then you shall find Mark Meador not guilty of aggravated robbery.
>
> Whatever may be your findings as to this defense you are reminded that the State still has the burden of establishing the guilt of Mark Meador upon the whole case beyond a reasonable doubt.

The appellant sought to have paragraph two of the instruction deleted. From the evidence adduced at trial, particularly the testimony of the appellant concerning why he owed the debt to the men who allegedly forced him to rob the nursing home, it could be inferred that the appellant's drug dependence placed him in the position to be forced by these men to do something he might otherwise not do. Thus the trial court's instruction that the appellant could not claim the defense if he recklessly put himself in that position was proper under the circumstances of the case.

The trial court is not to modify the AMCI instructions unless it is clear that, in a given case, the instruction incorrectly applies the law to the facts. *Conley* v. *State,* 270 Ark. 886, 607 S.W.2d 328 (1980).

Finally, the appellant argues that the evidence is insufficient to support his conviction. This argument is without merit. The appellant was identified by two witnesses at trial as the man who entered the nursing home and announced it was a "stick up;" the appellant had been to the nursing home on numerous occasions to visit his grandmother and therefore was familiar to the nursing home personnel. The appellant was identified by Mrs. Stain as the person who came to her home shortly after the attempted robbery took place, and took off the clothes he had on which were identified as the clothes worn by the robber. He was identified by Mrs. Stain's sister as the person she took to meet someone at Bigelow Junction. We find that there was substantial evidence to support the appellant's conviction, and therefore we must affirm. *Small* v. *State,* 5 Ark. App. 87, 632 S.W.2d 448 (1982).

Affirmed.

CLONINGER and CORBIN, JJ, agree.

Reba GORCHIK *v.* Ray GORCHIK

CA 83-227 663 S.W.2d 941

Court of Appeals of Arkansas
En Banc
Opinion delivered February 8, 1984

[redacted]

Howard & Howard, by: *William H. Howard,* for appellant.

Harkey, Walmsley, Belew and *Blankenship,* by: *Leroy Blankenship,* for appellee.

DONALD L. CORBIN, Judge. Appellant, Reba Gorchik, appeals the decision of the chancellor in a divorce action which gave appellee, Ray Gorchik, a money judgment against appellant for $22,557.00 consisting of: (1) a $5,000.00 judgment against appellant to compensate appellee for $5,000.00 he inherited during the marriage; (2) $15,000.00 for property appellee brought into the marriage as well as consideration for a tort claim arising out of appellant having shot appellee during the pendency of the divorce action, and (3) $2,557.00 to compensate appellee for appellant having withdrawn the sum of $5,000.00 from a joint bank account of the parties.

It is well settled that although we review chancery cases *de novo* on the record, we do not reverse a decree unless the chancellor's findings are clearly erroneous or clearly against a preponderance of the evidence. Since the question of preponderance turns heavily on the credibility of the witnesses, we defer to the superior position of the chancellor in this regard. *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W.2d 404 (1981); A.R.C.P. Rule 52(a). In the instant case, we find certain findings of the chancellor clearly against the preponderance of the evidence and, accordingly, reverse and remand.

In her first point for reversal, appellant contends that the court erred in awarding appellee a judgment for the $5,000.00 which appellee inherited from his father during the course of the marriage. Appellee testified that "upon the death of my father, I inherited $5,000.00 which I deposited in our joint savings account. Over a period of time, we withdrew the money and used it, I believe I used some of the money to purchase my tractor and trailer." After reviewing the limited testimony and evidence on this issue, it appears that appellant helped appellee spend his inheritance from a joint account. We believe the rule formulated in *Hayse* v. *Hayse,* 4 Ark. App. 160-B, 630 S.W.2d 48 (1982), is applicable in the case at bar. In *Hayse, supra,* we announced:

> Property received by bequest, devise, or descent is not 'marital property' subject to equal division upon divorce under Ark. Stat. Ann. § 34-1214 (Supp. 1981). The wife's inheritance would not be subject to equal division in the divorce unless by some action she had destroyed its status as non-marital property by creating an interest therein in her husband.

We believe that the facts in the instant case clearly reflect a change in the status of appellee's $5,000.00 inheritance. Appellee placed the money voluntarily in a joint account which both parties utilized during the course of their marriage. Accordingly, we reverse on this point.

Appellant alleges in her second point for reversal that the trial court erred in rendering judgment against her in the amount of $15,000.00 for property appellee allegedly brought into the marriage as well as for consideration of his tort claim. At the minimum, we must reverse and remand for the trial court to clarify its judgment by assigning specifically what amount was for the property brought into the marriage by appellee and what amount specifically was awarded appellee on the tort claim. Appellee's contention that appellant waived any argument on appeal concerning the trial court's findings is without merit. It is appellee's position that appellant was obligated to request the trial court to find the facts specially and state its conclusions of law as a prerequisite to our reviewing the findings on appeal. A.R.C.P. Rule 52(a) provides that "requests for findings are not necessary for purposes of review."

Turning to the issue that is most troublesome to this Court and one which we raise on our own motion is that of determining whether the chancery court had jurisdiction under the "clean-up doctrine" to determine the tort claim of appellee in this divorce action. It is well settled that subject matter jurisdiction is always open, cannot be waived, can be questioned for the first time on appeal, and can even be raised by this Court. *Hilburn* v. *1st State Bank of Springdale,* 259 Ark. 569, 535 S.W.2d 810 (1976). There, the Arkansas Supreme Court stated as follows:

> Subject matter jurisdiction cannot be conferred by consent of the parties. (cites omitted) We have said that it is not only the right but the duty of this court to determine whether it has jurisdiction of the subject matter. (cites omitted)

Accordingly, we may now raise the issue of subject matter jurisdiction on our own motion.

A spouse may maintain a tort action against his or her spouse. *Leach* v. *Leach,* 227 Ark. 599, 300 S.W.2d 15 (1957). In *Spitzer* v. *Barnhill,* 237 Ark. 525, 374 S.W.2d 811 (1964), Justice George Rose Smith raised the following question in the opening paragraph of his opinion:

> In this case the question which has given us the greatest concern is whether a chancery court, after having taken jurisdiction of a suit to restrain a tort defendant from denuding himself of his property, must then, as a matter of giving complete relief, retain jurisdiction and hear the common-law tort action on its merits.

Judge Smith, in writing for the majority, answered in the negative stating as follows:

> If the Legislature had intended to bring about such a drastic change in our law as that of permitting personal injury actions to be tried in equity as a matter of right, we think that intention would have been stated in language too plain to be misunderstood.

Spitzer, supra, cited a Mississippi case, *Jones* v. *Jones,* 79 Miss. 261, 30 So. 651, wherein the plaintiff attempted to maintain in equity a suit for personal injuries, relying upon statutes that permitted a creditor to attack a fraudulent conveyance without having first obtained a judgment at law. In rejecting this contention, the Mississippi court stated:

> It was never the contemplation of the statutes invoked by appellant to authorize chancery courts to take cognizance of a suit for unliquidated damages arising

> out of a tort before there has been any judgment at law ascertaining the damages, the defendant being within the jurisdiction of the court.

See also, *Chamberlain* v. *Newton County,* 266 Ark. 516, 587 S.W.2d 4 (1979). Accordingly, we do not believe as appellee asserts in the case at bar that appellee was required to assert his tort claim for personal injuries as a compulsory counterclaim under A.R.C.P. Rule 13(a). Rule 13(a) provides that any cause of action which a party has against his opponent and which arises out of the same transaction or occurrence as the opponent's claim must be pleaded as a counterclaim. However, this obviously was not a proper counterclaim inasmuch as appellee sought damages from appellant for an alleged intentional tort of which chancery court had no jurisdiction.

We reverse and remand on appellant's second point with directions to the trial court to transfer appellee's tort claim to circuit court. On remand, the trial court, pursuant to the authority of Ark. Stat. Ann. § 34-1214(A)(2) (Supp. 1983), is directed to return to the parties all property owned prior to the marriage unless the court makes some other division that it deems equitable. It appears from the record before us that the separate property of appellee was freely intermingled with marital property. It is important to note that the burden is upon the party who asserts an interest in property to establish that it is in fact separate property not subject to division.

Finally, appellant alleges the trial court erred in rendering judgment against her in the amount of $2,557.00 for funds withdrawn by her from a joint bank account. The only error we find on this issue is one of arithmetic. The evidence reflects that the account had a balance of $5,337.40 at the time the parties separated, all of which appellant withdrew. The decree should be modified to reflect that appellee is to have judgment in the amount of $2,668.70 against appellant for one-half of the sum she withdrew from the joint account in the Merchants and Planters Bank of Newport, Arkansas, on December 7, 1981. The withdrawal occurred three days after appellant filed her complaint for

divorce and the joint bank account was clearly marital property.

The judgment is reversed and remanded, with directions to the trial court to enter an order in keeping with this opinion.

Reversed and remanded.

Timothy DRAIN *v.* STATE of Arkansas

CA CR 83-122 664 S.W.2d 484

Court of Appeals of Arkansas
En Banc
Opinion delivered February 8, 1984
[Rehearing denied March 7, 1984.]

Michael Dabney, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Velda P. West,* Asst. Atty. Gen., for appellee.

DONALD L. CORBIN, Judge. On January 9, 1979, appellant, Timothy Drain, pleaded guilty to burglary and theft of property and received a three-year suspended sentence on conditions. One of the conditions was that appellant pay court costs of $43.00 and a fine of $500.00 payable $50.00 per month beginning February 10, 1979. On July 7, 1980, a year and a half later, appellant had paid the $43.00 in court costs but only $15.00 toward the $500.00 fine. On July 7, 1980, appellant was arraigned for revocation. He made a pauper's oath and the trial court appointed the Washington County Public Defender to represent him. At this time, the court granted appellant an additional 60 days to pay the $485.00 balance after accepting a plea of guilty to having failed to make payments on the fine. In an order dated September 10, 1980, defense counsel and the State agreed that appellant would be granted until November 15,

1980, to pay his fine, due to appellant's having been civilly committed to the Arkansas Mental Hospital. On December 11, 1981, the State again petitioned the court to revoke appellant's suspended sentence but appellant was not arrested until October 18, 1982. A hearing was finally held on February 18, 1983, when appellant's suspended sentence was revoked and he was sentenced to serve three years in the Department of Corrections. Appellant's original suspended sentence would have ended on January 9, 1982.

The only issue raised by appellant is whether or not under the testimony at the hearing, appellant was indigent so that the court should not have incarcerated him for nonpayment of his fine. Stated more succinctly, was appellant's nonpayment of the fine deliberate or was it because of his inability to pay? It is well settled that we will not overturn a decision in the trial court to grant a petition to revoke unless it is clearly against the preponderance of the evidence. *Cureton* v. *State,* 266 Ark. 1034, 589 S.W.2d 204 (Ark. App. 1979).

Appellant contends that Ark. Stat. Ann. § 41-1103 (Repl. 1977) applies, which provides in part:

> (2) Unless the defendant shows that his default was not attributable to a purposeful refusal to obey the sentence of the court, or to a failure on his part to make a good faith effort to obtain the funds required for payment, the court may order the defendant imprisoned in the county jail or other authorized institution designated by the court until the fine or costs or specified part thereof is paid. The period of imprisonment shall not exceed one (1) day for each ten dollars ($10.00) of the fine or costs, thirty (30) days if the fine or costs were imposed upon conviction of a misdemeanor, or one (1) year if the fine or costs were imposed upon conviction of a felony, whichever is the shorter period.

This statute basically codifies the principles established by the cases of *Tate* v. *Short,* 401 U.S. 395 (1971), and *Williams* v. *Illinois,* 399 U.S. 235 (1970), both of which stand

for the proposition that a sentence to imprisonment for nonpayment of a fine works an invidious discrimination against indigent defendants in violation of the equal protection clause of the Fourteenth Amendment.

The State, on the other hand, contends that this case is governed by subsections 4 through 6 of Ark. Stat. Ann. § 41-1208 (Repl. 1977). Those subsections read as follows:

> (4) If the court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspension or probation, it may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation.
>
> (5) The court may revoke a suspension or probation subsequent to the expiration of the period of suspension or probation, provided defendant is arrested for violation of suspension or probation, or a warrant is issued for his arrest for violation of suspension or probation, before expiration of the period.
>
> (6) If the court revokes a suspension or probation, it may enter a judgment of conviction and may impose any sentence on defendant that might have been imposed originally for the offense of which he was found guilty, provided that any sentence to pay a fine or to imprisonment when combined with any previous fine or imprisonment imposed for the same offense shall not exceed the limits of sections 901 [§ 41-901] or 1101 [§ 41-1101], or, if applicable, section 1001 [§ 41-1001]. [Acts 1975, No. 280, § 1208, p. 500.]

The State contends that "an inexcusable failure to comply with a condition of suspension" was shown pursuant to subsection 4, arguing that appellant was given a fine to pay as a condition of his suspended sentence. The State further argues that appellant was not imprisoned because he did not pay his fine but because he violated one of the conditions of his probation. The State believes this revocation was not the invidious discrimination envisioned in *Tate, supra.* It is

unnecessary to decide which of the above statutes is applicable as we reverse and dismiss on the following basis.

We believe the recent case of *Bearden* v. Georgia, 102 S. Ct. 3482 (1983), is dispositive of the issue in the case at bar. The probation of the defendant in *Bearden, supra,* was revoked after a hearing on the grounds that the defendant had failed to pay a fine and restitution upon which his probation had been conditioned. The defendant had borrowed funds to pay part of the amount owed but subsequently lost his job. Despite repeated efforts, the defendant was unable to pay the balance of his fine and restitution within the set time period. On appeal, the Georgia Court of Appeals rejected defendant's claim that imprisoning him for his inability to pay the fine and make restitution violated the equal protection clause of the Fourteenth Amendment. The Georgia Supreme Court denied review and on certiorari to the United States Supreme Court, the case was reversed and remanded. Justice O'Connor, in writing for the majority, stated:

> We hold, therefore, that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Justice O'Connor, in discussing the facts of the case, went on to state:

> At the parole revocation hearing, the petitioner and his wife testified about their lack of income and assets and of his repeated efforts to obtain work. While the sentencing court commented on the availability of odd jobs such as lawn-mowing, it made no finding that the petitioner had not made sufficient bona fide efforts to find work, and the record as it presently stands would not justify such a finding. . . . The State argues that the sentencing court determined that the petitioner was no longer a good probation risk. In the absence of a determination that the petitioner did not make sufficient bona fide efforts to pay or to obtain employment in order to pay, we cannot read the opinion of the sentencing court as reflecting such a finding. Instead, the court curtly rejected counsel's suggestion that the time for making the payments be extended, saying that 'the fallacy in that argument' is that the petitioner has long known he had to pay the $550 and yet did not comply with the court's prior order to pay. App. 45. The court declared that 'I don't know any way to enforce the prior orders of the Court but one way,' which was to sentence him to imprisonment. *Ibid.*
>
> The focus of the court's concern, then, was that the petitioner had disobeyed a prior court order to pay the fine, and for that reason must be imprisoned. But this is no more than imprisoning a person solely because he lacks funds to pay the fine, a practice we condemned in *Williams* and *Tate.* By sentencing petitioner to imprisonment simply because he could not pay the fine, without considering the reasons for the inability to pay or the propriety of reducing the fine or extending the time for payments or making alternative orders, the court automatically turned a fine into a prison sentence.

The facts in *Bearden, supra,* and in the instant case are similar. Here, appellant testified that he was just barely making it, that he was laid off, had no job, and was behind

on child support payments. He further testified that he was cutting and selling firewood when he could and looking for a job. He testified that he only had an eighth grade education. His brother-in-law, Johnny Sylvester, testified that there was not much money in cutting wood, that he had been cutting wood with appellant, and they had not been making much money. He said he had never seen appellant with more than $20.00 at one time. In response to questions concerning his looking for work, appellant said he had made application everywhere he could think of, mostly at roofing companies because all he knew how to do was roofing or construction work. He admitted that he smoked and that his sister had given him a pack of cigarettes that morning. When asked when he last purchased a pack himself, he said it was over a week ago, "cause I don't have no money."

The following remarks were made by the State in its closing argument at the revocation hearing of February 18, 1983, pertaining to its concern in regard to appellant's failure to pay the fine:

> Your Honor, as this Court realizes, the Judgment in this case came down January 29th, of '79, and that has been over four years ago. On the $500.00 fine, Defendant has paid a grand total of $15.00, and the State just can't believe in four years a person couldn't make a good faith effort to pay off that fine. It's a reasonable fine, yet he has only come up with $15.00. We would ask the Court to enforce its Order and send Mr. Drain down to the penitentiary.

The above appears to be the same conclusion reached by the trial court in sentencing appellant.

As stated in *Bearden, supra,* the decision to place the defendant on probation reflects a determination by the sentencing court that the state's penological interests did not require imprisonment. The trial court below originally found no purpose would be served by sentencing appellant to serve a prison term but instead elected to fine appellant and suspend the sentence. Appellant conducted himself

appropriately during his probationary period but was involuntarily unable to pay his fine. At earlier revocation proceedings, the trial court should have explored alternatives to the fine when it became apparent that appellant was unable to earn the funds necessary to pay the fine. We believe the record reflects bona fide efforts on appellant's part to obtain employment. Justice O'Connor in *Bearden, supra,* emphasized that the trial court could have reduced the fine, or directed that the probationer perform some form of labor or public service in lieu of the fine. We recognize that the State has an interest in punishment and deterrence, and likewise, is justified in pursuing a revocation of probation and the sentencing of a probationer for nonpayment of a fine when the defendant has willfully failed to pay the fine or failed to make bona fide efforts to do so. Pursuant to the authority of *Bearden, supra,* we normally would reverse and remand with directions to the trial court to make inquiry into alternative means of enforcement; however, the trial court, pursuant to the authority of *Easley* v. *State,* 274 Ark. 215, 623 S.W.2d 189 (1981), no longer has authority to revoke the probation. In that case the Arkansas Supreme Court reversed the trial court for revoking a 5-year suspended sentence on a date more than five years after the guilty plea was accepted and the suspended sentence was imposed.

Here, appellant's plea of guilty was accepted on January 9, 1979, and he was sentenced to three years which were suspended on condition. The sentence was not in accordance with the law in effect at that time, see *Culpepper* v. *State,* 268 Ark. 263, 595 S.W.2d 220 (1980), but the issue has not been raised by appellant. However, his original sentence ended on January 9, 1982, and under the authority of *Easley, supra,* it is now too late to revoke the suspended sentence which ended on January 9, 1982. Therefore, there is no reason to remand, so this matter is reversed and dismissed.

Reversed and dismissed.

CLONINGER and GLAZE, JJ., concur.

LAWSON CLONINGER, Judge, concurring. I agree only

with the result achieved by the majority of the court in this case.

The original sentence was improper. On January 9, 1979, appellant was "sentenced to three (3) years in the State Penitentiary suspended on each charge to run concurrent, upon the following conditions . . ." This was a suspended execution of a pronounced sentence, and that method of sentencing is not sanctioned by the 1976 Criminal Code. See Ark. Stat. Ann. § 41-803(4) (Repl. 1977); *Culpepper* v. *State,* 268 Ark. 263, 595 S.W.2d 270 (1980); *McGee* v. *State,* 271 Ark. 611, 609 S.W.2d 23 (1980). Having accepted the sentence, however, appellant now has no legal standing to complain. See, *McGee* v. *State, supra.*

In this case, the trial court had no jurisdiction to impose any sentence on appellant, because the term to which he had been sentenced expired on January 9, 1982, some thirteen months before a hearing on the revocation petition was held. Jurisdiction of the subject matter is always open and cannot be conferred by consent or waiver. *Haskins* v. *State,* 264 Ark. 454, 572 S.W.2d 411 (1978). Jurisdiction is not preserved by the provisions of Ark. Stat. Ann. § 41-1208 (Repl. 1977), which states that the court may revoke a suspension or probation subsequent to the expiration of the period of suspension or revocation, provided a warrant is issued for his arrest for violation of the terms of his suspension or probation, before expiration of the term. Section 41-1208 is a part of the 1976 Criminal Code and could be intended to apply only to suspension or probation as defined in the Criminal Code, § 41-803(4), *supra.* I would reverse and dismiss the judgment of the trial court on the basis of lack of jurisdiction.

Deborah A. BONE *v.* James R. BONE, Jr.

CA 84-17 663 S.W.2d 945

Court of Appeals of Arkansas
En Banc
Opinion delivered February 8, 1984

John R. Byrd, for appellant.

John Frank Gibson, for appellee.

PER CURIAM. We find the Supreme Court's holding in *Goodin* v. *Goodin,* 240 Ark. 541, 400 S.W.2d 665 (1966), controlling in this special proceeding. Therefore, appellant's motion to stay the chancellor's custody order pending an appeal to this Court is hereby dismissed without prejudice to request such a stay from the trial court.

TOM GLAZE, Judge, concurring. I concur. My reasons are fully set forth in my concurring opinion in *McCluskey* v. *Kerlen,* 4 Ark. App. 334, 631 S.W.2d 18 (1982). Suffice it to say, *McCluskey* was an adoption case and this Court's decision there in no way controls the custody matter before us now. The Supreme Court's rationale in *Goodin* v. *Goodin,* 240 Ark. 541, 400 S.W.2d 665 (1966), is clearly applicable to this cause and based on the record presented to us, the majority defers to the chancellor's superior position to decide the request for stay.

MELVIN MAYFIELD, Chief Judge, dissenting. In a per curiam opinion the majority of this court has today dismissed the appellant's motion asking that we stay a trial court's change of custody order pending determination of the appeal of that order. Today's decision is contrary to our decision in *McCluskey* v. *Kerlen,* 4 Ark. App. 334, 631 S.W.2d 18 (1982), where we granted a stay of the trial court's award of custody pending determination of the appeal of an adoption proceeding. I dissented in *McCluskey* and I dissent today.

In *McCluskey,* a motion had been filed in the trial court seeking a stay of the enforcement of that court's change of

custody order, but no order was filed in this court reflecting a decision by the trial court on that motion. My dissent stated that we should remand the matter to the trial court directing it to hold a hearing on the motion and to enter an order setting out its findings of fact and conclusions of law; and I said we should order the trial court to defer any further action for a period of 15 days after that hearing so that either party could have an opportunity to ask us to review the trial court's order before it was put into effect. The dissent then explained:

> If this procedure is followed, we can pass upon the propriety of the probate court's action. We need to have that court's findings before us before we decide whether or not its judgment should be stayed. As matters now stand, this court is granting a stay without benefit of the findings of the trial court which heard this matter and which may know more about it than we do.

I would follow the same procedure today and for the same reasons. Here too, a motion for stay was filed in the trial court and was not ruled upon — at least not directly. Seven days after entry of the change of custody order, it was stayed on the court's own motion, pending disposition of perjury charges filed against a witness whose testimony was the primary basis of the court's decision. Six months later, the court, without a hearing, entered an order finding that the witness had been acquitted on the perjury charges and lifting the stay order. The complete transcript of the proceedings in the trial court have been filed here and there is no order by the trial court which rules upon appellant's request for a stay, and there are no findings of fact or law in that regard. Those findings would be extremely helpful to us and we should have taken the necessary steps to secure them before ruling on the motion to stay filed in this court.

While today's per curiam may result in another opportunity for the trial court to make those findings, we should have, at least, granted a stay for a period sufficient in time to allow that court to act. As it stands now, there is the potential for conflicting orders which would unnecessarily

pull this five-year-old child back and forth until the appeal is decided.

Parenthetically, I note that if trial courts have had any question of their authority to stay or supersede their own change of custody orders pending determination of an appeal, it should be dispelled by today's per curiam and the case of *Goodin* v. *Goodin,* 240 Ark. 541, 400 S.W.2d 665 (1966), cited therein.

ROC-ARC WATER COMPANY and
THE HARTFORD INSURANCE COMPANY
v. George E. MOORE

CA 83-352 664 S.W.2d 500

Court of Appeals of Arkansas
Division II
Opinion delivered February 15 1984

Dale Grady, for appellant.

Gary Eubanks & Associates, by: *James Gerard Schulze,* for appellee.

LAWSON CLONINGER, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission which awarded disability benefits to appellee, George E. Moore. Appellee allegedly sustained an on-the-job injury on August 24, 1981, while employed by appellant, Roc-Arc Water Company.

The evidence shows that appellee collapsed and fell, striking his head on a concrete floor, while in the process of loading five-gallon mineral water bottles onto a delivery truck. The trauma from the blow to his head caused a brain injury requiring surgery, and resulted in disability.

The Commission found that appellee suffered an "unexplained fall" at work, that it was compensable, and that there was "no medical evidence that any internal condition personal to the claimant and unrelated to his employment caused claimant's fall." Appellant contends that the decision of the Commission has no basis under the facts or the law. We do not agree, and the decision of the Commission is affirmed.

Appellant urges that the decision of the Commission places the cause of appellee's disability somewhere between an "unexplained fall" and an "idiopathic fall," i.e., an occurrence caused by a non-occupational illness or weakness personal to the claimant. The administrative law judge based his finding of compensability upon the fact that "this incident followed weakness and dizziness while performing relatively strenuous work and in the absence of medical proof of internal contributing factors." The law judge, then, as well as the Commission, ruled out an idiopathic cause. The law judge apparently did not rule out the possibility that the injury arose because of the working conditions, giving credibility to the evidence of appellee that he became hot, tired and dizzy just prior to falling; the Commission, however, squarely based its decision upon its

finding that the fall was unexplained, and on this appeal we consider only the decision of the Commission. See *Kearby* v. *Yarbrough Brothers Gin Company,* 248 Ark. 1096, 455 S.W.2d 912 (1970).

There was evidence from which the Commission might have found that appellee's fall arose out of a condition personal to appellee. There was testimony that appellee had suffered some type of seizure on a previous occasion and had been treated at the University of Arkansas Medical Center at that time. There was no medical evidence that appellee suffered any illness prior to his fall or that he was prone to seizures.

The rule is that an appellate court is to review the evidence and all reasonable inferences therefrom in the light most favorable to the Commission and must uphold the Commission's findings if there is any substantial evidence to support them, even if the preponderance of the evidence would indicate a different result. *Hawthorne* v. *Davis,* 268 Ark. 131, 594 S.W.2d 844 (1980).

The Commission found by a preponderance of the evidence that appellee's fall arose in the course of his employment and that it was unexplained, and there is substantial evidence to support that finding. The fact situation in this case is strikingly similar to the one in the case of *Fairview Kennels* v. *Bailey,* 271 Ark. 712, 610 S.W.2d 270 (Ark. App. 1981). In *Fairview Kennels,* this court affirmed the Commission's finding that an unexplained fall was compensable, holding that the decision was supported by substantial evidence. In that case, the claimant had explained her fall as follows: "I was cleaning the kennels in back and disinfecting them, and I was going to the front to refill the disinfectant bottle, and I fell and couldn't get up." The court held that there was a sufficient explanation upon which the Commission could find that the claimant fell while doing the work her job required and that she thereby received an injury arising out of her employment. The court held that this was a question of fact and had been determined by the Commission.

Appellee, in explaining his fall, testified that the truck he was loading was behind schedule; that he had not taken his usual break because they were behind; that he became hot and fatigued and dizzy; that he had just told a fellow employee how tired he was; and that the next thing he knew he fell out and hit the concrete floor.

A question of fact was presented to the Commission, and although the Commission perhaps could have found that the injury was attributable to an idiopathic fall, which would not have been compensable, or to a fall arising out of appellee's employment, the Commission chose to find that the fall was unexplained and there is sufficient evidence to warrant that finding.

Affirmed.

CORBIN and COOPER, JJ., agree.

Stephen J. CONTI *v.* STATE of Arkansas

CA CR 83-143 664 S.W.2d 502

Court of Appeals of Arkansas
Division II
Opinion delivered February 15, 1984

Hubbard, Patton, Peek, Haltom & Roberts, by: *Raymond W. Jordon,* for appellant.

Steve Clark, Atty. Gen., by: *Marci Talbot,* Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant was convicted by jury verdict of forgery in the second degree and sentenced to five years in prison. Appellant urges five points for reversal of his conviction, but we find no reversible error.

Appellant's first point for reversal is that the trial court erred in ruling that appellant's statement to the police was voluntarily given.

Appellant's version of the events transpiring after his arrest was that he first gave a tape recorded statement, was then advised of his rights, and the next day signed a transcribed copy of his statement. The only threat or intimidation claimed by appellant was that a police officer threatened to give him a "Southern haircut." Appellant testified that if the tape were played the recording would be identical to the transcribed statement. He stated that he had been advised of his right to remain silent before he signed the transcribed statement, but not prior to the giving of the recorded statement.

Officer Claude Wells testified that appellant was advised of his rights prior to the giving of the recorded statement and that appellant signed a standard waiver of rights form. The bottom portion of the rights form consisted of a waiver of rights, stating that appellant had read the statement of his rights, understood them, was willing to make a statement and answer questions, and did not want an attorney. Officer Wells testified that the recorded statement was transcribed, and that on the next day appellant read it, stated that there were no corrections needed, and signed it. Officer Wells testified that no promises or threats were made and specifically denied threatening to cut appellant's hair.

Where the voluntariness of a confession is in issue, any conflict in the testimony of the witnesses is for the trial court to resolve. *Williamson* v. *State,* 277 Ark. 52, 639 S.W.2d 55 (1982). There was a conflict in the testimony of Officer Wells and appellant, and this court must defer to the superior

position of the trial judge to make such a resolution. *Brewer* v. *State,* 271 Ark. 254, 608 S.W.2d 363 (1980).

Appellant's second point for reversal is that the trial court erred in admitting into evidence the transcribed copy of appellant's confession and refusing to require the state to introduce into evidence the recording of the statement. Appellant argues that the best evidence rule was violated by the introduction into evidence of the transcribed statement, citing Rule 1002 of the Uniform Rules of Evidence. Rule 1002 provides in pertinent part as follows:

> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required. . . .

We do not perceive the issue here to involve the best evidence rule. What we have is a new statement, signed by appellant after he was admittedly advised of his rights. In any event, there is no showing of prejudice, because all the evidence, including the testimony of appellant, was that the recording and the transcribed statement were identical.

Appellant's next point for reversal is that the trial court erred in overruling appellant's objection to the prosecutor's closing argument that (1) appellant intended to commit additional criminal violations and (2) appellant could not pay a fine.

The general rule is that the prosecutor may not assert that the defendant's character is questionable where there is no adequate justification in the evidence. *Gustafson* v. *State,* 267 Ark. 278, 590 S.W.2d 853 (Ark. App. 1979). It is also a fundamental rule that the closing arguments of counsel must be confined to the questions in issue, the evidence introduced at the trial and all reasonable inferences and deductions which can be drawn therefrom. *Simmons & Flippo* v. *State,* 233 Ark. 616, 346 S.W.2d 197 (1961). The trial judge, however, has a very broad latitude of discretion in supervising and controlling arguments of counsel, and his action is not subject to a reversal unless there is manifest gross abuse of that discretion. *Parker* v. *State,* 265 Ark. 315,

578 S.W.2d 206 (1979). Not every comment, though improper, is of such magnitude as to constitute reversible error. See *Gustafson* v. *State, supra,* where the prosecutor referred to certain persons as "rats"; *Miller* v. *State,* 250 Ark. 199, 464 S.W.2d 594 (1971), where the prosecutor referred to the defendant as a con artist; *Johnson* v. *State,* 249 Ark. 208, 458 S.W.2d 409 (1970), where the prosecutor remarked that the defendant apparently made a livelihood from crime.

Both comments by the prosecutor in this case were logical inferences that could be drawn from the evidence. Appellant admitted that he had the alleged victim's entire checkbook on him which had eight additional checks in it, and there was no evidence that appellant had attempted to return the checks to the owner. Appellant stated that he had no mailing address or residence, and that he had arrived in Texarkana, Arkansas, where he was arrested, at 2:30 a.m. the day he was arrested, on a freight train.

Appellant contends that the trial judge was in error when he failed to give any admonition to the jury regarding the prosecutor's remarks, but the record reflects that no request was made for an admonition. Appellant made no request that the trial court take any specific action, and he cannot now complain that no action was taken. *Miller* v. *State,* 269 Ark. 341, 605 S.W.2d 430 (1980).

The trial court instructed the jury that "closing arguments of the attorneys are not evidence" and that "any arguments, statements or remarks of attorneys having no basis in the evidence should be disregarded by you." Those instructions by the court were sufficient to cure any impropriety on the part of the prosecutor. See *Abraham* v. *State,* 274 Ark. 506, 625 S.W.2d 518 (1981).

Appellant's final point for reversal is that the statutory sentence for forgery in the second degree, and the five year sentence in this case, are violative of constitutional provisions against cruel and unusual punishment.

Forgery in the second degree is a class C felony under the

provisions of Ark. Stat. Ann. § 41-2302(5) (Repl. 1977), and Ark. Stat. Ann. § 41-901 (Supp. 1981), provides that the sentence for a class C felony is from four to ten years.

It is within the power of the legislature to classify crimes and to determine punishment. *Stout* v. *State,* 249 Ark. 24, 458 S.W.2d 42 (1970). The Arkansas Supreme Court has consistently held that if a sentence comes within the limits imposed by statute, it is not cruel and unusual. See *Stout* v. *State, supra; Wilson* v. *State,* 271 Ark. 682, 611 S.W.2d 739 (1981). The fact that punishment is severe does not make it cruel or unusual. *Hinton* v. *State,* 260 Ark. 42, 537 S.W.2d 800 (1976).

In this case appellant did not receive the maximum punishment authorized by law but instead received only one year above the minimum of four years.

The judgment of the trial court is affirmed.

COOPER and CORBIN, JJ., agree.

Cleda CANTRELL *v.* Vernon CANTRELL

CA 83-105 664 S.W.2d 493

Court of Appeals of Arkansas
Division I
Opinion delivered February 15, 1984

[redacted]

[redacted]

W. H. "Dub" Arnold, for appellant.

Henry Morgan, for appellee.

TOM GLAZE, Judge. In this divorce case, appellant argues two points for reversal, contending the court erred (1) in placing appellee in possession of the parties' homestead and estate by the entirety rather than ordering it partitioned or sold; and (2) in making an unequal distribution of their personal property. On cross-appeal, appellee contends the chancellor erred (1) in granting appellant the divorce, and (2) in failing to award appellee any child support. After our review, we affirm the trial court on all points.

First, we consider appellant's arguments in the order presented above. The appellee was decreed possession of the parties' house and property so long as he lives in the house and does not remarry. He was also ordered to pay all taxes, insurance, maintenance and upkeep required on the property. Appellant contends the trial court's failure to partition or sell the parties' estate by the entirety prevented her receiving the one-half share of the property to which she was entitled. We find no merit in this contention. The trial court had two options in disposing of property held by the entirety: it could put one of the parties in possession of the premises, or it could order the property sold and the proceeds divided. *See Lytle* v. *Lytle,* 266 Ark. 124, 583 S.W.2d 1 (1979). Our courts have also held that the trial court may award the possession of the homestead to either spouse, upon such terms as appear to be equitable and just. *Hada* v. *Hada,* 10 Ark. App. 281, 663 S.W.2d 203 (1984). Here, the parties have resided on this fifty-six acre farm since 1972.

Before that time, appellee owned the property individually. After the parties' home was built in 1972, appellee paid the house payments and appellant bought their furniture. During the course of the parties' marriage, appellee became blind. His only sources of income are social security disability checks and earnings from the sales of cattle and hay from the farm operation. The appellant, on the other hand, has worked for twenty-five years and is presently employed by a lumber company. Appellee receives $470 disability pay per month for both himself and Royce, his sixteen-year-old son who lives with him; appellant earns $3.65 per hour, and takes home just over $100 per week. Given the law applicable to the disposition of homesteads held by the entirety and discussed in *Lytle* v. *Lytle, supra,* and *Hada* v. *Hada, supra,* the chancellor clearly had the authority to place the appellee in possession of the parties' homestead; and after reviewing the record, we cannot say he was clearly wrong in doing so.

Appellant's second point concerns the trial court's unequal distribution to appellee of the farm equipment and other farm personalty, valued at $22,575; appellant was awarded only the Avon and Mary Kay products valued at $4,158.75. All other marital personalty was divided equally between the parties. Unquestionably, the chancellor had authority to make an unequal division of the parties' personal property so long as he considered the factors set forth in Ark. Stat. Ann. § 34-1214 (Supp. 1983), and stated in writing his reasons for doing so. *See Ford* v. *Ford,* 272 Ark. 506, 616 S.W.2d 3 (1981). Here, the trial judge, in his decree, based the unequal property distribution upon the fact that appellee is blind and unemployable, while appellant is employable and has always worked outside the home. The chancellor reasoned that appellee's livelihood is dependent upon his farming the land, and the farm equipment, cattle, hay and other items awarded him are necessary for the farming operation. The judge further found that appellant had not contributed to the home expenses or payments and had not used her money for the family's benefit. These findings and the evidence, we believe, support the unequal division of property awarded by the chancellor.

Next, we turn to appellee's contentions on cross-appeal. Appellee first argues the appellant failed to prove and corroborate her grounds for divorce. Appellant alleged general indignities as her grounds, and, among other things, she presented evidence that appellee had accused her of infidelity with appellee's nephew, Lyle Gann. Although appellee offered testimony placing appellant with Gann on different occasions, he conceded that he was unaware if they "have ever had any type of relationship." In fact, none of the evidence established appellant was guilty of infidelity, and such unfounded assertions were in themselves indignities justifying a dissolution of the marriage. *Dennis* v. *Dennis,* 239 Ark. 384, 389 S.W.2d 631 (1965). In addition, appellant testified to instances when appellee argued with her and embarrassed her in front of friends and family members. She said that for several years prior to their separation, she was not allowed to write checks or to buy groceries. Appellee's parents testified and corroborated such indignities. In view of the evidence presented, we cannot say the chancellor was wrong in granting the divorce to appellant.

Finally, we also conclude that the chancellor's decision not to award monthly child support is not clearly against the preponderance of the evidence. The amount of child support to be awarded, if any, rests in the discretion of the court granting the divorce and is to be determined from the circumstances and the situation of the parties. *See Upchurch* v. *Upchurch,* 196 Ark. 324, 117 S.W.2d 339 (1938); and *Biddle* v. *Biddle,* 208 Ark. 777, 187 S.W.2d 720 (1945). We agree with appellee that gender, in itself, cannot serve as a basis or consideration for awarding or not awarding child support; however, the record clearly reflects that situation does not exist here. In fact, the parties' son, Royce, receives a disability check in the monthly sum of $138, and because he lives with appellee, Royce will also benefit from any supplemental income that is gained from the farming operation. Obviously, appellant, under the court's decree which places appellee in possession of the home and awards him the farm operation, is sharing in the support of Royce. In view of the circumstances in this case, we do not believe the chancellor erred in failing to award additional monthly child support.

Affirmed.

CLONINGER and CORBIN, JJ., agree.

Roy Lee GOLDEN *v.* STATE of Arkansas

CA CR 83-111 664 S.W.2d 496

Court of Appeals of Arkansas
Division I
Opinion delivered February 15, 1984

Bill E. Ross, Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. This appeal arises from appellant's conviction for burglary for which he was sentenced to ten years in the Department of Correction. The facts of the case are undisputed. Two Blytheville police officers, Don Pease and John Blair, testified that at approximately 5:30 A.M. on September 14, 1982, an alarm went off at the Blytheville Police Department, indicating that someone had entered Southern Farmers' Association, a chemical business. Police officers went to the building, found the front door locked, and summoned Doug Truelove, the assistant manager, to let them in. Their search of the building revealed appellant in the bathroom behind the door and a broken window in the

office area. The secretary's desk had been rifled. The appellant, who had a cut on his hand, had some Band-Aids in his shirt pocket which Truelove identified at trial as having come from the secretary's desk drawer.

The appellant was charged by information with burglary. To prove burglary, the State was required to show the appellant entered the Southern Farmers' building "with the purpose of committing therein any offense punishable by imprisonment." *See* Ark. Stat. Ann. § 41-2002 (Repl. 1977). Toward that end, the State at trial was permitted, over the objections of appellant's counsel, to introduce evidence showing that appellant had three previous convictions for burglary, two in 1979 and one in 1980. These convictions all resulted from guilty pleas by the appellant. In holding such evidence admissible under Rule 404(b) of the Uniform Rules of Evidence, the trial court found that "the best, strongest and most probative evidence available to the State" to show the defendant's "purpose, intent or state of mind . . . at the time he entered the building" was "to allow the prior offenses of a similar nature." Appellant contends the trial judge erred in permitting the State to introduce the three prior burglary convictions to show appellant's intent. Appellant also contends the trial judge erred in not submitting, on its own motion, a cautionary instruction to the jury respecting the three prior convictions. Since appellant's second point for reversal is the easier to resolve, we will discuss it first.

The record reveals that the trial court and appellant's attorney discussed the possibility of a limiting instruction. Appellant's attorney refused the trial court's offer to give such an instruction because he felt "any cautionary instruction would be ridiculous." The trial court's failure to give a cautionary instruction on its own motion was not otherwise raised at the trial level; therefore, it will not be considered in this appeal. *Smith* v. *State,* 266 Ark. 861, 587 S.W.2d 50 (1979), *cert. denied* 445 U.S. 905 (1980).

The main issue presented in this appeal is the proper application of Uniform Rule of Evidence 404(b), which states:

> (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,* 268 Ark. 535, 597 S.W.2d 598 (1980), the Supreme Court set forth the analytic framework to be followed in resolving 404(b) questions. *Price* requires that evidence of other crimes pass two tests to be admissible: (1) the other crimes evidence must be independently relevant, and (2) must meet the "probative value versus unfair prejudice" balancing test of Uniform Rule of Evidence 403. Whether the evidence of the three prior guilty pleas is relevant to show appellant Golden's specific intent to commit an offense punishable by imprisonment is a difficult matter to resolve. Because the introduction of the three prior pleas violates the Rule 403 test, we find it unnecessary to decide the relevancy issue.

Rule 403 states:

> Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. — Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This rule is easier stated than applied. The difficulty arises in the calculations a court must make to apply Rule 403 to a piece of evidence. The probative value and unfair prejudice of the evidence must be assessed somehow and these values must be compared to determine which will advance the search for truth. On the basis of this comparison, the proffered evidence is admitted or rejected.

Evidence of appellant's prior guilty pleas to burglary charges is no doubt highly prejudicial because of its

tendency to portray appellant as "a man of bad character, addicted to crime." *Alford* v. *State,* 223 Ark. 330, 266 S.W.2d 804 (1954). Such prejudice has a tendency to lead one to conclude that appellant must be guilty. Because the three previous guilty pleas are so prejudicial, this Court will review the facts to determine if, without the prior burglary convictions, the State proved the burglary charges against the appellant. If the State's evidence otherwise supports appellant's conviction, then the prior guilty pleas should not have been admitted — for reasons we will discuss later.

Before reviewing the facts, we first analyze the controlling case law on the subject on burglary. In several Arkansas cases prior to 1980, the Supreme Court held that the specific intent with which a person enters a building can be inferred from the circumstances of his illegal presence in the building. In these cases, as in the case at bar, the police arrested the alleged burglar after his illegal entry, but before he could commit a felony or theft inside the building. These cases are *Scates* v. *State,* 244 Ark. 333, 424 S.W.2d 876 (1968); *King* v. *State,* 256 Ark. 778, 510 S.W.2d 876 (1974); *Randle* v. *State,* 257 Ark. 232, 516 S.W.2d 6 (1974); and *Grays* v. *State,* 264 Ark. 564, 572 S.W.2d 847 (1978). Thus, given appellant's illegal presence in the Southern Farmers' building, and the permissible inferences allowed under the foregoing decisions, the State appears to have had a strong case on the intent issue, *i.e.,* appellant entered the building with the intent to commit an offense punishable by imprisonment.

However, in 1980, the Arkansas Supreme Court decided *Norton* v. *State,* 271 Ark. 451, 609 S.W.2d 1 (1980), and in doing so, the Court distinguished its earlier case of *Grays* v. *State, supra,* explaining that an accused's mere illegal presence was insufficient to show his intent to commit a burglary. The Court said:

> [A] specific criminal intent, which is an essential element of the crime of burglary, cannot be presumed from a mere showing of illegal entry of an occupiable structure. The prosecution must prove each and every element of the offense of burglary beyond a reasonable doubt and cannot shift to the defendant the burden of

> explaining his illegal entry by merely establishing it. Not only is illegal entry an independent element of burglary, but it also constitutes a separate crime punishable as criminal trespass. Ark. Stat. Ann. § 41-2004 (Repl. 1977). By implying a specific criminal intent from mere evidence of illegal entry, the state not only evades its constitutional evidentiary burden in criminal prosecutions but imposes upon a defendant the responsibility to prove he only committed a criminal trespass or stand in jeopardy of a conviction of burglary.

Id. at 453-54, 609 S.W.2d at 3. In *Norton,* the defendant had done nothing more than illegally enter a building. There was *no* evidence that the accused had taken anything.

Norton gives some indication of the constitutionally permissible manner in which the State can prove the specific intent for burglary. The Supreme Court in *Norton* distinguished *Grays* by observing that there the defendant had fled from the police. The Court held the flight of the accused is evidence of felonious intent. In *Johnson* v. *State,* 7 Ark. App. 172, 646 S.W.2d 22 (1983), this Court distinguished *Norton* by noting that there was evidence from which a jury could infer the defendant's theft of a purse after he had illegally entered an apartment. From the inferred fact of the defendant's theft, this Court held that a jury could infer his specific intent in entering the apartment.

In the case at bar, there are facts other than the defendant's illegal entry which establish his specific intent. In this case, as in *Johnson,* the defendant stole something after making an illegal entry. As we previously noted, appellant gained entry into the building through a broken window at 5:30 A.M. Once inside the building, appellant Golden rifled a secretary's desk and removed some Band-Aids. Golden's appropriation of the Band-Aids is a violation of Ark. Stat. Ann. § 41-2203 (Repl. 1977) — theft of property. This exercise of unauthorized control over the property of another is direct evidence of his intent to commit an offense punishable by imprisonment inside the building. *See Johnson, supra.* Theft of property is at the least a Class A

misdemeanor, which is punishable by imprisonment. *See* Ark. Stat. Ann. § 41-901(2)(a) (Supp. 1983). In sum, without the prior burglary convictions, the State's evidence established the appellant committed a burglary under either the holding in *Grays* or in *Norton.*

With the availability to the State of other means of proving appellant Golden's specific intent and in the highly prejudicial nature of the three prior guilty pleas, the convictions should not have been admitted. In terms of Uniform Rule of Evidence 403, the "probative value" of the three prior guilty pleas was "substantially outweighed by the danger of unfair prejudice." Given the similarity of the three pleas to the charge appellant Golden faced, their prejudicial effect was obvious.

The probative value of evidence is not usually as glaring as its prejudicial effect. No Arkansas case authority explains how to assess probative value. However, highly persuasive federal authorities indicate the probative value of evidence correlates inversely to the availability of other means of proving the issue for which the prejudicial evidence is offered. *See* Advisory Committee's Notes to Fed. R. Evid. 403 and Fed. R. Evid. 404(b); and M. Graham, *Handbook of Federal Evidence,* § 404.5, at 213 (1981). This means of determining probative value was clearly expressed by the United States Fifth Circuit Court of Appeals in *United States* v. *Beechum,* 582 F.2d 898, 914 (5th Cir. 1978):

> Probity in this context is not an absolute; its value must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference. It is the incremental probity of the evidence that is to be balanced against its potential for undue prejudice. Dolan, *Rule 403: The Prejudice Rule in Evidence,* 49 S.Cal.L.Rev. 220, 234-35 & n.52 (1976); *see United States* v. *Baldarrama,* 566 F.2d 560, 568 (5th Cir. 1978). Thus, if the Government has a strong case on the intent issue, the extrinsic offense may add little and consequently will be excluded more readily.

Id. at 914. *See also, United States* v. *Dolliole,* 597 F.2d 102, 106 (7th Cir. 1979).

As these authorities indicate, the probative value of appellant Golden's previous guilty pleas regarding his specific intent depends on the strength of the State's case on intent without evidence of the prior convictions. As the above analysis has shown, the State had direct as well as circumstantial evidence from which the jury could have inferred appellant intended to commit theft. Therefore, we reverse and remand this case for a new trial.

Reversed and remanded.

MAYFIELD, C.J., and CRACRAFT, J., agree.

Patsy Smith CRABB *v.* James E. SMITH

CA 83-37 664 S.W.2d 510

Court of Appeals of Arkansas
Division II
Opinion delivered February 22, 1984

Anthony W. Bartels and *Val P. Price,* for appellant.

No brief for appellee.

MELVIN MAYFIELD, Chief Judge. Appellant and appellee were married in 1960 and divorced in 1976. In the divorce action brought by the appellee, he was awarded custody of the parties' two minor children and possession of the family home. Title to the home was converted from a tenancy by the entirety to a tenancy in common. Appellant reopened the case in 1982 when she filed a petition for a change of custody of the remaining minor child and, in addition, requested partition of the home or, in the alternative, sale of the property and equal division of the proceeds. The custody matter was subsequently dropped and a hearing was held solely on the issue of partition. From a denial of her petition, appellant brings this appeal.

Appellant was not represented by counsel during the divorce proceeding although she was employed and presumably could have obtained an attorney. She filed a Waiver of Service and Entry of Appearance in which she specifically agreed that appellee was to have custody of the minor children; that he was to have possession of the family home; and that title to the home would be converted to a tenancy in common. The order denying partition is based on the finding that the agreement contained in the Waiver of Service and Entry of Appearance is a valid contract which the court cannot modify. The appellee has not filed a brief and our task is never made easier by a one-brief case.

We agree with the appellant's contention that the agreement in the Waiver of Service and Entry of Appearance was not the formal independent agreement which could be

enforced in a court of law and which the chancellor could not modify. It was signed by the appellant only and, in regard to possession of the home, it simply states, "It is further understood and agreed that the plaintiff is to be awarded possession of the home and that the home be made an Estate in Common." It seems clear that this is intended merely as a means of dispensing with proof on this issue and by its very terms is not designed to constitute an enforceable, independent contract. Thus, the agreement merges in the court's decree and could be changed. *See Armstrong* v. *Armstrong*, 248 Ark. 835, 454 S.W.2d 660 (1970); *Seaton* v. *Seaton*, 221 Ark. 778, 255 S.W.2d 954 (1953); *Holmes* v. *Holmes*, 186 Ark. 251, 53 S.W.2d 226 (1932).

This does not mean, however, that the court's decree should be changed. The appellant testified that she signed the agreement because she wanted to make sure that her children — whose custody she also agreed would be awarded to appellee — would have a place to stay. At the time of the hearing on the partition question, the parties' son was 13 years of age and still lived in the home with the appellee. There is no doubt that the chancellor had the right to place the appellee in possession of the home, even for life. *See Yancey* v. *Yancey*, 234 Ark. 1046, 356 S.W.2d 649 (1962). *See also Russell* v. *Russell*, 275 Ark. 193, 199, 628 S.W.2d 315 (1982) and *Bratcher* v. *Bratcher*, 5 Ark. App. 250, 635 S.W.2d 278 (1982). The court denied the appellant's petition for partition and in our de novo review of the record we find no change in circumstances to warrant a change in possession of the home. For that reason, we affirm the chancellor's decision.

COOPER and GLAZE, JJ., agree.

Michael WAYMACK *v.* KCLA, INC.

CA 83-57 664 S.W.2d 509

Court of Appeals of Arkansas
Division II
Opinion delivered February 22, 1984

Eilbott, Smith, Eilbott, & Humphries, by: *Zachary Taylor,* for appellant.

Ramsay, Cox, Lile, Bridgeforth, Gilbert, Harrelson & Starling, by: *L. Layne Livingston,* for appellee.

MELVIN MAYFIELD, Chief Judge. This case involves an employment contract. The appellant filed suit seeking payment for two weeks vacation time. The trial court found against him. We reverse.

The case was submitted upon a written stipulation of fact with a copy of the employment agreement attached

thereto. No other evidence was presented. The stipulation states that the appellant was originally hired under a written contract for six months; that he worked the full six-month period and his contract was not renewed; that the parties then entered into an oral contract of employment terminable at the will of either party; that approximately one month later the appellant's employment was terminated; and that appellant then demanded payment for the two weeks vacation time. Two portions of the stipulation state:

> 2. That the parties to the contract understood that Michael Waymack would receive compensation in the amount set forth in paragraph 3(a) for any vacation taken while he was an employee of KCLA, Inc. for the period allowed under the contract as set forth in paragraph 9.
>
> 9. *Vacation* The employee shall be entitled to four (4) weeks of vacation time during each employment year in which this contract remains in force which shall accrue at the rate of two weeks for each six months of such employment. Employee's vacation time, except with the express permission of management of the Employer to the contrary, will be taken in increments not in excess of one week.

To sustain the trial court's decision, the appellee cites us to 53 Am. Jur. 2d *Master and Servant* § 80 (1970), which states: "The rights to vacation pay or to pay in lieu of vacation time not taken depend upon the express or implied terms of the employment contract." Cited in that section is the case of *Oil Fields Corporation* v. *Hess*, 186 Ark. 241, 248, 53 S.W.2d 444 (1932), which states:

> Where an employee is given a vacation with pay, or a leave of absence is granted, or where the employee's absence is involuntary as where the employer fails to furnish work, the employee is entitled to his wages for the time off. (Citation omitted.)

In our case, the stipulation plainly states that the contract provides that the employee shall be entitled to

vacation time which shall accrue at the rate of two weeks for each six months of employment and that the "parties to the contract understood" that the appellant would receive compensation for vacation time taken. *Green* v. *Ferguson*, 263 Ark. 601, 567 S.W.2d 89 (1978), says: "It is well settled that whenever parties to a contract express their intention in clear and unambiguous language in a written instrument, it is the court's duty to construe the writing in accordance with the plain meaning of the language employed." We think the contract here clearly provides that at the end of six months employment the appellant will have accrued two weeks vacation. The fact that his contract was not renewed did not affect the vacation time he had earned. To hold that he lost the two weeks vacation because his contract expired the day he became eligible for the vacation is to create an illusory contract that the parties simply did not make.

The appellee relies upon the case of *Lim* v. *Motor Supply, Ltd.*, 45 Hawaii 198, 364 P.2d 38 (1961). That case holds that a discharged employee, hired under a contract providing for an annual two-week vacation, was not entitled to be paid for vacation time accumulated over his whole period of employment of several years, and the court pointed out that "though plaintiff's annual vacation of two weeks may have been a matter of right, when this right was not insisted upon each year and instead was tacked on to the current two weeks vacation time, it became as to the excess merely a privilege which might be and in fact was lost." We think the case really supports the appellant's claim. There is no claim here for vacation time not taken when it became due, and we certainly do not think the additional thirty-day period that appellant worked should cause him to lose the vacation earned during his six-month employment period.

Another case, found in the pocket supplement to 53 Am. Jur. 2d, *supra*, leads us to the same conclusion. In *Olson* v. *Rock Island Bank*, 33 Ill. App. 3d 914, 339 N.E.2d 39 (1975), the court said the bank seemed to contend that since an employee was not entitled to a vacation credit for 1973 until January 1, 1974, he could not claim the vacation because he was retired on January 1, 1974. That interpretation was rejected.

Reversed and remanded with directions to enter judgment in appellant's favor for $750.00, which is one-half of his monthly compensation.

COOPER and GLAZE, JJ., agree.

Howard J. BARNES and Barbara BARNES, *v.*
ARKANSAS STATE HIGHWAY COMMISSION

CA 83-107 664 S.W.2d 884

Court of Appeals of Arkansas
Division II
Opinion delivered February 22, 1984
[Rehearing denied March 21, 1984.]

Ball, Mourton, & Adams, for appellants.

Thomas B. Keys and *Chris Parker,* for appellee.

GEORGE K. CRACRAFT, Judge. Howard J. Barnes and Barbara Barnes appeal from a judgment entered on a jury verdict assessing just compensation for the taking of their lands by the Arkansas State Highway Commission. They contend that the trial court erred in denying their motions to suppress evidence regarding two ordinances of the City of Fayetteville and in allowing the appellee to present evidence of enhanced value to their remaining lands as a result of the taking. We find no error.

In 1969 the City of Fayetteville adopted Ordinance No. 1661 which as amended required all developers of lands abutting controlled access highways to submit to the City Planning Commission a plat of any proposed development and required that each such development include a 50 foot right-of-way for a service road across the property. It further required that the construction of the service road was to be at the individual developer's expense but deferred the obligation of construction until all property between it and the outlet to the controlled access highway had been provided. The ordinance further required the service road to be dedicated to the City of Fayetteville. At that same time the city council adopted Ordinance No. 1662 declaring the entire length of U.S. 71 Bypass to be a controlled access highway.

Ten years later the Highway Commission determined that it would construct a service road adjacent to U.S. 71 Bypass at state expense. In November 1979 the Commission commenced condemnation proceedings against appellants to acquire right-of-way for the service road. Appellants owned jointly one tract of land across which the service road passed and appellant Barbara Barnes owned a tract immediately south of it in her own right. The two proceedings were consolidated and set for trial on September 20, 1982.

Immediately prior to the commencement of the trial the appellants made oral motions in limine seeking to suppress testimony regarding the city ordinances. These motions were denied and the State's experts were allowed to testify that in arriving at the fair market value of lands immediately before the taking they had given consideration to the existence of these ordinances along with all other factors affecting market value. They testified that any knowledgeable buyer would be aware of the financial burden these ordinances imposed upon the owner to construct service roads and would discount the price they would be willing to pay.

In arriving at the market value of the lands immediately after the taking the experts also took into consideration the fact that the taking had relieved the owner of the lands of that financial burden and in their opinion this factor would enhance the value of the remaining property. The court instructed the jury that they could consider these ordinances in determining fair market values of the land and gave a proper instruction that the Commission had the burden of proving that the highway had enhanced the value of the property remaining after the taking and that the benefits were of a special and peculiar nature not shared by the general public. *Ark. Hwy. Comm'n* v. *Hambuchen,* 243 Ark. 832, 422 S.W.2d 688 (1968).

The appellants argue that these ordinances were invalid and that during the pendency of this appeal the Supreme Court declared them to be in violation of Ark. Const. art. 2, § 22. *Calabria* v. *City of Fayetteville,* 277 Ark. 489, 644 S.W.2d 249 (1982). They contend that the court erred in permitting testimony regarding the ordinances and instructing the jury as to enhancement.

It is well settled that the measure of damages for the taking of private property for highway purposes is the difference in the fair market value of the lands immediately before the taking and immediately after less any enhancement in value resulting from the taking. *Young* v. *Ark. State Hwy. Comm'n,* 242 Ark. 812, 415 S.W.2d 575 (1967).

Ark. Stat. Ann. § 76-521 (Repl. 1981) specifically provides that in cases of condemnation for highway purposes the jury may deduct from the value of lands taken any benefits the highway may confer on the remaining land. *Bridgman* v. *Baxter County,* 202 Ark. 15, 148 S.W.2d 673 (1941). It is also settled that in arriving at "before and after" value of the lands a jury may consider every element that can fairly enter into the question of market value and which a businessman of ordinary prudence would consider before purchasing the property. *Ark. State Hwy. Comm'n* v. *1st Pyramid Life Ins.,* 269 Ark. 278, 602 S.W.2d 609 (1980). Whether these ordinances were invalid or would subsequently be held unconstitutional was not the issue in the trial court. The issue was whether the fact that they existed, unchallenged and presumptively valid *at the time of taking* was a factor that an ordinary prudent person would consider before purchasing the property. From the evidence the jury could, and from its verdict it obviously did, believe that they were a factor and that the action of the Highway Commission in relieving the landowner of this financial burden was a factor that an ordinary prudent man would consider before making the purchase.

We find no error.

MAYFIELD, C.J., and COOPER, J., agree.

Gary WOLF *v.* STATE of Arkansas

CA CR 83-173 664 S.W.2d 882

Court of Appeals of Arkansas
Division II
Opinion delivered February 22, 1984
[Rehearing denied March 21, 1984.]

Guy Jones, Jr., P.A., for appellant.

Steve Clark, Atty. Gen., by: *Marci L. Talbot,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant was charged with manufacturing a controlled substance, *i.e.*, marijuana. After a trial by jury, the appellant was convicted and sentenced to four years in the Department of Correction. From that decision, comes this appeal.

For reversal, the appellant argues that the affidavit upon which the search warrant was based was fatally defective, and that there was insufficient evidence presented at his trial concerning control of the premises upon which the marijuana was discovered to support his conviction.

The appellant argues that the affidavit was insufficient to support the issuance of the search warrant in two respects: first, the affidavit of Sheriff Gus Anglin, the Van Buren County Sheriff, failed to establish the reliability of the confidential informant or give sufficient basis for reasonable cause for issuance of the search warrant and second, that the search warrant did not properly describe the property to be searched to such a degree as to give the officers executing the warrant sufficient guidance in reference to what area was to be searched. The affidavit upon which the search warrant was based states:

> The undersigned, being duly sworn, deposes and says: That a confidential informant observed green vegetable matter appearing to be marijuana on the 31st day of August, 1982. He informed me that he discovered the green vegetable matter on property located in the E1/2 SE1/4, Sec. 30, T-12-N, R-14-W, in Van Buren County, Arkansas. This is the same confidential informant who helped us in the case of State versus Howard Broyles.

In prior cases, affidavits supporting search warrants had to pass a two-pronged test adopted by the United States Supreme Court in *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *State* v. *Prue*, 272 Ark. 221, 614 S.W.2d 221, cert. denied, 454 U.S. 863 (1982). The affidavit had to reflect 1) some underlying circumstance showing the reliability of the informant and 2) some underlying circumstance from which the informant concluded that the items to be seized were where he

said they were. However, in *Thompson* v. *State*, 280 Ark. 265, 658 S.W.2d 350 (1983), the Arkansas Supreme Court adopted the test for reviewing the sufficiency of such affidavits that the United States Supreme Court set forth in *Illinois* v. *Gates*, 103 S.Ct. 2317 (1983). Under this new totality of the circumstances test, the magistrate issuing the warrant must make a practical, common sense decision based on all the circumstances set forth in the affidavit. Under this test, "the duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . concluding' that probable cause existed" to issue the warrant. *Id.* However, conclusory statements in affidavits which give no substantial basis for determining the existence of probable cause will not be accepted. There must still be enough information presented to the magistrate to allow him to determine that there exists probable cause. *Id.*

In the case at bar, the affiant, Sheriff Anglin, stated that a confidential informant, whose reliability had been proven in a previous case, observed plants which he believed were marijuana growing on a particular piece of property in Van Buren County. The Sheriff obtained a correct legal description for the property occupied by the appellant and his girl friend. Based on the test adopted by the Arkansas Supreme Court in *Thompson* v. *State, supra,* as defined in *Gates,* we find the affidavit sufficient to establish probable cause.

Next, the appellant argues that the State failed to prove his ownership or control of the property upon which the contraband was found. The only testimony of the appellant's control over the property or dominion over the area in which the marijuana was found was based on the knowledge of Sheriff Anglin and two deputies executing the warrant. They testified that they were aware that the appellant was renting the property. The Sheriff further testified that he knew many of the county's residents and where they resided. The appellant was one of these persons whom the Sheriff knew to be living in a certain location. When the search warrant was served the appellant was not present, but the woman with whom he was living was present. The tes-

timony shows that there were several trails leading directly from the house out into the outlying acreage where the marijuana was found.

We find substantial evidence to support the jury's determination of the factual issue of control or dominion over the property by the appellant.

Affirmed.

MAYFIELD and CRACRAFT, JJ., agree.

Waymon Kilan BROWN *v.* STATE of Arkansas

CA CR 83-139 664 S.W.2d 507

Court of Appeals of Arkansas
EN BANC
Opinion delivered February 22, 1984

William R. Simpson, Jr., Public Defender, by: *Thomas J. O'Hern,* Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Victra L. Fewell,* Asst. Att'y Gen., for appellee.

DONALD L. CORBIN, Judge. Appellant, Waymon Kilan Brown, entered a plea of guilty to theft of property by deception on July 6, 1982, and was given a suspended

imposition of sentence for a period of five years on conditions. One of the conditions was that he make restitution to the State of Arkansas in the amount of $2,725.00, payable at the rate of $50.00 per month beginning December 1, 1982. Appellant was arrested on March 7, 1983, pursuant to a petition for revocation based upon appellant's alleged failure to make any payments toward restitution. On March 24, 1983, a hearing was held on the petition for revocation wherein the trial court committed appellant to the Arkansas Department of Corrections for a term of ten years with credit for jail time from March 7, 1983, to March 24, 1983. We affirm.

Appellant testified at the revocation hearing that he did not work in December of 1982 or in January and February of 1983. He stated that he had worked in September, October and November of 1982. Appellant was in jail from November 15, 1982, to December 16, 1982, because of his failure to pay the fine and costs assessed against him on the original theft by deception charge. He testified further that he was planning to go to work for his mother, although it was unclear at what time and for what wages. He offered no evidence to explain why he was not working, what job contacts he had made, or what his living expenses were. The record reveals appellant offered nothing in the way of explanation as to why he had failed to comply with the conditions previously imposed upon him by the trial court.

The provisions for revocation of suspended sentence are found in Ark. Stat. Ann. § 41-1208 (Repl. 1977). Subsection four of that statute addresses the showing that is required to revoke a suspended sentence, stating, "If the Court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspension or probation, it may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation." Thus, the State must prove not only that a condition was violated but also that there was nothing that could be said to fairly excuse the violation. These factors need only be proved by a preponderance of the evidence. *Selph* v. *State*, 264 Ark. 197, 570 S.W.2d 256 (1978). On appeal, the appellant has the burden of proving that the

court's findings were clearly erroneous. *Pearson* v. *State*, 262 Ark. 513, 558 S.W.2d 149 (1977).

Bearden v. *Georgia*, ___ U.S. ___, 103 S. Ct. 2064 (1983), indicates that the sentencing court must inquire into the reasons for the failure of a probationer to pay a fine or restitution. In the instant case, appellant was represented by counsel and little, if any, explanation was provided by appellant for his failure to pay restitution. In such proceedings where the probationer is represented by counsel, we do not believe the probationer can sit back and rely totally upon the trial court to make inquiry into his excuse for nonpaymet. The defendant should go forward with whatever evidence he has in an attempt to establish excusable reasons why he did not pay the fine or restitution. In the instant case, the record reveals that the State proved by a preponderance of the evidence that appellant had not made payment and that his failure was inexcusable. The facts of the case at bar are clearly distinguishable from those of *Drain* v. *State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984). In *Drain, supra*, the defendant had applied for jobs everywhere he could think of, only had an 8th grade education, cut firewood when he could, and had been committed to a mental hospital for a period of time. Witnesses verified most of those facts and the State did not refute them.

Accordingly, we find the evidence sufficient to support the finding that appellant had inexcusably violated the conditions of his probation.

Affirmed.

Roy E. SMITH *v.* STATE of Arkansas

CA CR 83-152 664 S.W.2d 505

Court of Appeals of Arkansas
Division I
Opinion delivered February 22, 1984

Ernie Witt and *R. Kevin Barham,* for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellant appeals his jury conviction for possession of marijuana. He was sentenced to one year in the county jail and fined $1,000. For reversal, appellant raises seven issues.

Before discussing each issue, we briefly review the evidence. On October 10, 1982, law enforcement officers were serveilling a marijuana patch they had found near Clear Creek in Johnson County. During their surveillance, they observed the appellant picking leaves from marijuana stalks and placing them in a large paper sack. The officers subsequently arrested the appellant, who later gave a statement admitting he had picked the marijuana, but denying that he intended to sell or smoke it. Appellant stated that he found the patch while squirrel hunting. After taking some squirrels he had shot to his truck, he returned to pick the marijuana. He said that he intended to take it home "and keep it." The officers found some dead squirrels in the appellant's truck as well as his hunting vest in the cab.

Appellant first argues that in its discovery response, the State indicated it would introduce photographs of the marijuana and the patch but instead introduced both photographs and actual marijuana samples. In doing so, appellant contends that the State violated Rule 17.1 of the Arkansas Rules of Criminal Procedure, and that the court's admission of the marijuana samples into evidence was error.

Rule 17.1 requires that the prosecuting attorney disclose to defense counsel, upon timely request, any material and information the prosecutor intends to use in any hearing or at trial but as the Court noted in *Brenneman* v. *State*, 264 Ark. 460, 573 S.W.2d 47 (1978), the exclusion of such evidence is not mandatory. In *Fisk* v. *State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982), this Court stated that a trial court is not required under Rule 19.7 of the Arkansas Rules of Criminal Procedure to comply with discovery procedures unless there is a likelihood that prejudice will result. Also, the party alleging error is required to demonstrate that prejudice did in fact exist. *Gruzen* v. *State*, 276 Ark. 149, 634 S.W.2d 92 (1982). In the instant case, appellant fails to show how he was prejudiced by the introduction of the marijuana into evidence. Appellant denied neither the existence of the contraband nor that he picked it and put the leaves in a sack. The State proved the existence of the marijuana both by the officers' testimonies and by photographs of the contraband. In view of such overwhelming proof, the prejudicial impact, if any, caused by the introduction of the actual samples of marijuana was insignificant.

For similar and other reasons, we do not agree with appellant's contention that the State's failure to establish the chain of custody in handling the marijuana prevented its introduction at trial. Again, appellant's possession of the marijuana was clearly shown and undenied. He was convicted only of possession of the controlled substance so the chemical analysis of the amount or weight of the substance proved of no prejudicial import. Even if appellant could argue otherwise, he made no timely objection to the introduction of the marijuana samples. Arkansas does not adhere to the "plain error rule," and accordingly, we cannot consider such an issue for the first time on appeal. *See*

Robinson v. *State*, 278 Ark. 516, 648 S.W.2d 444 (1983); and *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

Appellant also challenges the trial court's admission of three photographs into evidence. He argues the pictures depicted the marijuana stalks and protective wire screens, thus unfairly leading the jury to believe he manufactured marijuana. He further argues that one of these photographs was inadmissible because it did not accurately reflect the marijuana or the terrain where it was grown. This secondary argument, however, was not made below, so we are unable to address it here. *Wicks, id.* The law is settled that the introduction of photographs rests largely within the discretion of the trial judge and they are admissible for the purpose of describing and identifying the scene of a crime. *Stewart* v. *State*, 233 Ark. 458, 345 S.W.2d 472 (1961). This purpose was served here, and we cannot say the trial court abused its discretion in allowing the photographs into evidence, especially considering the place of the alleged offense and the manner in which it was performed. *See also Tucker* v. *State*, 3 Ark. App. 89, 622 S.W.2d 202 (1981) (wherein this Court upheld the admissibility of certain photographs, stating that under Rule 403 of the Uniform Rules of Evidence the weighing of the opposing factors lies within the sound discretion of the trial court and its decision will not be reversed absent a clear abuse of that discretion).

Appellant's next contention is that error ensued even though the trial court sustained his objection to the prosecutor's question to an officer, "[I]s it usual or unusual for a person to pick another person's marijuana?" Following that ruling, the court denied appellant's request for a mistrial, which he assigns as error here. As is oft stated, it is within the sound discretion of the trial court to deny a motion for a mistrial and such discretion will not be disturbed on appeal unless there is a showing of abuse. *Parrott* v. *State*, 246 Ark. 672, 439 S.W.2d 924 (1969). Here, the trial judge promptly agreed with appellant that the question posed to the officer was improper. Appellant did not ask for a cautionary instruction, and the judge simply did not believe the question alone justified granting a mistrial. We cannot say the trial court abused its discretion

in so holding.

Finally, appellant argues the trial court erred in failing to exclude the testimony of an officer regarding the weight of the marijuana because (1) the weight included non-controlled substances such as stalks and sterilized seeds, (2) the officer was not an expert, and (3) the accuracy of the scales he used was not established. We find no merit in these arguments. The trial court instructed the jury that marijuana does not include the mature stalks, the fiber produced from the plant or the sterilized seed of the plant which is incapable of germination. More importantly, the officer testified to the weight of the sack that contained only marijuana leaves. As noted earlier, appellant was convicted of possession of marijuana, not possession with the intent to deliver. Thus, the State's evidence of the amount or weight of marijuana did not prejudicially influence the jury to find appellant guilty of the greater offense. Nonetheless, the officer's testimony concerning the weight of the marijuana as well as the reliability of the scales he used in determining the weight is, we believe, admissible. Undoubtedly, the objection to such testimony goes to the weight that should be given the officer's testimony and not to its competency or admissibility. We affirm.

Affirmed.

CLONINGER and CORBIN, JJ., agree.

Gladys BRISCOE *v.* SHOPPERS NEWS, INC. et al

CA 83-311 664 S.W.2d 886

Court of Appeals of Arkansas
Division II
Opinion delivered February 29, 1984

R. J. Brown, P.A., by: *Lisa A. Kelly*, for appellant.

Paul Hickey, P.A., and *W. J. Walker*, for appellees First National Bank and Bland Adkins.

Thorp Thomas, for appellee Shoppers News, Inc.

GEORGE K. CRACRAFT, Judge. Gladys Briscoe appeals from a decree of the Chancery Court of Pulaski County alleging several errors. We find no merit in any of them and affirm.

Gladys Briscoe was the owner of a five-acre tract on which her residence was located. In February 1971 she entered into a lease purchase agreement with Shoppers News, Inc. in which she agreed to construct an office building at a cost of approximately $30,000 on a quarter acre tract behind her residence and lease it to Shoppers News for a term of eight years and four months at a rental of $300 per month. She also agreed to provide a thirty-foot easement for access along the south side of the property extending to the center of Mabelvale Pike. Shoppers News was granted an option to purchase the leased premises at the end of the lease term for a further consideration of $6,000. The agreement recited that Briscoe was constructing an office building adjacent to Shoppers News and granted Shoppers News a first refusal to purchase it and the property on which her home was located should she elect to sell it. The lease also contained the following provisions:

> It is understood that the property upon which the building is so constructed will be subject to a mortgage, but it is also understood that in the event of purchase by the lessee, the property will be conveyed by warranty deed showing a clear and merchantable title. In the event the lessor shall default in the payment of the

> mortgage payments against said property, the Shopper News, Inc. shall have the right to continue these same payments with the mortgagee for the purchase of the property described in this instrument.

On March 10, 1971 Briscoe obtained the financing for the construction of the Shoppers News building by executing a note in the sum of $30,000 payable to the appellee, Bland Adkins, and securing the note by a mortgage on her entire five-acre tract. In December, Briscoe executed a note for an additional $30,000 to Bland Adkins also secured by a mortgage on the entire five-acre tract. The first $30,000 was used to build the Shoppers News building but the second $30,000 was used only for erecting an additional office building and for improvements on Briscoe's residence.

Subsequently Briscoe became indebted to the First National Bank of Little Rock and secured that indebtedness by a mortgage on a part of the five-acre tract which did not include the Shoppers News leasehold.

At the time the lease purchase agreement was executed Briscoe was one of seven equal shareholders in Shoppers News and was employed by it. Tommy Trent subsequently acquired a controlling interest in the corporation and terminated Briscoe's employment at Shoppers News in September 1972.

The litigation between Briscoe and Shoppers News began in 1974 when Shoppers News brought an action seeking to enjoin her from interfering with its access to the property. She counterclaimed against Shoppers News and Tommy Trent seeking an accounting and other relief not involved in this proceeding. In 1974 the chancery court entered a "partial decree" declaring that Shoppers News was entitled to an easement across Briscoe's property thirty feet in width "along the south line of the leased property and extending to the center of Mabelvale Pike." The record does not reflect any action on the accounting issues.

In 1979 at the termination of the term provided in the lease, Shoppers News gave notice of its election to purchase

the Shoppers News building and tendered into court the $6,000 purchase price. Briscoe contended that the option had not been exercised properly but the chancery court entered an order directing specific performance. This order was appealed to the Court of Appeals which affirmed the decree of the chancellor but expressly stated that it did not purport to deal with any issues which remained pending. Upon remand the chancellor entered an order directing Briscoe to execute and deliver to Shoppers News a warranty deed to the leased property "free of all liens and encumbrances."

After Shoppers News made its last payment of rent under the lease agreement Briscoe defaulted on the payments of her notes to Bland Adkins and First National Bank and both mortgagees instituted foreclosure proceedings. The three cases were then consolidated for trial. The chancellor found that Briscoe owed Adkins in excess of $47,000 and was indebted to the First National Bank of Little Rock for a balance in excess of $6,900 and ordered the entire five-acre tract sold by the Commissioner. In that decree the court also awarded an attorney's fee of $670 to Adkins and $695 to First National Bank of Little Rock.

After that decree was entered counsel for Briscoe and the mortgagees pointed out that there were errors in the decree which should be corrected. The chancellor then entered an amended and substituted decree in which it granted Adkins judgment against Briscoe for over $53,000, ordered an attorney's fee of $5,300, corrected a description of the five-acre tract and the mortgage to the First National Bank of Little Rock, granted the bank judgment in the amount of $7,000, awarded it an attorney's fee in the amount of $700, recited that "by agreement of the parties all of the lands would be sold in one tract," and reserved control of the cause for further orders as may be necessary to protect the rights of the parties after the report of the Commissioner. Briscoe appeals from all orders entered in the consolidated cases. Shoppers News does not cross-appeal.

The appellant first contends that the chancellor erred in his construction of the lease purchase agreement and in directing her to execute a warranty deed "free and clear of all

liens and encumbrances." She argues that the contract did not provide for a deed free of encumbrances but only a "warranty deed showing clear and merchantable title." She argues that one can convey property subject to a mortgage by warranty deed and that such deeds providing for an assumption of the mortgage are common. This argument presupposes the validity of her contention that the clause in question provided for an assumption by Shoppers News. In this regard she argues that as that provision gave Briscoe a right to default, that language imposed on Shoppers News the duty to assume in the event of default. The provisions on which she relies merely gave Shoppers News a right to protect its own interest. It did not impose any obligation to assume the mortgage. We conclude that the provisions referred to required that Briscoe convey by a warranty deed containing general warranties against all defects and encumbrances. We find no error in the chancellor's ruling.

The appellant next contends that the chancellor erred in not ruling on the scope of the easement granted to Shoppers News. The order of the court provided that the easement be thirty feet wide and run along the south line of the leased premises extending eastwardly across the remaining lands to Mabelvale Pike. It declared that appellant must not interfere with the use of that portion of it running across her lands and that Shoppers News must not interfere with her use of the strip. The easement was clearly defined in the court's order.

Appellant argues that the chancellor should have ruled further because there was evidence that Shoppers News had been using the easement for purpose other than ingress and egress. She argues that Shoppers News had used it for additional parking spaces as well and that an easement granted for one purpose might not be used for another. Our review of the record does not disclose whether this issue was ever pled or argued in the court below. Appellant did make one passing reference to parking on her property. We do not consider this point sufficiently raised to warrant our consideration of it for the first time on appeal.

With regard to the foreclosure action the appellant

contends that the chancellor erred in failing to order the Shoppers News property sold separately and the proceeds from it first applied to the debt before her remaining lands were sold. Secondly, she argues that her homestead should have been carved out of the total tract and not sold at all unless absolutely essential. Thirdly, she argues that the lien to the First National Bank of Little Rock extended only to a portion of the property and it should be sold separately and before the balance of her lands, and finally that the decree did not set forth the rights of the parties to the surplus or deficit proceeds of the sale. While we find no merit to any of these contentions we do not address them because the record shows that the appellant consented to these terms of the amended decree at the time that it was entered.

The chancellor recited in his decree:

> That the lien of First National Bank of Little Rock is on land included in the lien of plaintiff Bland Adkins. *By agreement of the parties, all of the land shall be sold in one tract,* being the larger tract upon which Bland Adkins has a lien. [Emphasis supplied.]

The record amply sustains this finding of the court. After the amended decree was entered the appellant filed a "Motion for Rehearing on Attorney's Fees" in which she recited that the amended decree was a proper one in all respects except in its provision for attorney's fees. She recited:

> In the presence and at the suggestion of the court, the parties to the case have *agreed to the entry of a modified decree* correcting the technical errors of description in the earlier decree. *Ms. Briscoe agreed that no appeal would be prosecuted from such a corrected decree.* Counsel for Ms. Briscoe approved these procedures, the accommodations suggested, and the entry of a decree correcting the earlier decree so that the matter could go to sale in foreclosure of Ms. Briscoe's equity of redemption. [Emphasis supplied.]

Having agreed to the entry of the decree containing

such an order of sale the appellant is in no position to present the arguments contained in her brief. Even if the action of the chancellor in ordering the land sold as one tract was incorrect, it is well settled under the doctrine of invited error that appellant may not complain on appeal of an erroneous action of the chancellor if he has induced, consented to or acquiesced in that action. *Missouri Pacific Railroad Co.* v. *Gilbert,* 206 Ark. 683, 178 S.W.2d 73 (1944); *J. I. Case Co.* v. *Seabaugh,* 10 Ark. App. 186, 662 S.W.2d 193 (1983).

The appellant next argues that the chancellor erred in "failing to consider appellant's motion for rehearing on attorney's fees or otherwise explain the increase in fees awarded the attorney for Bland Adkins." In the original decree an award of $670 in attorney's fees was awarded. As that decree contained certain technical errors already referred to, an amended and substituted decree was entered in which Bland Adkins was awarded a $5,300 attorney's fee. Although appellant's pleading was styled "Request for Rehearing on Attorney's Fees" we conclude that she did not in fact ask for a hearing but only that the chancellor reconsider his ruling on that issue.

In her motion the appellant asserted that she was "not unappreciative of those difficulties encountered by the appellees in the foreclosure" and agreed that the fee of $500 that was allowed in the original decree was inadequte to compensate the attorneys for their services and should have been increased. She asserted that the sum of $5,300 awarded by the court was excessive for the number of hearings and the amount of time, investigation, preparation and "post-trial windup" involved in this case. She did not ask for a hearing on the issue but submitted a corrected amended decree in foreclosure which would have allowed a fee of $1,500. This motion was filed subsequent to her notice of appeal and no mention of it was made in the notice.

It is not necessary in every case to have a hearing on the reasonableness of an attorney's fee awarded by the court. The court can apply its own general knowledge of the proceedings in determining the amount of attorney's fee and we

recognize the superior position of the trial judge to make the determination because of its acquaintance with the record and the quality of services rendered. There is no fixed formula or policy to be considered in arriving at these fees other than the rule that the appropriately broad discretion of the trial court should not be abused. *Farm Bur. Mut. Ins. Co.* v. *Kizziar,* 1 Ark. App. 84, 613 S.W.2d 401 (1981); *Equitable Life Assur. Society* v. *Rummell,* 257 Ark. 90, 514 S.W.2d 224 (1974). It is only where the trial court denies a timely request for a hearing on the issue of attorney's fees that we have remanded the cause for that purpose. *Farm Bur. Mut. Ins. Co.* v. *Kizziar,* supra; *Thos. Jefferson Ins.* v. *Stuttgart Home Ctr.,* 4 Ark. 75, 627 S.W.2d 571 (1982).

We find no error.

MAYFIELD, C.J. and COOPER, J., agree.

Tommy HILL *v.* WHITE-RODGERS

CA 83-318 665 S.W.2d 292

Court of Appeals of Arkansas
En Banc
Opinion delivered February 29, 1984
[Rehearing denied March 28, 1984*.]

*MAYFIELD, C.J., and COOPER, J., would grant rehearing.

Highsmith, Gregg, Hart, Farris and Rutledge, by: *Linda F. Boone,* for appellant.

Harkey, Walmsley, Belew & Blankenship, for appellee.

GEORGE K. CRACRAFT, Judge. Tommy Hill appeals from an order of the Workers' Compensation Commission adopting the findings and conclusions of the administrative law judge that his injury was a scheduled one which could not be apportioned to the body as a whole and that therefore wage earning factors could not be considered in addition to the functional loss as provided in Ark. Stat. Ann. § 81-1313(c) (Repl. 1976). He argues that the Commission erred in refusing to consider additional evidence not presented to the

administrative law judge but proffered by the appellant on his appeal. We find no error.

In April 1979 the appellant sustained a crushing injury to his right foot while working for White-Rodgers. After a period of temporary total disability the appellant returned to work for appellee. Dr. H. Austin Grimes rated appellant's permanent partial disability at that time at 15% to the right leg. Although the injury was to the foot, Dr. Grimes' rating was based on his determination that the pain from the foot extended to the leg. Around the same time, Dr. Jerry L. Thomas rated his disability at 25% to the foot. Appellant was paid full permanent partial disability benefits by his employer for a 25% loss to the lower right extremity.

The appellant continued to experience difficulty because his foot injury caused pain to go up his leg into his hip and resulted in numbness to his leg. He changed jobs several times until he found employment which did not require him to be on his feet for prolonged periods, and at the time of the hearing in January 1983, he was employed at an hourly wage rate almost double what he was being paid at the time of his injury.

In December 1982, appellant had sought and obtained from Dr. Grimes a report that appellant had "5% or less permanent partial rating to the body as a whole." By two subsequent reports Dr. Grimes clarified his earlier one in the following language:

> The patient's attorney requested that I rate him regarding the body as a whole. I then gave him a 5% PPPI rating as regards the body as a whole. *It is not from a new injury.* [Emphasis supplied]
>
> . . . .
>
> This patient was given a 5% PPPI rating for his injury as it relates to the body as a whole. He was given a 15% PPPI rating *for the same injury* for how it relates to the leg as a whole. *An injury to the foot affects the leg as a whole and at the same time affects the body as a whole.* [Emphasis supplied]

All of the above reports were a part of the record before the administrative law judge.

At a hearing before the administrative law judge the claimant stated:

> MR. FARRIS: It's the claimant's contentions, Judge, that the injury to the foot has now become under Dr. Grimes' medical report, an injury to the body as a whole, and the claimant is entitled to be compensated for an injury to the body as a whole. Dr. Grimes gives him a 5% rating to the body as a whole, permanent partial injury.
>
> JUDGE MAZZANTI: As I understand it, the claimant requests instead of the rating to the right lower extremity, a rating which has already been paid of 25%, the claimant is contending he's entitled to the difference between the 25% to the right lower extremity and 5% to the body as a whole.
>
> MR. FARRIS: Yes, sir, by his education, age and work experience.

The administrative law judge ruled that the injury to appellant's lower extremity was a scheduled one and correctly denied the claim and ruled that absent a showing of total disability a scheduled injury cannot be apportioned to the body as a whole. *Taylor* v. *Pfeiffer Plbg. & Htg. Co.,* 8 Ark. App. 144, 648 S.W.2d 526 (1983); *Haygood* v. *Belcher,* 5 Ark. App. 127, 633 S.W.2d 391 (1982); *Clark* v. *Shiloh Tank & Erection Co.,* 259 Ark. 521, 534 S.W.2d 240 (1976); *Meadowlake Nursing Home* v. *Sullivan,* 253 Ark. 403, 486 S.W.2d 82 (1972); *Anchor Const. Co.* v. *Rice,* 252 Ark. 460, 479 S.W.2d 573 (1972).

Shortly after the administrative law judge's opinion was announced, the appellant filed a notice of appeal to the Commission in which he requested permission to brief and orally argue the matter and to supplement the record with additional medical evidence. Attached to his petition was

the following one paragraph letter from Dr. Grimes to appellant's attorney:

> This is in regard to our telephone conversation of March 17, 1983. This gentleman's rating was altered because his foot and leg pain altered his gait increasing the action and work of his back which aggravated his back condition as well. If any further information is needed please let me know.

The Commission entered an order denying the motion to submit additional evidence and stated that it found no reason to depart from the basic mandate of Ark. Stat. Ann. § 81-1327(c) (Supp. 1983) which provides that each party shall present all evidence at the initial hearing and a further hearing for the purpose of introducing additional evidence can be granted only in the discretion of the hearing officer or the Commission. In that order, the Commission recited that in reaching its decision on the motion it had been guided by the prerequisites set out in *Mason* v. *Lauck,* 232 Ark. 891, 340 S.W.2d 575 (1960) and *Haygood* v. *Belcher, supra.* The appellant then withdrew his request for briefs and oral arguments and submitted the matter to the Commission, which in a subsequent order affirmed the findings and conclusions of the administrative law judge.

In *Haygood* v. *Belcher, supra,* we declared that the Commission is vested with discretion in determining whether and in which circumstances a case appealed to it should be remanded for taking additional evidence and that their ruling will not be reversed on appeal unless there is an abuse of that discretion. In *Haygood* we determined that the Commission had not exercised its discretion in that case. In *Haygood* we reiterated the rules set out in *Mason* v. *Lauck, supra,* concerning when such a motion to present new evidence should be granted: 1) Is the new evidence relevant; 2) is it cumulative; 3) would it change the result; and 4) was the movant diligent?

Although it was argued in our conference of this case that *Haygood* and *Mason* are distinguishable from the matter now under review and that the Commission, in

considering these criteria, acted arbitrarily, we do not address that issue because it was not argued in appellant's brief. In fact the appellant concedes, and the majority here agree, that the Commission applied the right criteria. Appellant argues only that the Commission erred in its finding that the proffered evidence was not relevant. The majority adheres to the long established and familiar rule of procedure that we do not consider points not advanced on appeal. *Hazen* v. *City of Booneville,* 260 Ark. 871, 545 S.W.2d 614 (1977); *Cummings* v. *Boyles,* 242 Ark. 923, 415 S.W.2d 571 (1967). This rule has been applied with equal force to appeals from the Arkansas Workers' Compensation Commission. *Bradford* v. *Ark. State Hospital,* 270 Ark. 99, 603 S.W.2d 896 (Ark. App. 1980); *W. Shanhouse & Sons, Inc.* v. *Simms,* 224 Ark. 86, 272 S.W.2d 68 (1954).

Appellant does argue that our prior decisions which limit a scheduled injury, except where there is total permanent disability, are inequitable and produce unfair results. He contends that we should reconsider this rule and that if we do so, the proffered evidence would be relevant. In view of the long line of cases which have held the adopted rule to be a clear mandate from the legislature, we decline to do so. We agree with the statement of Justice George Rose Smith in *Intl. Paper Co.* v. *Remley,* 256 Ark. 7, 505 S.W.2d 219 (1974), in which he said, "Of course the courts are bound by the legislature's decision to adopt a rigid rule in the case of scheduled injuries." Under our prior decisions the proffered evidence would not be relevant and could not change the result. We find no abuse of discretion in refusing to reopen the record where it is shown that such a procedure would be futile. Additionally, we note that the proffered evidence was merely cumulative of that previously submitted.

Appellant also argues that if we are unwilling to reconsider the established rule, we should hold that a scheduled injury "need not preclude a finding that another compensable injury, which is not a total permanent injury, may be found to exist and may be compensated for." He argues that if proof could have been submitted to the Commission that appellant had suffered an unscheduled

injury as a result of his scheduled one, his disability might have been apportioned to his body as a whole and contends that the proffered evidence was relevant for that purpose. The courts have already declared that where a worker has received a scheduled injury and subsequently receives an unscheduled one, he may be compensated for both, but other wage loss factors may be taken into consideration only with regard to the unscheduled one absent a finding of total disability. *Clark* v. *Shiloh Tank & Erection Co., supra.*

However, we find no merit to this argument. First, this argument was not made to the Commission and no contention was made before the administrative law judge that the claim was being made for a second, unscheduled injury. Appellant contended only that he had sustained a single injury to his lower extremity and that the pain resulting from it should be apportioned to his body as a whole. Nor does appellant's one paragraph letter petition to the Commission raise that issue. It merely states that he wishes "to supplement the record" made before the administrative law judge. In all his previous reports Dr. Grimes had made it clear that there was no new injury and the proffered letter gave no indication of a claim on a second independent injury resulting from the scheduled one or the extent of any resulting disability on which the Commission might have based a finding. Although this point was also argued in our conference the majority adheres to the well established rule that grounds for relief cannot be asserted for the first time on appeal and that this rule applies to appeals from the Workers' Compensation Commission. *Ashcraft* v. *Quimby,* 2 Ark. App. 332, 621 S.W.2d 230 (1981); *Jeffery Stone* v. *Lester H. Raulston,* 242 Ark. 13, 412 S.W.2d 275 (1967).

Affirmed.

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

MELVIN MAYFIELD, Chief Judge, dissenting. I have two basic problems with the majority opinion and must respectfully dissent.

My first concern is with the case of *Haygood* v. *Belcher,*

5 Ark. App. 127, 633 S.W.2d 391 (1982), relied upon by both the Commission and the majority opinion. I have no trouble with the result of that case, but, in my judgment, its reasoning is wrong and it has misled the Commission in this case. Since I agreed to the opinion in *Haygood,* I want to acknowledge my error and explain what I think is wrong with that opinion.

In that case, just as in the instant case, after the administrative law judge had issued his decision, the claimant appealed to the full Commission and requested permission to present additional evidence. While the opinion in *Haygood* states that the claimant filed a motion requesting that the matter be remanded to the law judge for the taking of additional evidence, it may not be clear that a motion to present additional evidence was also filed. I have examined the briefs in the case and a motion to present additional evidence was filed with the Commission at the same time the notice to appeal was filed, and the motion was denied in the same opinion that affirmed the law judge's decision. Although the opinion of this court in *Haygood* is directed mainly to the remand motion (the considerations are surely the same), it also discusses the Commission's Rule 14 and the application of that rule in *Williams* v. *Coca-Cola Bottling Co.,* 266 Ark. 736, 585 S.W.2d 372 (Ark. App. 1979).

Rule 14 has now been incorporated verbatim into Ark. Stat. Ann. § 81-1327(c) (Supp. 1983), by Act 290 of 1981, and this act was in effect at the time of the decision of the Commission in this case. The act plainly states that all evidence should be presented at the initial hearing, and that further hearings for the purpose of introducing additional evidence "will be granted only at the discretion of the hearing officer or Commission." The *Haygood* opinion recognized the discretionary ingredient but measured its application by the four prerequisites set out in *Mason* v. *Lauck,* 232 Ark. 891, 340 S.W.2d 575 (1960). The problem is that *Mason* did not involve the same situation involved in *Haygood.* In *Mason* the Commission's decision was appealed to circuit court, as the law at that time provided, and a motion was filed in that court asking that the case be remanded to the Commission for the purpose of considering

newly discovered evidence. The circuit court held it had no authority to grant that motion, but the Arkansas Supreme Court held that the same authority existed to grant that motion as existed to grant a similar motion in the usual civil or criminal case filed in circuit court. The opinion then set out four prerequisites, (which were later set out in *Haygood* and which are set out in the opinion in the instant case) and said, if those prerequisites were met, the circuit court should remand the case to the Commission for it to consider the newly discovered evidence.

Now that is not the same situation involved in the instant case. Here, there was a request to the *Commission* asking that the appellant be allowed to introduce *additional* evidence for the Commission to consider *when it decided* the merits of the case. In *Mason* there was a motion in *circuit court* asking that it remand the matter back to the Commission for it to consider *newly discovered* evidence to determine if it should change a decision it had *already made* on the merits of the case. In my defense, and in defense of the opinion in *Haygood,* I would note that while the circuit court there reversed the Commission's refusal to allow additional evidence to be introduced and remanded the matter to the Commission for it to hear that evidence, on appeal of that order to this court, the appellant's brief relied upon *Mason* and argued the matter as if the circuit court had remanded on a motion made in circuit court. The situations, however, are clearly different and the difference is crucial.

It is true, of course, that this court can hold that the discretion granted the Commission under Ark. Stat. Ann. § 81-1327(c) should be exercised only if the prerequisites set out in *Haygood* are present. But the legislature did not so confine the Commission's discretion, and neither did *Williams* v. *Coca-Cola Bottling Co., supra,* when it applied Rule 14. It is apparent that the discretion granted the Commission by the legislature has been severely limited by *Haygood.* That the Commission recognized this is indicated by its order which significantly stated, "In reaching our decision on this motion we have been guided by the four prerequisites set out in *Mason* v. *Lauck,* 232 Ark. 891, 340 S.W.2d 575 (1960), which was recently affirmed in *Haygood*

v. *Belcher,* 5 Ark. App. 127, 633 S.W.2d 391 (1982)." Undoubtedly, the Commission applied these prerequisites because it thought it was required to do so. If it wants to place these conditions on its discretion, it has that authority, but it should tell us, not tell us we told it. I would admit that our reasoning was wrong in *Haygood* and would remand the instant case to the Commission for it to exercise the discretion granted by the legislature, and I would interfere with that discretion only to the extent that it is abused.

The majority opinion simply brushes over the above considerations with the statement that the appellant concedes that the Commission applied the right criteria. The appellant, says the majority, only argues that the Commission erred in its finding that the proffered evidence was not relevant and, therefore, we are excused from worrying about the matter because we do not consider points not advanced on appeal.

I have searched the appellant's brief very carefully and have not found where he concedes that the Commission applied the right criteria. I do find where he sets out the criteria referred to in *Mason* and where he says since the Commission said it was guided by the four prerequisites set out in *Mason* and affirmed in *Haygood,* and since he thought neither of the other three was involved, he thought it apparent that the Commission felt the proffered evidence did not meet the relevance requirement. I also notice that the only point relied upon in appellant's brief is that the Commission erred in failing to consider the additional evidence proffered by him, and I notice that he concludes his brief by asking that we remand this case to the Commission for it to consider his proffered evidence. The point he relies upon and the relief he wants is clear enough to me, and I have no trouble understanding the statement in his argument that "The Arkansas Statutes vest in the Commission discretion in deciding whether to hear additional evidence."

I think it is also worth noting that the fair and judicious consideration of the claims of injured workers in this state is important to employees, employers, and the state in general;

and that it is not always considered wrong for a court to decide a matter on its own motion. In Leflar, *Appellate Judicial Opinions* 129 (1974), Dr. Leflar has reprinted portions of a law review article in which the following statements are found:

> Occasionally an appellate court will consider a matter sua sponte because of the demands of justice. This is a reflection of one of the purposes of appellate review — justice for the parties. . . . When the matter involves more than just the individuals, and involves a reflection on the courts and the judicial system, there is more willingness to consider it sua sponte.

Vestal, *Sua Sponte Consideration in Appellate Review,* 27 Fordham L. Rev. 477, 509-10 (1959).

My other basic problem with the majority opinion is its failure to recognize the extent of the claim that the appellant made before the administrative law judge and the Commission. The record shows that at a hearing held on January 25, 1983, the appellant's attorney stood before the law judge and told him that it was the appellant's contention that according to Dr. Grimes' medical report the appellant's foot injury had become an injury to the body as a whole; that Grimes gave appellant a 5% disability rating to the body as a whole; and that the appellant was entitled to be compensated for an injury to the body as a whole.

Several reports from Dr. Grimes were introduced into evidence. One dated September 19, 1980, stated appellant had a disability of 15% to the leg as a whole. The last one, dated January 11, 1983, states that appellant has been given a 5% disability rating to the body as a whole. Despite these reports and despite appellant's testimony that his foot injury had ultimately caused numbness in the upper part of his hip, the law judge held, as the majority opinion states it, "that the injury to appellant's lower extremity was a scheduled one and . . . absent a showing of total disability a scheduled injury cannot be apportioned to the body as a whole."

The appellant then filed an appeal to the full Commission and, in his notice of appeal, requested oral argument and permission to supplement the record with additional medical evidence. Subsequently, he sent the Commission another report from Dr. Grimes. That report simply clarified the doctor's previous reports by stating that the appellant's rating was changed "because his foot and leg pain altered his gait increasing the action and work of his back which aggravated his back condition as well." The Commission, however, would not allow this report into evidence. The appellant then withdrew his request for oral argument and the Commission affirmed and adopted the law judge's decision. It is my view that the Commission rejected the report because it thought this was required by *Mason* and *Haygood,* but at any event, it is perfectly obvious that the appellant was still seeking an award for disability to the body as a whole.

Appellant next appealed to this court and in his brief he argues, as the majority opinion states, "that our prior decisions which limit a scheduled injury, except where there is total permanent disability, are inequitable and produce unfair results." However, the majority opinion fails to mention that appellant also argues "it is not merely that inequity that appellant relies upon in urging the court to adopt a different stance in this type of situation." He then quotes Ark. Stat. Ann. § 81-1313(d) (Repl. 1976), which provides that a permanent partial disability not scheduled in subsection (c) shall be apportioned to the body as a whole, and the appellant's brief then states:

> If proof could have been submitted to the Commission that Mr. Hill had suffered such an injury as a result of the injury to his foot, neither this statute nor the statute listing the scheduled injury precludes apportioning the injury to the body as a whole.

From the above it seems clear enough to me that the appellant has consistently claimed, at each stage of this matter, that he is entitled to an award for a disability to the body as a whole. The majority opinion, however, says this issue is being raised here for the first time. I think the

majority's failure to recognize the extent of the claim made before the law judge and the Commission may come from a failure to fully appreciate the case of *Clark* v. *Shiloh Tank & Erection Co.*, 259 Ark. 521, 534 S.W.2d 240 (1976), cited in appellant's brief and referred to in the majority opinion.

In that case the claimant received an injury that required a surgical amputation of his foot. The Commission awarded him, under the scheduled injury section of the act, 125 weeks of compensation for the loss of his foot, *plus an additional* 22.5 weeks for a 5% disability to the body as a whole for a back injury which the Commission found was *attributable to the loss of the foot.* The majority opinion cites the *Clark* case as support for a statement which contains the phrase "where a worker has received a scheduled injury and subsequently receives an unscheduled one, he may be compensated for both." That interpretation of the case may explain the position taken by the majority opinion that "no contention was made before the administrative law judge that the claim was being made for a second, unscheduled injury." But *Clark* does not treat the claimant's back injury as a *second* injury and it does not say he *subsequently* received an unscheduled injury. The case says the Commission found the back injury "was attributable to the loss of the foot."

That is what the appellant claims in this case. That is what the report offered to the Commission was trying to make clear. The Commission refused to allow the report into evidence and gave as its reason the holdings in the *Mason* and *Haygood* cases. We should reverse and remand with directions to the Commission to rule upon the admissibility of the report in the exercise of the discretion granted it by Ark. Stat. Ann. § 81-1327(*c*) (Supp. 1983), and not by the application of the prerequisites set out in the *Mason* and *Haygood* decisions. I dissent from our failure to take that action.

COOPER and CORBIN, JJ., join in this dissent.

OZARK GAS TRANSMISSION SYSTEM *v.* Delbert L. HILL and Ann HILL, and CITIZENS BANK OF LAVACA

CA 83-108 664 S.W.2d 892

Court of Appeals of Arkansas
Division II
Opinion delivered February 29, 1984

Bethell, Callaway, Robertson & Beasley, by: *Donald P. Callaway,* for appellant.

Douglas & Douglas, by: *Troy R. Douglas,* for appellee.

JAMES R. COOPER, Judge. This is an eminent domain case. The appellant condemned a seventy foot right-of-way which encompassed 1.17 acres for the installation of a gas line, and .114 acre for a temporary construction easement. From a jury award finding just compensation to be $13,500.00 comes this appeal.

On appeal, the appellant argues that the trial court erred in permitting the landowner and his witnesses to testify as to damages incurred to the Hill's ten acre tract's

value as a subdivision. The landowner, appellee Delbert Hill, testified that he had intended to sell lots off his tract of land; that he believed he could have gotten $5,000.00 per lot; and that some of, if not all, of the planned lots were no longer marketable. The landowner's testimony as to value per acre, both before and after the taking, was based on his planned subdivision of the raw acreage. He did not testify as to his estimated costs to develop the property, but he stated that he thought he could do it "reasonable." Mr. Hill estimated the damage to the tract to be $18,000.00.

Mr. James Patterson, President of the Citizens Bank of Lavaca and Barling testified on behalf of the appellees. He testified that the highest and best use of the tract was as a small acreage subdivision. He had appraised the property for the bank at $18,000.00 and he valued it after the taking at $10,000.00. He testified that he was knowledgeable about subdivisions and the value of land in the vicinity, but admitted he had no comparable sales which formed the basis for his opinions as to value. His after value figure was apparently based on the belief that any kind of land was worth $1,000.00 per acre.

Mr. Lewis Ballard, an independent appraiser, prepared a detailed schedule showing the land cost per 2.5 acre lot, the development cost per lot, the estimated market price per lot after development, and the profit which he estimated at $14,400.00 before the easement and $2,799.00 after the easement, leaving a loss of $11,600.00. To that figure he added his estimate of the value of the .84 acre actually taken, which, when multiplied by his per acre figure, $2,000.00, equaled $1,680.00 totalling $13,280.00 as his estimate of the total damage caused by the easement. Mr. Ballard's estimates as to development costs were based on his experience as an appraiser, but that estimate did not take into account any real estate commissions or interest.

Mr. Q. A. Mabrey, a witness for the appellant, testified that in his opinion the highest and best use of the tract was for a rural homesite and acreage. He appraised the property at $1,500.00 per acre before the taking; that the highest and best use of the property had not changed; and that the

damage sustained as a result of the easement was $1,850.00 which represented 1.23 acres (the total land taken, both temporarily and permanently) times $1,500.00 per acre. He found no damage to the remaining land.

The Hills had taken no steps to subdivide their 10 acres. The property had not been surveyed for a subdivision, no plot had been prepared, no lots had been sold or offered for sale, nor was there any evidence of any other steps having been taken to create a subdivision. The testimony of Mr. Hill, Mr. Patterson, and Mr. Ballard, is precisely the type of testimony, based on a mythical subdivision, which has been held speculative and based on conjecture by the Arkansas Supreme Court. In *Ark. State Highway Comm.* v. *Watkins,* 229 Ark. 27, 313 S.W.2d 86 (1958), the Court quoted with approval the following language from *City of Philadelphia* v. *United States,* 53 Fed. Supp. 492 (1943):

> "Equally improper is evidence showing how many building lots the tract under consideration could be divided into, and what such lots would be worth separately. It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted; but it is the tract, and not the lots into which it might be divided, that is to be valued."

See also Arkla Gas v. *Howard,* 240 Ark. 511, 400 S.W.2d 488 (1966).

The appellee argues that the witnesses were only testifying as to the value of the entire tract, considering its highest and best use as a subdivision. It is difficult to discern the basis for Mr. Patterson's after value, but it is obvious to us that both Mr. Hill and Mr. Ballard based their estimates of damage on the loss of potential lots in a non-existent subdivision. It is true, as appellee asserts, that the landowner may show all the advantages his property possesses, and that is what proper testimony by witnesses would accomplish, since both Mr. Hill and Mr. Ballard could have testified as to the value of the entire tract, considering its suitability for a subdivision rather than a rural homestead. Therefore, because the testimony of Mr. Hill and Mr. Ballard should

have been stricken, we reverse and remand for a new trial.

The appellant also argues that the trial court erred in rulings concerning the admissibility of evidence concerning special damages, *i.e.* damages to a pond. This issue is tied to the trial court's refusal to grant a continuance so that the contrator, who had agreed to indemnify the appellant for damages arising from its negligence, could be joined as a party to the suit. Since the case is being remanded for a new trial, we find it unnecessary to address this point.

Finally, the appellant argues that the trial court erred in its instruction to the jury regarding the measure of damages. The appellant argues that, since the taking was by an entity authorized to condemn land by federal law [under the Federal Energy Regulatory Commission, pursuant to 15 U.S.C. 717f(h) (1976)], the measure of damages should be the federal standard, that is, the difference in the fair market value of the land with and without the easement. Nichols on *Eminent Domain*, Vol. 4, § 12.41.[2].

We disagree. The measure of damages in Arkansas in a utility easement case is well settled. The landowner may recover compensation for the full market value of the land taken for the easement, plus the damage, if any, to the remainder. *Arkla Gas Co.* v. *Howell*, 244 Ark. 86, 423 S.W.2d 867 (1968). As stated in *Ozark Gas Transmission Systems* v. *Barclay*, 10 Ark. App. 152, 662 S.W.2d 188 (1983).

> We find nothing in the language of this enactment which requires in either court the application of rules of substantive law differing from those in similar proceedings under State law. . . .

We reverse and remand for a new trial.

Reversed and remanded.

MAYFIELD, C.J., and CRACRAFT, J., agree.

ARKANSAS OKLAHOMA GAS CORPORATION
v. Keith BURTON and Margaret BURTON

CA 83-115 664 S.W.2d 894

Court of Appeals of Arkansas
Division II
Opinion delivered February 29, 1984

Daily, West Core, Coffman & Canfield, by: *Michael C. Carter* and *Wyman R. Wade, Jr.,* for appellant.

Pearson, Woodruff & Evans, by: *Marsha C. Woodruff,* for appellee.

JAMES R. COOPER, Judge. This is an eminent domain case. The appellees, Mr. and Mrs. Keith Burton, were

awarded $3,500.00 as just compensation for a right-of-way easement taken from them by the appellant for a gas pipeline. The appellant brings this appeal claiming that there was not sufficient competent evidence before the jury to support its verdict of $3,500.00, that the trial judge erred in not striking the testimony of Keith Burton concerning the after value of his remaining lands and finally that the trial judge erred in permitting the jury to hear and consider testimony from Keith Burton concerning damage to his well. We reverse and remand for a new trial.

Arkansas Oklahoma Gas Corporation took .53 of an acre of the appellees' lands for a gas pipeline from the appellees' 19.21 acre farm. At trial, only Keith Burton testified for the appellees/landowners as to the value of the land being taken. Mr. Burton stated that the before value of his land was $61,500.00 based on the price he purchased it for approximately a month before the pipeline was constructed. Mr. Burton then stated that the after value of the property was $54,000.00, for a difference of $7,500.00 damages resulting from the taking. As a basis for his testimony, Mr. Burton stated he had viewed 35-40 pieces of property prior to purchasing the farm he now owned. He also stated he and his wife had bought and sold ten to twelve houses and had experience in real estate purchases in California and Iowa. He also testified that he had been involved in an eminent domain case on a farm he owned in Iowa. This testimony is perhaps as confusing to us as it was to the trial judge, who commented that maybe Mr. Burton should not have tried to qualify himself as an expert and should have testified simply as an owner. In any event, Mr. Burton went on to state, on cross-examination, that he believed that the property was worth $1,500.00 per acre, that he did not have an identifiable method which he used for estimating the after value he had testified to, but that he just felt $7,500.00 was just compensation for "the land, the road, the trees, the shrubs, and everything that was damaged. My estimate, that is what I feel the damage is."

The appellant produced one expert witness on damages, John Libby. Mr. Libby testified that he considered comparable sales in the area and was of the opinion that the

land taken had a value of approximately $1,000.00 per acre. Mr. Libby went on to state that in his opinion, just compensation for the .53 of an acre taken plus the additional .18 of an acre temporary construction easement was $1,000.00.

The law is well settled in Arkansas that a landowner may testify to the value of his property because of his status as an owner, and the weight of the landowner's testimony is affected by his knowledge of values. *Southwestern Bell Tel. Co.* v. *Fulmer,* 269 Ark. 727, 600 S.W.2d 450 (Ark. App. 1980); *Arkansas Highway Commission* v. *Darr,* 246 Ark. 204, 437 S.W.2d 463 (1969). While we have no trouble with Mr. Burton's basis for his estimate as to the value of the tract before the taking, his testimony as to the value after the taking appears to us to have had no real basis. Perhaps the most revealing comment by Mr. Burton was his statement in response to the question by counsel for the appellant, who was persistently attempting to determine the basis for Mr. Burton's $7,500.00 figure;

> Counsel: All right, so you added all of them up [trees, shrubbery, the roads, the land, the well] and you came up with a figure of $7,500.00, is that right?
>
> Mr. Burton: First, we put down I thought it was about $12,000.00, but then we reconsidered and talked to my attorneys, not being an expert on trees and stuff like that. I thought $7,500.00.

It is quite apparent that Mr. Burton's after value figure was totally arbitrary and without factual basis and should have been stricken. It becomes obvious that after stating that the price per acre of his land was $1,500.00, admitting that the taking was less than 1 acre, and then attempting to fix a value on this taking at $7,500.00, that the witness was merely speculating upon the after value of the entire tract.

The appellees were entitled to recover the full fair market value of the land taken for the easement, plus the damage, if any, to the remainder of the tract, *Arkla Gas Co.* v. *Howell,* 244 Ark. 86, 423 S.W.2d 867 (1968), rather than the

difference in value of the entire tract before and after the taking.

The appellee also argues that the trial court should have stricken the testimony of Mr. Burton concerning damages to his well caused by the placement of the pipeline. Mr. Burton testified that the ditch was approximately 18 feet from his well, and that shortly after it was dug, his water became muddy, his water system lost pressure, and he had to clean mud out of his water tank in order to get the water pressure back. Counsel for the appellant objected to this testimony on the grounds that Mr. Burton did not establish a connection between the laying of the pipeline and the well becoming muddy as required by the Arkansas Supreme Court in *Continental Geophysical Co.* v. *Adair,* 243 Ark. 589, 420 S.W.2d 836 (1967). In *Continental,* the appellant drilled ten holes to a depth of 100 feet and set dynamite charges in them for the purpose of seismic exploration. The appellees owned water wells ranging from 1,600 feet to 6,300 feet from the appellant's test holes. The appellees claimed the blasting caused their wells to go dry. There was also a severe drouth in progress at the time of the blasting. The Court found that the proof was insufficient to show a causal relationship between the detonation of the test holes and the failure of appellees' wells. The Court remanded the case, finding that there was no affirmative showing that the blasting could not have caused the wells in question to go dry. We feel that this case is similar. Although Mr. Burton's testimony is insufficient to establish the required nexus between the appellant's activities and the problems he stated he experienced with the well, neither did the appellant show that it could not have been the cause of the problems. Therefore on remand, we believe that the appellees should have the opportunity to demonstrate through competent evidence that the appellant's digging caused their well to become muddy and lose its pressure.

Reversed and remanded.

MAYFIELD, C.J., and CRACRAFT, J., agree.

Michael J. ROBINSON *v.* STATE of Arkansas

CA CR 83-160 664 S.W.2d 890

Court of Appeals of Arkansas
Division II
Opinion delivered February 29, 1984

William R. Simpson, Jr., Public Defender, *Arthur L. Allen,* Deputy Public Defender, by: *Jerome Kearney,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Patricia G. Cherry,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case, the appellant, Michael J. Robinson, was charged with a class C felony, theft of property valued at over $100.00. It was alleged

that the appellant stole four batteries from buses parked at the Little Rock School District's Bus Yard. After a non-jury trial, the appellant was convicted of theft of property valued at more than $100.00 and he was sentenced to four years in the Department of Correction. From that decision, the appellant brings this appeal.

For reversal, the appellant contends that the trial court erred in finding sufficient evidence of value to support the appellant's conviction.

On November 20, 1982, an alarm went off at the Little Rock School Bus Yard which indicated a break-in in progress through the fence surrounding the premises. The security guard contacted the Little Rock Police Department which responded by dispatching a patrol unit to the scene. When the patrol unit arrived, the police officer encountered the appellant placing a battery into the front seat of an automobile. Upon further investigation, the automobile was found to contain three other batteries. Four buses on the lot were missing batteries.

At the appellant's trial, the security guard testified that the batteries were worth $60.00 each. He was not asked about the basis for his opinion. On cross-examination, he testified that he was not involved in the purchase of batteries for the buses. The matter of his qualifications was not pursued, no motion to strike his testimony was made, and no other witness testified as to the value of the batteries. The State rested its case, the appellant moved for a reduction to misdemeanor theft, and the trial court denied the motion for reduction, and found the appellant guilty of felony theft of property.

Under Ark. Stat. Ann. § 41-2203 (Repl. 1977), theft of property is a class C felony where the property is valued at more than $100.00 but less than $2,500.00. and it is a class A misdemeanor where the value of the property is under $100.00. The State has the burden of proving value. *Lee* v. *State,* 264 Ark. 384, 571 S.W.2d 603 (1978). Value testimony must be based on facts in order to constitute substantial evidence, and testimony based on conclusions or hearsay is

not substantial evidence. *Hughes* v. *State,* 3 Ark. App. 275, 625 S.W.2d 547 (1981).

The appellant argues that it was shown that the security guard had no basis for his opinion. We disagree. All that was established was that he had an opinion as to value, and that he had no responsibility for the purchase of batteries for the district. His testimony may have been based on conjecture, experience, expertise, or anything else for all we know, since no one ever asked him. What we do know is that the trial court had before him a witness who, under oath, opined as to the value of the property stolen. The trier of fact has the duty to determine the weight to be given the testimony of the witnesses, and he did so in this case. On appeal, we are required to affirm criminal cases where we find substantial evidence to support the verdict, after viewing the evidence in the light most favorable to the State. *Lunon* v. *State,* 264 Ark. 188, 569 S.W.2d 663 (1978). We cannot say that the evidence as to value was insubstantial, even though there are obviously superior methods of proving value. We choose not to speculate as to why the State chose to rely totally on the security guard to establish value, nor as to why the defense was so unconcerned about his qualifications to so testify. It is enough to say that the trier of fact had some evidence of value before him, and, on this record, we cannot say it was insubstantial.

Affirmed.

MAYFIELD, C.J., and CRACRAFT, J., agree.

ARKANSAS LOUISIANA GAS COMPANY
v. Roy Lee CATES and Mrs. Roy Lee CATES

CA 83-102 664 S.W.2d 897

Court of Appeals of Arkansas
Division I
Opinion delivered February 29, 1984

[redacted]

Daily, West, Core, Coffman & Canfield, by: *Michael C. Carter* and *Wyman R. Wade, Jr.,* for appellant.

Walters & Rush, by: *Bill Walters,* for appellees.

DONALD L. CORBIN, Judge. Appellant, Arkansas Louisiana Gas Company, appeals a verdict of $7,500.00 awarded to appellees, Roy Lee Cates and wife, for damages arising from the taking of appellees' land for a gas line right-of-way and a 40 foot easement. We reverse and remand.

Appellant raises three issues on appeal and we will combine and address the first two which concern the testimony of appellee Roy Lee Cates. Appellant contends the testimony of appellee Roy Lee Cates was based on speculation and was not competent testimony. Appellee Roy Lee Cates testified that the damage to his property amounted to $7,500.00, and the jury returned a verdict against appellant in that amount. Accordingly, appellant argues that since the jury obviously awarded damages based on appellee Roy Lee Cates' testimony, its verdict was not based on substantial, competent evidence. In determining the sufficiency of the evidence to support a verdict, we must view the evidence with every reasonable inference arising therefrom in the light most favorable to appellee, and if there is any substantial evidence to support the verdict, it cannot be disturbed by this Court. *Butler* v. *Ark. State Hwy.*

Comm'n, 6 Ark. App. 267, 640 S.W.2d 467 (1982).

At trial, appellant offered the opinions of two expert real estate appraisers concerning the amount of compensation to which appellees were entitled. Its first expert testified that there was no severance damage to the property, that the highest and best use of the property was that of a rural homesite, and that total compensation to appellees was $700.00. Appellant's second expert concluded there was no severance damage and that just compensation to appellees amounted to $550.00. Appellees' expert witness testified to a reduction in value to appellees in the amount of $5,250.00. Appellees' expert also testified that in his opinion, the highest and best use of the property fronting on the highway would be valued in small tracts.

It is well settled that a landowner can give an opinion as to the value of his property taken by condemnation, regardless of his knowledge of market values and the testimony must be based upon facts to support his opinion. *Enterprise Sales Co.* v. *Barham,* 270 Ark. 544, 605 S.W.2d 458 (1980). In the instant case, appellee Roy Lee Cates testified that he had purchased his thirty-acre farm in two land sale transactions, twenty acres of which he purchased in 1972 and upon which he located his home. Additionally, appellee Roy Lee Cates testified that he had purchased two other different tracts of land in his lifetime. He testified that during the time he was buying and selling land, he had determined what real estate was selling for in the area and became familiar with the value of property. Appellee stated he knew of other pieces of property that had been bought and sold and the amounts they sold for. In the opinion of appellee Roy Lee Cates, the fair market value of the property prior to the taking amounted to $45,000.00 and that it was worth $37,500.00 after the pipeline was placed on his property.

Rules governing the determination of just compensation in eminent domain cases have been long and firmly established in Arkansas. The measure of damages allowed for the taking of land for a right-of-way is the market value of the land taken and the damage, if any, resulting to the

owner's remaining land from the construction of the improvement. *Texas Illinois Natural Gas Pipeline Co.* v. *Lawhon,* 220 Ark. 932, 251 S.W.2d 477 (1952). The condemnor is liable for the full value of the right-of-way as if the fee had been taken and the fact that the owner is given permissive use of the right-of-way cannot be considered in reduction of the sum to be allowed as compensation. *Ark. Power & Light Co.* v. *Haskins,* 258 Ark. 698, 528 S.W.2d 407 (1975).

In eminent domain proceedings land is evaluated on the basis of the most valuable use to which it can be put, comprehending any use to which it is clearly suited. In *Ark. State Hwy. Comm'n* v. *Griffin,* 241 Ark. 1033, 411 S.W.2d 495 (1967), the Court stated that the measure of compensation for condemned land includes its "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." The court may not engage in speculation and conjecture in determining future uses, but it must be shown with some degree of certainty that the use of the land will change in the not too distant future. *Rest Hills Pk.* v. *Clayton Chapel Imp. Dist.,* 6 Ark. App. 180, 639 S.W.2d 519 (1982).

At the conclusion of the testimony by appellee Roy Lee Cates, appellant moved to strike all of his testimony as to "after" value. The motion was denied by the trial court. Appellant argues that what appellees might realize by a subsequent subdivision of their property and sale of lots amounts to mere speculation. It was appellee's opinion that the highest and best use of his property would be for development. Appellee noted that there were other small tract divisions of land in the same community. A landowner across the road from him had sold two tracts of five acres. Appellee stated that small tract divisions were located in nearby Witcherville and Cumbie. He further testified that his property was flat and cleared and that it had more frontage on a paved road which made the property even more attractive and valuable than other property which had been developed.

While it is proper for a landowner to show that his property is suitable for division into lots and that it is valuable for that purpose, it is not proper to show the number and value of such lots. This procedure was thoroughly condemned in *Ark. State Hwy. Comm.* v. *Watkins,* 229 Ark. 27, 313 S.W.2d 86 (1958), where the Court adopted language from Nichols, Eminent Domain, Third Edition, § 3142(1) as follows:

> It is well settled that if land is so situated that it is actually available for building purposes, its value for such purposes may be considered, even if it is used as a farm or is covered with brush or boulders. The measure of compensation *is not* (emphasis supplied) however, the aggregate of the prices of the lots into which the tract could best be divided, since the expense of cleaning off and improving the land, laying out streets, dividing it into lots, advertising and selling the same, and holding it and paying taxes and interest until all the lots are disposed of cannot be ignored and it is too uncertain and conjectural to be computed. The measure of compensation is the market value of the land as a whole, taking into consideration its value for building purposes if that is its most available use.

See also *Ark. State Hwy. Comm'n.* v. *Allen,* 253 Ark. 46, 484 S.W.2d 331 (1972); *Ark. State Hwy. Comm'n* v. *Schmoll,* 248 Ark. 52, 449 S.W.2d 938 (1970).

A sample of appellee Roy Lee Cates' testimony in this connection appears in the record as follows:

> Q. I am going to ask you one more time. How did you ascertain the $7,500.00 worth of damage on the 12 acres?
>
> A. If I were a builder, which I am not —
>
> Q. No, I want you to tell me how you did it.
>
> A. Well, the way I would figure it, is chop that up into lots and put six across there, and those lots would be worth about $3,000.00 or $1,500.00 an acre. And with

that pipe line there you are going to knock the price of those down to probably about $1,250.00 for a deal, which would not work at all. And that is where I am going to come up with $7,500.00.

Q. So you come up with six lots up there across the top?

A. Uh huh.

Q. Well, have you endeavored to subdivide this into six lots across the top?

A. The only thing I have done is just myself.

Q. Well, I understand that, but you haven't had this surveyed into six lots out across the top, I guess?

A. No.

Accordingly, we hold that while it was permissible for appellee Roy Lee Cates to testify that the highest and best use of the property was for development, it was not proper for him to show the number and value of such lots as the subdivision was not *in esse* at the time of the taking of the property by appellant.

We find it unnecessary to discuss appellant's two other points for reversal. In one point, appellant argues an evidentiary issue to the effect that it was error to permit appellee to testify that appellant would not allow him to tap onto the proposed gas line. Whether this evidentiary matter arises again depends upon how this cause is developed on re-trial. Obviously, if such issue is fully developed and argued in that proceeding, the trial judge necessarily will be required to determine the relevance of the testimony and to decide if the probative value of that testimony is substantially outweighed by its prejudicial value or the other grounds set forth in Rule 403 of the Uniform Rules of Evidence. In its reply brief, appellant also raises a constitutional issue concerning the same testimony. However, appellant provides no citations of authority and very little

argument in support of that issue and under such circumstances, we need not decide it. *Harrison* v. *Benton State Bank, Gdn.*, 6 Ark. App. 355, 642 S.W.2d 331 (1982).

Reversed and remanded.

CLONINGER and GLAZE, JJ., agree.

Violet B. GOOCH *v.* James T. GOOCH

CA 83-181 664 S.W.2d 900

Court of Appeals of Arkansas
En Banc
Opinion delivered February 29, 1984

Cliff Jackson, P.A., for appellant.

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

DONALD L. CORBIN, Judge. This case involves a

determination of the validity of an antenuptial agreement which was at issue in a divorce action brought by appellee, James T. Gooch, against appellant, Violet B. Gooch. Venue of the action was also questioned by appellant. Judge Royce Weisenberger ruled that the proper venue was in Clark County rather than Garland County. Judge Weisenberger awarded appellant $1,250.00 temporary monthly support; found the antenuptial agreement was valid; that neither party was to have an interest in the property the other owned before the marriage, or any increase in its value during the marriage from its exchange or investments; that appellant's earnings from his law practice should be excluded from marital property; and recused himself from hearing the divorce on the merits. Judge Henry Yocum, Jr. on assignment heard the merits of the divorce and awarded appellee a divorce and ruled that the provision of the antenuptial agreement relating to a payment of $50,000.00 was inoperative because appellee was granted the divorce. We affirm.

The question of proper venue in this case is primarily a factual question to be determined by the intent of the person seeking to maintain a residence and domicile. Among the factors looked at to determine whether a person has the requisite intent to establish a domicile in a particular place are: declarations of the parties; the exercise of political rights; the payment of personal taxes; a house of residence; and a place of business. *Ellis* v. *Southeast Construction Co.*, 158 F. Supp. 798 (W. D. Ark. 1958). Such factors were examined in a divorce case reported in *Morgan* v. *Morgan*, 202 Ark. 76, 148 S.W.2d 1078 (1941), to establish that a person was domiciled in Arkansas despite his physical presence in Missouri. The facts in the instant case were of at least equal weight as those found in *Morgan, supra.* Here, appellee testified extensively concerning his intent to retain Clark County as his domicile rather than Garland County where he and appellant resided in a lakeside home for the better part of the five years they were married. Appellee testified that he had practiced law in Arkadelphia, Clark County, Arkansas, since 1954. He further testified that he maintained a home in Caddo Valley, Arkadelphia, Arkansas, which was completely furnished with telephone, television, etc. He continued to maintain his voting rights in Clark County

and was a director of the Elk Horn Bank in Clark County. He testified that he never considered Garland County, Arkansas, as his home and that he had no business, religious or any other association with Garland County, Arkansas, other than his ownership of the lake house. He testified that he declared his permanent residence to be Clark County since he moved there in 1947. Appellant stipulated that both parties, throughout the marriage, voted in Clark County, Arkansas. Appellee never severed any of his business connections in Clark County nor did he sell or dispose of any of his property. He continued his practice of law and service as an officer and director of the Elk Horn Bank in Arkadelphia. The evidence is overwhelming that Clark County was the proper venue for this action.

Chancery cases are tried *de novo* on appeal, and the appellate court does not reverse the chancellor's findings of fact unless they are clearly erroneous (clearly against the preponderance of the evidence). A.R.C.P. Rule 52(a), *Ballard* v. *Carroll,* 2 Ark. App. 283, 621 S.W.2d 484 (1981). We must review the testimony in the light most favorable to the appellee, and indulge all reasonable inferences in favor of the decree. *Ark. State Hwy. Comm.* v. *Oakdale Development Corp.,* 1 Ark. App. 286, 614 S.W.2d 693 (1981).

Concerning the validity of the antenuptial agreement which the parties entered into on May 27, 1976, we agree with the chancellor's finding that it was a valid and enforceable agreement. In Arkansas, an antenuptial agreement is valid if it was freely entered into, and is free from fraud and not inequitable. *Arnold* v. *Arnold,* 261 Ark. 734, 553 S.W.2d 251 (1977). Further, the agreement must be made in contemplation of the marriage relation subsisting until death, rather than in contemplation of divorce. *Oliphant* v. *Oliphant,* 177 Ark. 613, 7 S.W.2d 783 (1928). The evidence in this case clearly establishes that the agreement was freely entered into by the parties with no evidence of fraud, duress or coercion being exercised by either party. In view of the parties' respective stations in life and their extensive experience, education and knowledge of financial and legal matters, the agreement was equitable and fair. Appellant was forty-nine years old at the time the agreement was

executed. She had children who were 35 and 15 years of age. She testified that she had worked as a legal secretary; was employed as a court reporter for 14 years; worked as a secretary in construction and home building; and owned some Shakey's Pizza Parlors. She testified that she had supported herself by buying and selling stocks and bonds. She further testified that she had three years of college. She testified that she had substantial assets of her own. She testified that when the agreement was mailed to her in Dallas that "there was no point in getting advice from a lawyer there" and "I wouldn't think a lawyer could give me an opinion any more than Jim could give it to me." She further testified that at the time they entered into the agreement that appellee was a practicing attorney who had indicated he was quite well off. On the other hand, appellee was sixty-two years old with two grown children by a previous marriage at the time the agreement was executed. He had a prosperous practice as an attorney, was a director of a bank and owned extensive property. He listed the bulk of his holdings in the agreement to an extent that substantially disclosed his wealth, particularly to anyone having the background and business experience of appellant. Appellant's assertion that she was ignorant of the consequences of the agreement and that she failed to fully inform herself of the consequences of the circumstances of the parties because she was "in love" is no evidence of fraud, as was held in *Babb* v. *Babb, Ex'r,* 270 Ark. 289, 604 S.W.2d 574 (Ark. App. 1980). This case is very different from the Arkansas cases in which antenuptial agreements have been declared void because of fraud or the absence of a full and fair disclosure. For example, in *Faver* v. *Faver,* 266 Ark. 262, 583 S.W.2d 44 (1979), it was found that there was a complete lack of disclosure as to the extent or value of the husband's property before execution of the contract as well as a disproportion between the provision for the wife and the means of the husband. Similarly, in *Arnold, supra,* it was found that the husband did not make a full disclosure to the wife and that the husband "obtained the agreement" through "design, studied planning and concealment, which constituted fraud and overreaching." In contrast, appellant in the present case was made fully aware of the extent of appellee's property before the agreement was executed; appellant had full opportunity to

read the agreement and seek legal advice concerning it; and appellant knew that the agreement did not in express terms address the contingency of divorce.

Appellant testified that the only promises made by appellee to her prior to her signing the antenuptial agreement were that he would support her and that she would have a "nice, new life". She further testified that he lived up to that promise in supporting her in a "very well" style. Appellant apparently understood at the time of the signing of the agreement that if she lived with appellee until he died, she would be entitled to none of his property except for the $50,000.00 mentioned in the last paragraph of the agreement. She also apparently understood that, by the same token, appellee would receive none of her property if she died. It is manifestly unreasonable for appellant to have expected a substantial share of appellee's property if they divorced, but only $50,000.00 if she remained married to him until his death. With respect to the purpose of the agreement in this case, appellant testified that it was to protect each party and their separate children in the event of the death of one party, and she admitted that divorce was never mentioned in connection with the agreement. Hence, both parties agree that the requirement that such an agreement be made in contemplation of death rather than divorce is met. Appellant contends, nevertheless, that the agreement is "inequitable" because it did not in express terms provide for the contingency of a divorce. In other words, appellant apparently asks this Court to rewrite the contract so as to make it void *ab initio,* since antenuptial agreements in contemplation of divorce alone, which tend to induce divorce, are against the public policy of Arkansas. *Hughes* v. *Hughes,* 251 Ark. 63, 471 S.W.2d 355 (1971); *Oliphant, supra.*[1] This we refuse to do.

We find no error in the trial court's determination that appellant was not entitled to a portion of appellee's law practice as marital property because of her contribution as a party hostess. Appellee's practice had been established many

[1]This would not be the rule for those agreements executed after the effective date of Act 705 of 1979 (Ark. Stat. Ann. § 34-1212).

years before his marriage to appellant. No showing was made that her serving as a party hostess in any way contributed to any growth of appellee's law practice. Further, we see no evidence of a joint effort in the acquisition of the lake house in Garland County, Arkansas. Appellee used assets that he brought into the marriage to purchase the lake house and was explicit in his requirement that the title to the lake house be placed in his name solely. This is in keeping with the tenor of the antenuptial agreement and consistent with the maintaining of appellee's assets separate and apart from that of appellant.

Accordingly, we cannot say the chancellor's findings are clearly erroneous. Each party shall pay his own costs. Appellee is ordered to pay appellant's attorney a fee of $750.00.

Affirmed.

GLAZE, J., not participating.

CLONINGER, J., dissents.

LAWSON CLONINGER, Judge, dissenting. I respectfully dissent from the majority's opinion. I would hold the antenuptial agreement invalid on the basis that the chancellor's decision was clearly against a preponderance of the evidence in that there was not a full and fair disclosure of Mr. Gooch's property in the antenuptial agreement. The antenuptial agreement describes appellant's property as set out below:

> Whereas the party of the first part has disclosed to the party of the second part the full amount of all property owned by him, consisting primarily of the building at 5th and Clay Streets and rents therefrom, in Arkadelphia, Arkansas, approximately 240 acres in Tallachatahie County, Mississippi, approximately 2200 acres in Lincoln County, Arkansas, approximately one-half interest in property located on Hy. 7, referred to as 'Hide Out', property located at 2211 West Pine,

> Arkadelphia, Arkansas, Partial Remainderman's interest in property located at 107 No. 9th Street, Arkadelphia, Ark., stock in Bank of Star City, Benton State Bank and Elk Horn Bank and Trust Company and a few other stocks which party of the second part is familiar with; . . .

The rule in Arkansas with respect to antenuptial agreements is that they are to be regarded with the most rigid scrutiny and will not be enforced against a wife where the circumstances show that she has been overreached and deceived. *Arnold* v. *Arnold,* 261 Ark. 734, 553 S.W.2d 251 (1977). A presumption of designed concealment arises where the provision in an antenuptial agreement is disproportionate to the means of the intended husband. This casts the burden upon the husband who drafted the agreement to prove that there was full knowledge on the part of the intended wife of all that materially affected the contract. In other words, the intended husband must show by a preponderance of the evidence that the intended wife had full knowledge of the nature and extent of his property at the time the agreement was entered into before the husband can overcome the presumption of designed concealment. See *Faver* v. *Faver,* 266 Ark. 262, 583 S.W.2d 44 (1979); *Arnold* v. *Arnold, supra; Davis* v. *Davis,* 196 Ark. 57, 116 S.W.2d 607 (1938).

The majority states that Mr. Gooch "listed the bulk of his holdings in the agreement to an extent that substantially disclosed his wealth." Further, it is stated that Mrs. Gooch failed to fully inform herself of the consequences and that there was no evidence of fraud. However, under Arkansas law, I find that the burden was not on Mrs. Gooch to inform herself of the consequences, but rather the burden was on Mr. Gooch to show that he *fully,* not substantially, informed her of the nature and extent of his property. That he failed to do.

Mr. Gooch did not disclose any of his income, including income which he received from his property holdings, his law practice, his stock holdings and income from his interest in race horses. Further, Mr. Gooch, in the antenuptial agreement, did not state the value of any of the

property which he owned, as well as the income generated from such property. He stated in the agreement that he owned stock, but did not state how many shares or what the value of the shares are.

Nevertheless the majority distinguishes this case from the cases of *Faver, supra,* and *Arnold, supra,* on the basis that in this case Mrs. Gooch was "made fully aware of the extent of appellee's property before the agreement was executed." I do not conceive how the majority can reach this conclusion in light of the above stated facts.

The majority emphasizes the fact that Mrs. Gooch was an experienced businesswoman coming into the marriage and should have informed herself of the consequences of the antenuptial agreement. However, as I have stated earlier, under Arkansas law the burden was not on Mrs. Gooch to show that she had fully informed herself of the consequences of the agreement, but rather was on Mr. Gooch to show that there was a full and fair disclosure of his property. *Arnold, supra; Faver, supra.*

In *Arnold, supra,* the following language is poignantly relevant to the facts in this case:

> . . . because of the confidential relations between the parties, such an agreement is sufficiently suspicious to cast the burden of proof upon those who seek to support it to show that the husband took no advantage of his influence and knowledge and that the arrangement was fair and conscientious.

In *Arnold, supra,* the wife was to receive $100,000 in cash, an automobile and a trailer from the terms of an antenuptial agreement. The chancellor had found that the agreement was unjust and inequitable and was tainted with fraud in holding the agreement invalid. On appeal, the Arkansas Supreme Court noted that the widow's rights would probably have been twice as valuable as the provision for her under the agreement in upholding the chancellor's decision.

In this case, Mrs. Gooch receives nothing under the

agreement. Obviously, her interests would have been substantial if she had not signed the agreement. Mr. Gooch stood in a confidential relationship to Mrs. Gooch, and it can be fairly said that he stood in a fiduciary capacity with respect to her interests, particularly in light of the fact that Mr. Gooch was a prominent lawyer in the community. Her testimony that "I wouldn't think a lawyer could give me an opinion any more than Jim could give me" demonstrates the trust appellant reposed in appellee. I believe he failed in his fiduciary duty to Mrs. Gooch and that he failed to fully disclose the nature and extent of his property in the agreement. Aside from these reasons, I would reverse merely on the basis that the agreement, as written, is unjust and inequitable. See *Arnold* v. *Arnold, supra.*

Michael Jo ROBINSON *v.* STATE of Arkansas

CA CR 83-161 664 S.W.2d 905

Court of Appeals of Arkansas
Division I
Opinion delivered February 29, 1984

William R. Simpson, Jr., Public Defender, by: *Arthur L. Allen,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. In this criminal case, appellant's sole point for reversal is the failure of the evidence to support his conviction of second degree forgery, for which he was sentenced to five years in the Department of Correction. The second degree forgery charge against appellant was based on a check made payable to a Safeway grocery store. The unauthorized check in the amount of $65.00 was drawn on the account of Mary E. Evans. The crux of appellant's argument is the lack of evidence that he ever possessed or passed this forged check. Therefore, he concludes the trial court based its finding of guilt upon mere speculation and conjecture. We disagree.

Appellant reads the applicable law much too narrowly. One commits forgery in the second degree if he forges a written instrument that is a check. *See* Ark. Stat. Ann. § 41-2302(3)(a) (Repl. 1977); and *Mayes* v. *State,* 264 Ark. 283, 571 S.W.2d 420 (1978). A person forges a written instrument if with purpose to defraud, he draws, makes, completes, alters, counterfeits, possesses *or* utters any written instrument that purports to be or is calculated to become, or to represent if completed, the act of a person who did not authorize the act. Ark. Stat. Ann. § 41-2302(1) (Repl. 1977). Any of the acts set forth in § 41-2302(1) constitutes the single crime of forgery. *See Mayes,* 246 Ark. at 290, 571 S.W.2d at 424-25.

From our review of the record, we believe the evidence,

albeit circumstantial, unquestionably established the appellant forged the Evans check. The evidence is undisputed that the check in issue was unauthorized and that someone uttered it at a Safeway store; thus, the purpose to defraud Safeway was shown by the State. The State introduced into evidence the check that has the appellant's name on the back as the endorser. The State's witness, Larry Gaines, then testified that he had either given this Evans check to the appellant or the appellant "got it on his own." Gaines explained that he had hidden a book of the Evans checks in his apartment where the appellant stayed. Gaines, a convicted forger, admitted that he had signed and otherwise completed the check in question with the exception of endorsing the appellant's name on the back and making the check payable to Safeway. Ms. Linda Taylor, an examiner of questionable documents for the State Crime Lab, testified that the appellant wrote the word "Safeway" on the payee line of the check and that he wrote his name on the back.

The appellant did not testify, and the foregoing evidence stands otherwise uncontradicted. Viewing that evidence in the light most favorable to the appellee, we believe the State met its burden and proved each element of the crime of second degree forgery. In sum, the State's evidence, reasonably and inferentially, showed that the appellant made, completed and possessed the Evans check which was fraudulently cashed at Safeway. Furthermore, because the evidence indicates the appellant made the check payable to Safeway and endorsed it, we believe it was reasonable for the trial court to infer that he uttered or caused the check to be uttered to defraud Safeway. Therefore, we affirm the trial court's decision.

Affirmed.

CLONINGER and CORBIN, JJ., agree.

[redacted]